12–23–10 Thursday
Vol. 75 No. 246 Dec. 23, 2010

Pages 80673–81076

Federal Register

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

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Washington, DC 20002

RESERVATIONS: (202) 741–6008

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Contents

Federal Register

Vol. 75, No. 246

Thursday, December 23, 2010

Administration on Aging
See Aging Administration

Aging Administration
NOTICES
Funding Availability for Title VI Grant Applications; Extension, 80818–80819

Agricultural Marketing Service
NOTICES
Applications for the Federal–State Marketing Improvement Program, 80786–80787

Agriculture Department
See Agricultural Marketing Service
See Food and Nutrition Service
See Forest Service
See Rural Housing Service

Alcohol, Tobacco, Firearms, and Explosives Bureau
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
  Application For Tax-Exempt Transfer and Registration of Firearm, 80846
  Application for Tax-Exempt Transfer of Firearm and Registration to Special Occupational Taxpayer, 80847
  Federal Firearms License, 80848–80849
  Implementation of Public Law 103–322, The Violent Crime Control and Law Enforcement Act of 1994, 80847–80848
  NFA Special Tax Renewal Registration and Return, etc., 80845–80846
  User-Limited Permit (Explosives), 80844–80845

Army Department
NOTICES
Availability for Exclusive, Non-Exclusive, or Partially-Exclusive Licensing of Inventions:
  Inactivated Dengue Virus Vaccine and a Method and Kit for Detection of Dengue Virus, 80798
Environmental Impact Statements; Availability, etc.:
  Pohakuloa Training Area, Hawaii, 80799–80800
  Texas Army National Guard, South Texas Training Center, McMullen County, TX, 80798–80799

Bureau of Ocean Energy Management, Regulation and Enforcement

RULES
Increased Safety Measures for Energy Development on the Outer Continental Shelf, 80717

Census Bureau
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
  Survey of Income and Program Participation Wave 10 of the 2008 Panel, 80790–80791

Centers for Disease Control and Prevention
NOTICES
Draft Current Intelligence Bulletins:
  Occupational Exposure to Carbon Nanotubes and Nanofibers, 80819–80820

Centers for Medicare & Medicaid Services
PROPOSED RULES
Medicare Program:
  Emergency Medical Treatment and Labor Act: Applicability to Hospital and Critical Access Hospital Inpatients and Hospitals with Specialized Capabilities, 80762–80765
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 80820–80821

Coast Guard
RULES
Safety Zones:
  Sacramento New Years Eve, Fireworks Display, Sacramento, CA, 80717–80720
NOTICES
Shipboard Air Emission Reduction Technology Report, 80833–80834

Commerce Department
See Census Bureau
See International Trade Administration
See National Oceanic and Atmospheric Administration

Commodity Futures Trading Commission
PROPOSED RULES
End-User Exception to Mandatory Clearing of Swaps, 80747–80758
Swap Data Repositories, 80898–80945

Defense Department
See Army Department
See Navy Department

Department of Transportation
See Pipeline and Hazardous Materials Safety Administration

Education Department
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 80801
Meetings:
  National Advisory Committee on Institutional Quality and Integrity, 80801–80803
National Advisory Committee on Institutional Quality and Integrity; Members, 80803–80804

Energy Department
See Federal Energy Regulatory Commission
PROPOSED RULES
Chronic Beryllium Disease Prevention Program, 80734–80735
Request for Exclusion of 120 Volt, 100 Watt R20 Short Incandescent Reflector Lamps, 80731–80733

Environmental Protection Agency
PROPOSED RULES
National Emission Standards for Hazardous Air Pollutants: Reciprocating Internal Combustion Engines, 80761–80762
NOTICES
Environmental Impact Statements; Availability, etc.: Weekly Receipt, 80807–80808
Proposed Consent Decree, Clean Air Act Citizen Suit, 80808–80810

Equal Employment Opportunity Commission
NOTICES
Meetings; Sunshine Act, 80810–80811

Executive Office of the President
See Presidential Documents

Federal Aviation Administration
RULES
Standard Instrument Approach Procedures, and Takeoff Minimums and Obstacle Departure Procedures; Miscellaneous Amendments, 80680–80684
PROPOSED RULES
Airworthiness Directives:
Boeing Co. Model 777–200, –200LR, 300, and 300ER Series Airplanes, 80738–80742
McDonnell Douglas Corp. Model DC 9 81 (MD 81), DC 9 82 (MD 82), DC 9 83 (MD 83), DC 9 87 (MD 87), and MD–88 Airplanes, 80744–80746
McDonnell Douglas Corp. Model MD 90–30 Airplanes, 80742–80744
Interpretation of Rest Requirements, 80746–80747
Special Conditions:
Gulfstream Model GVI Airplanes; High Incidence Protection, 80735–80738
NOTICES
Meetings:
EUROCAE WG–72; RTCA Special Committee 216; Aeronautical Systems Security, 80885–80886
RTCA Special Committee 220; Automatic Flight Guidance and Control, 80886
RTCA Special Committee 224; Airport Security Access Control Systems, 80886

Federal Deposit Insurance Corporation
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 80811–80812
Meetings; Sunshine Act, 80812
Updated Listing of Financial Institutions in Liquidation, 80812–80813

Federal Energy Regulatory Commission
RULES
Contract Reporting Requirements of Intrastate Natural Gas Companies, 80685–80697
PROPOSED RULES
Storage Reporting Requirements of Interstate and Intrastate Natural Gas Companies, 80758–80761
NOTICES
Combined Filings, 80804–80807

Federal Financial Institutions Examination Council
NOTICES
Appraisal Subcommittee:
ASC Rules of Operation; Amended, 80813–80817

Federal Motor Carrier Safety Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Hazardous Materials Safety Permits, 80886–80887
Qualification of Drivers:
Exemption Applications; Diabetes Mellitus, 80889–80892
Exemption Applications; Vision, 80887–80888

Federal Reserve System
RULES
Home Mortgage Disclosure, 80675
Truth in Lending; Correction, 80675–80677

Federal Trade Commission
NOTICES
Charges for Certain Disclosures, 80817

Fish and Wildlife Service
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Injurious Wildlife; Importation Certification for Live Fish and Fish Eggs, 80837–80838

Food and Drug Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Guidance for Industry on Updating Labeling for Susceptibility Test Information in Systemic Antibacterial Drug Products, etc., 80823–80824
Pet Event Tracking Network — State, Federal Cooperation to Prevent Spread of Pet Food Related Diseases, 80825–80826
Registration and Product Listing for Owners and Operators of Domestic Tobacco Product Establishments, etc., 80823
Study of Clinical Efficacy Information in Professional Labeling, etc.; Correction, 80821–80823
Compliance Policy Guide; Dairy Products; Availability:
Microbial Contaminants and Alkaline Phosphatase Activity, 80826–80827
Compliance Policy Guides:
Radiofrequency Identification Feasibility Studies and Pilot Programs for Drugs, 80827
Draft Compliance Policy Guide Sec. 510.800 Beverages, Serving Size Labeling; Availability, 80828

Food and Nutrition Service
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Supplemental Nutrition Assistance Program, 80787–80788

Forest Service
NOTICES
Meetings:
Northern New Mexico Resource Advisory Committee, 80788–80789
New Fee Site, 80789

Health and Human Services Department
See Aging Administration
See Centers for Disease Control and Prevention
See Centers for Medicare & Medicaid Services
See Food and Drug Administration

See National Institutes of Health
See Substance Abuse and Mental Health Services Administration
PROPOSED RULES
Rate Increase Disclosure and Review, 81004–81029
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 80817–80818

Homeland Security Department
See Coast Guard
See Secret Service
See U.S. Citizenship and Immigration Services

Housing and Urban Development Department
NOTICES
Federal Property Suitable as Facilities to Assist the Homeless, 80836–80837

Interior Department
See Bureau of Ocean Energy Management, Regulation and Enforcement
See Fish and Wildlife Service
See Land Management Bureau

Internal Revenue Service
RULES
Nuclear Decommissioning Funds, 80697–80716

International Trade Administration
NOTICES
Final Results of 2008–2009 Antidumping Duty Administrative Review of the Antidumping Duty Order:
Pure Magnesium from the People's Republic of China, 80791–80795
Final Results of Sixth Antidumping Duty Administrative and New Shipper Reviews:
Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, 80795–80796
Proposed Methodology for Respondent Selection in Antidumping Proceedings; Correction, 80796

International Trade Commission
NOTICES
Complaints:
Certain Reduced Ignition Proclivity Cigarette Paper Wrappers and Products Containing Same, 80842–80843
Determinations:
Petroleum Wax Candles from Canada, 80843
Investigations:
Certain Gaming and Entertainment Consoles, Related Software and Components Thereof, 80843–80844
Termination of Proceedings:
Certain Digital Television Products and Certain Products Containing Same and Methods of Using Same, 80844

Justice Department
See Alcohol, Tobacco, Firearms, and Explosives Bureau

Labor Department
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Operator Response to Schedule for Submission of Additional Evidence and Operator Response to Notice of Claim, 80849
Initial Determinations:
Products Requiring Federal Contractor Certification as to Forced/Indentured Child Labor; Correction, 80849–80850

Land Management Bureau
NOTICES
Alaska Native Claims Selection, 80838
Invitation to Participate In Coal Exploration License, Utah, 80838–80839
Meetings:
Twin Falls District Resource Advisory Council, Idaho, 80839
Proposed Reinstatement of Terminated Oil and Gas Lease WYW 163285 Wyoming, 80839
Realty Actions:
Direct Sale of Public Land in Kern County, CA, 80841–80842
Direct Sale of Public Lands in Lane County, OR, 80839–80841

Legal Services Corporation
NOTICES
Development of Strategic Plan 2011–2015, 80850

National Aeronautics and Space Administration
NOTICES
Meetings:
Science Committee, Planetary Protection Subcommittee, 80850–80851
Science Committee, Planetary Science Subcommittee, 80851

National Archives and Records Administration
NOTICES
Records Schedules; Availability and Request for Comments, 80851–80853

National Credit Union Administration
RULES
Conversions of Insured Credit Unions, 80678–80680
Low-Income Definition, 80677–80678

National Institutes of Health
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
NIH–American Association for Retired Persons interactive Comprehensive Lifestyle Interview by Computer Study, 80828–80829
Technology Transfer Center External Customer Satisfaction Survey, 80830
Meetings:
Center for Scientific Review, 80830–80831
National Heart, Lung, and Blood Institute, 80831–80832
National Library of Medicine, 80831

National Oceanic and Atmospheric Administration
RULES
Fisheries of the Northeastern United States; Northeast Multispecies Fishery:
Fishing Year (FY) 2010 Sector Operations Plans and Contracts; Addenda, 80720–80729
PROPOSED RULES
Takes of Marine Mammals Incidental to Specified Activities:
Space Vehicle and Missile Launch Operations at Kodiak Launch Complex, Alaska, 80773–80785

NOTICES
Meetings:
New England Fishery Management Council, 80796–80798
South Atlantic Fishery Management Council, 80797–80798

National Science Foundation
NOTICES
Request for Information:
Designing a Digital Future; Federally Funded Research and Development in Networking and Information Technology, 80853–80854

Navy Department
NOTICES
Government-Owned Inventions; Available for Licensing, 80800–80801

Nuclear Regulatory Commission
RULES
Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation, 81032–81037
Update and Final Revision of Waste Confidence Decision, 81037–81076
PROPOSED RULES
Petitions for Rulemaking:
Francis Slakey, American Physical Society, 80730–80731
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 80854
Applications for Design Certification Renewal:
Toshiba Corp., 80854–80855
Environmental Assessments; Availability, etc.:
Dominion Energy Kewaunee, Inc., Kewaunee Power Station, 80855–80857
NUREG–1800, Revision 2 and NUREG–1801, Revision 2; Availability, 80857

Pipeline and Hazardous Materials Safety Administration
PROPOSED RULES
Hazardous Materials:
Adoption of ASME Code Section XII and the National Board Inspection Code, 80765–80773
NOTICES
Applications for Modification of Special Permit, 80892–80893
Applications for Special Permits, 80893

Postal Regulatory Commission
NOTICES
New Postal Products, 80857–80861

Presidential Documents
ADMINISTRATIVE ORDERS
Government Agencies and Employees:
Office of Personnel Management; Delegation of certain functions and authorities (Memorandum of December 20, 2010), 80673

Railroad Retirement Board
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 80861–80865

Rural Housing Service
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 80789–80790
Multi-Family Housing Program 2011 Industry Forums, 80790

Secret Service
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 80834–80835

Securities and Exchange Commission
PROPOSED RULES
Conflict Minerals, 80948–80975
Disclosure of Payments by Resource Extraction Issuers, 80978–81002
NOTICES
Applications for Deregistration under Section 8(f) of the Investment Company Act of 1940, 80865–80866
Credit Rating Standardization Study, 80866–80868
Self-Regulatory Organizations; Proposed Rule Changes:
Chicago Board Options Exchange, Inc., 80872–80873
Chicago Stock Exchange, Inc., 80870–80872
Depository Trust Co., 80878
EDGA Exchange, Inc., 80873–80875
EDGX Exchange, Inc., 80876–80878
NASDAQ OMX PHLX, Inc, 80869–80870

Small Business Administration
NOTICES
Disaster Declaration :
U.S. Virgin Islands, 80878–80879

State Department
NOTICES
Bureau of Educational and Cultural Affairs Request for Grant Proposals:
English Language Materials Training and Development Program, 80879–80885
Culturally Significant Objects Imported for Exhibition Determinations:
Rooms with a View; The Open Window in the 19th Century, 80885
The Buddhist Heritage of Pakistan, 80885

Substance Abuse and Mental Health Services Administration

NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 80832–80833

Surface Transportation Board
NOTICES
Abandonment Exemptions:
Delta Southern Railroad, Inc., Desha and Chicot Counties, AR, 80894
Lease Renewal Exemptions:
Wichita, Tillman & Jackson Railway Co., Oklahoma Department of Transportation, 80895
Wichita, Tillman & Jackson Railway Co., Union Pacific Railroad Co., 80894
Quarterly Rail Cost Adjustment Factor, 80895

Thrift Supervision Office
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Hiring or Indemnifying Senior Executive Officers or Directors, 80896

Transportation Department
See Federal Aviation Administration
See Federal Motor Carrier Safety Administration
See Pipeline and Hazardous Materials Safety Administration
See Surface Transportation Board

Treasury Department
See Internal Revenue Service
See Thrift Supervision Office
NOTICES
Survey of U.S. Ownership of Foreign Securities as of December 31, 2010, 80895–80896

U.S. Citizenship and Immigration Services
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Application for Replacement Naturalization/Citizenship Document, 80835–80836
Application for Suspension of Deportation or Special Rule Cancellation of Removal, 80836

Veterans Affairs Department
RULES
VA Veteran-Owned Small Business Verification Guidelines; Correction, 80720

Separate Parts In This Issue

Part II
Commodity Futures Trading Commission, 80898–80945

Part III
Securities and Exchange Commission, 80948–80975

Part IV
Securities and Exchange Commission, 80978–81002

Part V
Health and Human Services Department, 81004–81029

Part VI
Nuclear Regulatory Commission, 81032–81076

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

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CFR PARTS AFFECTED IN THIS ISSUE

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

3 CFR

Administrative Orders:

Memorandums:

Memorandum of December 20, 2010 80673

10 CFR

51 (2 documents) 81032, 81037

Proposed Rules:

70.....80730

430.....80731

850.....80734

12 CFR

203.....80675

226.....80675

701.....80677

708a.....80678

708b.....80678

14 CFR

97 (2 documents) 80680, 80682

Proposed Rules:

25.....80735

39 (3 documents) 80738, 80742, 80744

135.....80746

17 CFR

Proposed Rules:

39.....80747

49.....80898

229 (2 documents) 80948, 80978

249 (2 documents) 80948, 80978

18 CFR

284.....80685

Proposed Rules:

284.....80758

26 CFR

1.....80697

602.....80697

30 CFR

250.....80717

33 CFR

165.....80717

38 CFR

74.....80720

40 CFR

Proposed Rules:

63.....80761

42 CFR

Proposed Rules:

489.....80762

45 CFR

Proposed Rules:

154.....81004

49 CFR

Proposed Rules:

171.....80765

173.....80765

178.....80765

180.....80765

50 CFR

648.....80720

Proposed Rules:

217.....80773

Federal Register
Vol. 75, No. 246
Thursday, December 23, 2010

Presidential Documents

Title 3—

The President

Memorandum of December 20, 2010

Delegation of Certain Functions and Authorities

Memorandum for the Director of the Office of Personnel Management

By the authority vested in me as President by the Constitution and the laws of the United States, including section 301 of title 3, United States Code, I hereby delegate to you the functions and authority conferred upon the President by section 7301 of title 5, United States Code, with respect to providing appropriate workplace accommodations for executive branch civilian employees who are nursing mothers.

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



THE WHITE HOUSE,
Washington, December 20, 2010

[FR Doc. 2010–32463
Filed 12–22–10; 8:45 am]
Billing code 6325–01–P

Rules and Regulations

Federal Register
Vol. 75, No. 246
Thursday, December 23, 2010

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

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

FEDERAL RESERVE SYSTEM

12 CFR Part 203

[Regulation C; Docket No. 1398]

Home Mortgage Disclosure

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule; staff commentary.

SUMMARY: The Board is publishing a final rule amending the staff commentary that interprets the requirements of Regulation C (Home Mortgage Disclosure). The staff commentary is amended to increase the asset-size exemption threshold for depository institutions based on the annual percentage change in the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPIW). The adjustment from $39 million to $40 million reflects the increase of that index by 2.21 percent during the twelve-month period ending in November 2010. Thus, depository institutions with assets of $40 million or less as of December 31, 2010 are exempt from collecting data in 2011.

DATES: Effective January 1, 2011.

FOR FURTHER INFORMATION CONTACT: John C. Wood, Counsel, Division of Consumer and Community Affairs, at (202) 452–3667; for users of Telecommunications Device for the Deaf (TDD) only, contact (202) 263–4869.

SUPPLEMENTARY INFORMATION: The Home Mortgage Disclosure Act (HMDA; 12 U.S.C. 2801 *et seq.*) requires most mortgage lenders located in metropolitan areas to collect data about their housing-related lending activity. Annually, lenders must report those data to their federal supervisory agencies and make the data available to the public. The Board's Regulation C (12 CFR part 203) implements HMDA.

Prior to 1997, HMDA exempted depository institutions with assets totaling $10 million or less, as of the preceding year-end. Provisions of the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (codified at 12 U.S.C. 2808(b)) amended HMDA to expand the exemption for small depository institutions. The statutory amendment increased the asset-size exemption threshold by requiring a one-time adjustment of the $10 million figure based on the percentage by which the CPIW for 1996 exceeded the CPIW for 1975, and it provided for annual adjustments thereafter based on the annual percentage change in the CPIW. The one-time adjustment increased the exemption threshold to $28 million for 1997 data collection.

Section 203.2(e)(1)(i) of Regulation C provides that the Board will adjust the threshold based on the year-to-year change in the average of the CPIW, not seasonally adjusted, for each twelve-month period ending in November, rounded to the nearest million dollars. Pursuant to this section, the Board has adjusted the threshold annually, as appropriate.

For 2010, the threshold was $39 million. During the twelve-month period ending in November 2010, the CPIW increased by 2.21 percent; as a result, the exemption threshold will increase to $40 million. Thus, depository institutions with assets of $40 million or less as of December 31, 2010 are exempt from collecting data in 2011. An institution's exemption from collecting data in 2011 does not affect its responsibility to report data it was required to collect in 2010.

Final Rule

Under the Administrative Procedures Act, notice and opportunity for public comment are not required if the Board finds that notice and public comment are unnecessary. 5 U.S.C. 553(b)(B). The amendment in this notice is technical. Comment 2(e)–2 is amended to update the exemption threshold. This amendment merely applies the formula established by Regulation C for determining any adjustments to the exemption threshold. For these reasons, the Board has determined that publishing a notice of proposed rulemaking and providing opportunity for public comment are unnecessary. Therefore, the amendment is adopted in final form.

List of Subjects in 12 CFR Part 203

Banks, Banking, Federal Reserve System, Mortgages, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, the Board amends 12 CFR part 203 as follows:

PART 203—HOME MORTGAGE DISCLOSURE (REGULATION C)

■ 1. The authority citation for part 203 continues to read as follows:

Authority: 12 U.S.C. 2801–2810.

■ 2. In Supplement I to part 203, under *Section 203.2 Definitions, 2(e) Financial Institution,* paragraph 2(e)–2 is revised to read as follows:

Supplement I to Part 203—Staff Commentary

* * * * *

Section 203.2 Definitions

* * * * *

2(e) Financial Institution.

* * * * *

2. *Adjustment of exemption threshold for depository institutions.* For data collection in 2011, the asset-size exemption threshold is $40 million. Depository institutions with assets at or below $40 million as of December 31, 2010 are exempt from collecting data for 2011.

* * * * *

By order of the Board of Governors of the Federal Reserve System, acting through the Director of the Division of Consumer and Community Affairs under delegated authority, December 17, 2010.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. 2010–32210 Filed 12–22–10; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

12 CFR Part 226

[Regulation Z; Docket No. R–1394]

Truth in Lending

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Interim final rule, correction.

SUMMARY: This document corrects certain cross-references and typographical errors in the regulation, staff commentary to the regulation, and the supplementary information of the interim final rule published in the

Federal Register of October 28, 2010 (75 FR 66554) (Docket No. R–1394). A paragraph describing revisions to staff comment 1(d)(5)–1 is also added to the section-by-section analysis of the supplementary information. The interim final rule amends Regulation Z, which implements the Truth in Lending Act, in order to implement provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.

DATES: This correction is effective December 27, 2010.

Compliance Date: To allow time for any necessary operational changes, compliance with the interim final rule as corrected is optional until April 1, 2011.

Comments: Comments must be received on or before December 27, 2010.

FOR FURTHER INFORMATION CONTACT: Jamie Z. Goodson, Attorney, or Lorna M. Neill, Senior Attorney, Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System, at (202) 452–3667 or 452–2412; for users of Telecommunications Device for the Deaf (TDD) only, contact (202) 263–4869.

SUPPLEMENTARY INFORMATION: The Board published an interim final rule in the **Federal Register** on October 28, 2010 (75 FR 66554) (Docket No. R–1394), amending Regulation Z (Truth in Lending) to implement provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Public Law 111–208, 124 Stat. 1376 (Jul. 21, 2010).

In the interim final rule, Docket No. R–1394, published on October 28, 2010, (75 FR 66554) make the following corrections:

1. On page 66555, in the first column, line 24, correct "April 1, 2010" to read "April 1, 2011".

2. On page 66556, in the third column, immediately under the heading "IV. Section-by-Section Analysis," add the following:

"*Section 226.1 Authority, Purpose, Coverage, Organization, Enforcement and Liability*

Section 226.1(d) Organization

Section 226.1(d) describes how Regulation Z is organized. Section 226.1(d)(5) describes Subpart E of Regulation Z, which this interim final rule amends by adding new § 226.42, "Valuation Independence." The interim final rule also revises comment 1(d)(5)–1 to add a new subpart 1(d)(5)–1.ii, stating that compliance with the interim final rule is mandatory on April 1, 2011, for open- and closed-end extensions of consumer credit secured by the consumer's principal dwelling. The revised comment also states that § 226.36(b), which is substantially similar to § 226.42(c) and (e), is removed effective April 1, 2011. The comment explains that applications for closed-end extensions of credit secured by the consumer's principal dwelling that are received by creditors before April 1, 2011, are subject to § 226.36(b) regardless of the date on which the transaction is consummated. However, parties subject to § 226.36(b) may, at their option, choose to comply with § 226.42 instead of § 226.36(b), for applications received before April 1, 2011. To illustrate, the comment explains that an application for a closed-end extension of credit secured by the consumer's principal dwelling received by a creditor on March 20, 2011, and consummated on May 1, 2011, is subject to § 226.36(b), but the creditor may choose to comply with § 226.42 instead. The comment further explains that, for an application for open- or closed-end credit secured by the consumer's principal dwelling that is received on or after April 1, 2011, the creditor must comply with § 226.42."

3. On page 66558, in the first column, line 50, correct "Section 226.42(b)(5)" to read "Section 226.42(b)(3)".

3a. On page 66558, in the second column, line 4, correct "§ 226.42(b)(5)" to read "§ 226.42(b)(3)".

4. On page 66559, in the third column, line 41, correct "comment 42(c)(1)(1)–3" to read "comment 42(c)(1)–3".

5. On page 66570, in the first column, lines 1–3, remove "companies that publicly hold themselves out as".

6. On page 66574, in the second column, lines 1–2, correct "on rates" to read "on information about rates".

7. On page 66575, in the third column, line 39, correct "comment 42(g)–6" to read "comment 42(g)(1)–6."

8. On page 66576, in the second column, line 34, correct "§ 226.42(b)(2)" to read "§ 226.42(b)(1)".

9. On page 66578, in the second column, line 23, correct "18,749,687" to read "75,894".

10. On page 66580, in the second column, revise the List of Subjects under 12 CFR Part 226 to read as follows: "Advertising, Consumer protection, Federal Reserve System, Mortgages, Reporting and recordkeeping, Truth in Lending".

Authority Citation for Part 226 [Corrected]

11. On page 66580, in the second column, under the authority citation, correct the reference to "124 Stat. 1376, 2188" to read "124 Stat. 1376, 2187".

§ 226.42 [Corrected]

12. On page 66581, in the third column, line 1, in § 226.42(d)(3)(i), correct "based the value" to read "based on the value".

13. On page 66582, in the first column, line 29, in § 226.42(f)(2)(i) introductory text, correct "a creditor shall" to read "a creditor or its agents shall".

Supplement I to Part 226 [Corrected]

14. On page 66583, in the first column, line 57, in paragraph 1(d)(5)–1.ii, correct "(ii)" to read "ii.".

15. On page 66583, in the first column, line 63, in paragraph 1(d)(5)–1.ii, correct "§ 226.42(b) and (e)" to read "§ 226.42(c) and (e)."

16. On page 66583, in the third column, lines 50–51, in paragraph 42(c)(1)–3, correct "See comment 42(b)(5)–1." to read "See comment 42(b)(3)–1."

17. On page 66584, in the first column, line 7, in paragraph 42(c)(1)–4, correct "exceed" to read "exceeds".

18. On page 66584, in the third column, lines 13–14, in paragraph 42(d)(2)(ii)–1, correct "(as defined in paragraph (d)(4)(ii) and comment 42(d)(4)(ii)–1)" to read "(as defined in paragraph (d)(5)(i) and comment 42(d)(5)(i)–1)".

19. On page 66585, in the first column, lines 1 and 3, in paragraph 42(d)(3)–1 (continued from previous page), correct "paragraph (d)(2)" to read "paragraph (d)(3)".

20. On page 66585, in the second column, lines 35–36 and line 37, in paragraph 42(d)(4)(ii)–1, correct "paragraph (d)(4)(i)" to read "paragraph (d)(4)(ii)".

21. On page 66585, in the second column, line 46, in paragraph 42(d)(5)(i)–1, correct "paragraphs (d)(3) and (d)(4)(ii)" to read "paragraphs (d)(2) and (d)(4)(i)".

22. On page 66587, in the first column, lines 22–26, in paragraph 42(g)(1)–1, correct "Uniform Standards of Professional Appraisal Practice established by the Appraisal Standards Board of the Appraisal Foundation (as defined in 12 U.S.C. 3350(9) (USPAP)" to read "Uniform Standards of Professional Appraisal Practice (USPAP) established by the Appraisal Standards Board of the Appraisal Foundation (as defined in 12 U.S.C. 3350(9))".

23. On page 66587, in the second column, line 31, in paragraph 42(g)(1)–4, add "and" before "other persons that provide 'settlement services' ".

By order of the Board of Governors of the Federal Reserve System, acting through the

Secretary under delegated authority, December 14, 2010.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2010–31824 Filed 12–22–10; 8:45 am]

BILLING CODE P

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 701

RIN 3133–AD75

The Low-Income Definition

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final rule.

SUMMARY: NCUA is amending the definition of "low-income members" to clarify that, in determining if a credit union qualifies for a low-income designation, the comparison of credit union data, whether individual or family income data, must be with statistical data for the same category. The amendment will clarify the intention of the original regulatory text so it is consistent with the geo-coding software the agency uses to make the low-income credit union (LICU) designation.

DATES: Effective December 23, 2010 this rule finalizes without change, the interim final rule published on August 5, 2010, 75 FR 47171 (Aug. 5, 2010). That interim rule was effective upon publication on August 5, 2010.

FOR FURTHER INFORMATION CONTACT: Regina Metz, Staff Attorney, Office of General Counsel, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314–3428, or telephone: (703) 518–6540.

SUPPLEMENTARY INFORMATION:

Background

The Federal Credit Union Act (Act) authorizes the NCUA Board (Board) to define "low-income members" so that credit unions with a membership consisting of predominantly low-income members can benefit from certain statutory relief and receive assistance from the Community Development Revolving Loan Fund. 12 U.S.C. 1752(5), 1757a(b)(2)(A), 1757a(c)(2)(B), 1772c–1. This authority has been implemented in § 701.34 of NCUA regulations, known as the low-income rule. 12 CFR 701.34. In April 2008, the Board proposed substantial changes to the rule, which had previously been based on measuring median household income, with geographic differentials for certain areas with higher costs of living. 73 FR 22836 (April 28, 2008). In brief, the Board proposed to, and as adopted in the final rule, did replace median household income with median family income or median earnings for individuals as better measures, more flexible, and in line with standards used by other Federal agencies. 73 FR 71909 (Nov. 26, 2008).

As discussed in the preamble to the final rule, NCUA also undertook as part of the regulatory changes to facilitate the low-income designation process by eliminating the requirement for credit unions to apply for the designation. NCUA is in the process of implementing geo-coding software to make the calculation automatically for credit unions during the examination process.

NCUA will make the determination of whether a majority of an FCU's members are low-income based on data it obtains during the examination process. This will involve linking member address information to publicly available information from the U.S. Census Bureau to estimate member earnings. Using automated, geo-coding software, NCUA will use member street addresses collected during FCU examinations to determine the geographic area and metropolitan area for each member account. NCUA will then use income information for the geographic area from the Census Bureau and assign estimated earnings to each member.

73 FR at 71910–11. NCUA's software ensures that the same categories of data available for member income at a particular credit union are compared with like categories of statistical data on income from the Census Bureau. In particular, individual member earnings information is compared to median individual earnings data and family income information is compared to median family income data.[1]

The final rule in November 2008 also provided credit unions, as an alternative to relying on NCUA's geo-coding software, the option of providing actual income information about their members as a basis for qualifying as a LICU. Confusion has arisen regarding the appropriate comparison of actual member information and statistical data from the Census Bureau, prompting the need for this clarifying amendment. The confusion arises from a discussion in the preamble to the final rule, where the Board stated:

> The rule also provides an alternative basis for an FCU to qualify for a LICU designation. An FCU may be able to demonstrate the actual income of its members based on data it has, for example, from loan applications or surveys of its members. An FCU may qualify as a LICU if it can establish a majority of its members meet the low-income formula. For example, an FCU with 1,000 members may be able to show the actual income of 501 or more of its members is equal to or less than 80% of the MFI for the metropolitan area(s) where they live. As a practical matter, the Board thinks few FCUs will need this option because NCUA's approach of matching member residential information with Census Bureau income information will provide an estimate very close to members' actual income.

73 FR at 71911. The rule provides median family income or median individual earnings as alternatives and, as noted above, NCUA's geo-coding software compares like categories of data. Unfortunately, the above-quoted statement in the preamble indicated that, as an alternative to relying on the NCUA's geo-coding, a credit union could apply for a low-income designation relying on a comparison of actual income data for individual members to statistical data on median family income as the basis for the designation. This would not be a valid or meaningful comparison. The Board believes that, as a matter of logic and statistical reasoning, only like categories of data may be compared in making the determination that a credit union's membership meets the low-income definition. Actual individual member income information should not be measured against median family income, but rather, against individual median earnings.

Interim Final Rule and Comments

In July 2010, the Board issued an interim final rule amending § 701.34(a)(1) by clarifying that median family income and median earnings for individuals are alternative bases on which credit union members may qualify as low income. 75 FR 47171 (Aug. 5, 2010). In addition, the interim final rule amended the subsection of the rule regarding the option for credit unions to submit their own information

[1] NCUA's geo-coding software, known within the agency as the "Low-Income Designation Assessment Tool," is currently a stand-alone software program developed by NCUA's Office of the Chief Information Officer with guidance from regional staff experienced in low-income designation. Regional staff as well as Economic Development Specialists currently use the tool as needed based on requests from credit unions. Eventually, the same software rules will be embedded into the NCUA AIRES examination software. The current version performs 30 different ratio calculations for each member based on a variety of factors and data to determine whether the member meets the low-income definition. The variety of ratios is expansive in order to provide all of the possible options for members to meet the definition. Factors recognize the following: (1) Data sources include both decennial income data as well as American Community Survey income data; (2) different data is incorporated for metro vs. non-metro geographic areas; and (3) ratio options include comparisons of census tract and block group income data, to zip code, county, MSA, state, and national data, plus comparisons of county income data to CBSA, state, and national income data.

for purposes of qualifying for the designation to clarify that actual member data must be compared with a like category of statistical data.

NCUA received three comment letters: One from a federal credit union and two from credit union trade associations. All three commenters supported the clarification in the interim final rule. The two trade associations, commenting on an issue outside the scope of the interim final rule, urged the NCUA to consider further amendment of the low-income rule to permit credit unions that do not qualify under NCUA's geo-coding software to use a statistically valid, random sample of member income data to support a designation as a low-income credit union. Concurrent with issuing this final rule, the Board is separately issuing a proposed rule addressing the use of a statistically valid, random sample to support the low-income designation.

Regulatory Procedures

Regulatory Flexibility Act

The Regulatory Flexibility Act requires NCUA to prepare an analysis to describe any significant economic impact any regulation may have on a substantial number of small entities. 5 U.S.C. 603(a). For purposes of this analysis, NCUA considers credit unions having under $10 million in assets small entities. Interpretive Ruling and Policy Statement 03–2, 68 FR 31949 (May 29, 2003). As of December 31, 2007, out of approximately 8,410 federally insured credit unions, 3,599 had less than $10 million in assets. This interim final rule merely clarifies the existing low-income rule and, therefore, an analysis is not required. NCUA, however, provided an analysis when it issued the final rule in November 2008, concluding that the economic impact on entities affected by the rule would not be significant. 73 FR 71911–12.

Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996, Public Law 104–121, provides generally for congressional review of agency rules. A reporting requirement is triggered in instances where NCUA issues a final rule as defined by Section 551 of the Administrative Procedures Act. 5 U.S.C. 551. The Office of Information and Regulatory Affairs has determined that this final rule is not a major rule for purposes of SBREFA.

Paperwork Reduction Act

This clarifying amendment does not change the collection requirements under the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.*

Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. In adherence to fundamental federalism principles, NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order. The final rule will not have substantial direct effect on the states, on the connection between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. NCUA has determined this final rule does not constitute a policy that has federalism implications for purposes of the executive order.

The Treasury and General Government Appropriations Act, 1999—Assessment of Federal Regulations and Policies on Families

NCUA has determined that this final rule will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, 1999, Public Law 105–277, 112 Stat. 2681 (1998).

List of Subjects in 12 CFR Part 701

Credit unions, Federal credit unions, Low income, Nonmember deposits, Secondary capital, Shares.

By the National Credit Union Administration Board, on December 16, 2010.

Mary F. Rupp,

Secretary of the Board.

■ For the reasons stated above, NCUA amends 12 CFR part 701 as follows:

PART 701—ORGANIZATION AND OPERATIONS OF FEDERAL CREDIT UNIONS

■ Accordingly, the interim final rule amending 12 CFR part 701 which was published at 75 FR 47171 on August 5, 2010, is adopted as a final rule without change.

[FR Doc. 2010–32130 Filed 12–22–10; 8:45 am]

BILLING CODE 7535–01–P

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Parts 708a and 708b

RIN 3133–AD84; 3133–AD85

Conversions of Insured Credit Unions

AGENCY: National Credit Union Administration (NCUA).

ACTION: Interim final rule with request for comments.

SUMMARY: NCUA is issuing final amendments to revise the definition of the phrase "Regional Director" in NCUA's rule on credit union to mutual savings bank conversions and to add the same revised definition of that phrase to NCUA's rule on conversions to nonfederal deposit insurance.

DATES: The rule is effective December 23, 2010. Comments must be received by January 24, 2011.

ADDRESSES: You may submit comments by any of the following methods (Please send comments by one method only):

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

NCUA Web site: http://www.ncua.gov/Resources/RegulationsOpinionsLaws/FinalRegulations.aspx. Follow the instructions for submitting comments.

E-mail: Address to *regcomments@ncua.gov.* Include "[Your name] Comments on "Interim Final Rulemaking for Parts 708a and 708b—Definition of "Regional Director" in the e-mail subject line.

Fax: (703) 518–6319. Use the subject line described above for e-mail.

Mail: Address to Mary Rupp, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314–3428.

Hand Delivery/Courier: Same as mail address.

Public Inspection: All public comments are available on the agency's Web site at *http://www.ncua.gov/Resources/RegulationsOpinionsLaws/FinalRegulations.aspx* as submitted, except as may not be possible for technical reasons. Public comments will not be edited to remove any identifying or contact information. Paper copies of comments may be inspected in NCUA's law library at 1775 Duke Street, Alexandria, Virginia 22314, by appointment weekdays between 9 a.m. and 3 p.m. To make an appointment, call (703) 518–6546 or send an e-mail to *OGCMail@ncua.gov.*

FOR FURTHER INFORMATION CONTACT: Jacqueline Lussier, Staff Attorney, Office of General Counsel, at the address above or telephone (703) 518–6540.

SUPPLEMENTARY INFORMATION:

Background

In 2009, the NCUA Board created the NCUA Office of Consumer Protection (OCP) to become operational on January 1, 2010. The OCP is charged with responsibilities in the areas of credit union chartering, insurance and supervision, as well as consumer compliance. NCUA is in the process of moving responsibility for the review and approval of certain types of credit union conversions from the Regional Directors to the Director of the OCP, including credit union conversions to mutual savings banks or mutual savings associations (MSBs) in 12 CFR part 708a and the conversion from National Credit Union Share Insurance Fund (NCUSIF) share insurance to nonfederal share insurance in 12 CFR part 708b. To accommodate this reassignment of staff functions, the NCUA Board is adding the Director of the OCP to the definition of the phrase "Regional Director" in part 708a and adding a new definition of the phrase "Regional Director" to part 708b that mirrors the revised definition in part 708a.

Part 708a

Part 708a governs conversions of federally-insured credit unions to MSBs. The definitions under part 708a are set forth in § 708a.1. 12 CFR 708a.1. Section 708a.1 currently defines the phrase "Regional Director" as the director of the NCUA regional office where a natural person credit union's main office is located, and for corporate credit unions, "Regional Director" means the director of NCUA's Office of Corporate Credit Unions. This final rule amends the definition of "Regional Director" for natural person credit unions to include the Director of OCP.

Part 708b

Part 708b governs credit union-to-credit union mergers and terminations of NCUSIF share insurance and conversions from NCUSIF share insurance to nonfederal share insurance. The definitions under part 708b are set forth in § 708b.2. 12 CFR 708b.2. Unlike part 708a, part 708b does not currently contain a definition of "Regional Director." This final rule amends part 708b to add a definition of that phrase to § 708b.2 identical to the parallel definition in part 708a.

Interim Final Rule

NCUA is issuing this rulemaking as an interim final rule effective upon publication in the **Federal Register**. The Administrative Procedure Act (APA), 5 U.S.C. 553, generally requires that before a rulemaking can be finalized it must first be published as a notice of proposed rulemaking with the opportunity for public comment, unless the agency for good cause finds that notice and public comment are impracticable, unnecessary, or contrary to the public interest. NCUA believes good cause exists for issuing these amendments without notice and public comment. The amendments to these rules are not substantive but merely update the regulations to provide NCUA with additional administrative flexibility.

Additionally, the APA requires that a final rule must have a delayed effective date of 30 days from the date of publication, except for good cause. 5 U.S.C. 553(d). NCUA also finds good cause to waive the customary 30-day delayed effective date requirement under the APA. These revisions will, therefore, be effective immediately upon publication.

NCUA does not anticipate comments on these changes and so is allowing only a 30-day comment period.

Regulatory Procedures

Regulatory Flexibility Act

The Regulatory Flexibility Act requires NCUA to prepare an analysis to describe any significant economic impact a proposed rule may have on a substantial number of small credit unions (those under $10 million in assets). Only a few credit unions convert in a given year. Accordingly, the NCUA Board certifies that the interim final rule will not have a significant economic impact on a substantial number of small credit unions, and, therefore, a regulatory flexibility analysis is not required.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) applies to rulemakings in which an agency by rule creates a new paperwork burden on regulated entities or modifies an existing burden. 44 U.S.C. 3507(d). For purposes of the PRA, a paperwork burden may take the form of either a reporting or a recordkeeping requirement, both referred to as information collections. The revised definition does not impose any new paperwork burden.

Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. In adherence to fundamental federalism principles, NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order. The interim final rule will not have substantial direct effects on the states, on the connection between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. NCUA has determined that this rule does not constitute a policy that has federalism implications for purposes of the executive order.

The Treasury and General Government Appropriations Act, 1999—Assessment of Federal Regulations and Policies on Families

NCUA has determined that the interim final rule will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, 1999, Public Law 105–277, 112 Stat. 2681 (1998).

Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121, provides generally for congressional review of agency rules. A reporting requirement is triggered in instances where NCUA issues a final rule as defined by section 551 of the Administrative Procedure Act, 5 U.S.C. 551. While NCUA views these revisions as minor, the formal determination by the Office of Information and Regulatory Affairs of the Office of Management and Budget is pending.

List of Subjects

12 CFR Part 708a

Charter conversions, Credit unions.

12 CFR Part 708b

Credit unions, Mergers of credit unions, Reporting and recordkeeping requirements.

By the National Credit Union Administration Board on December 20, 2010.

Mary F. Rupp,

Secretary of the Board.

■ For the reasons stated in the preamble, the National Credit Union Administration amends 12 CFR parts 708a and 708b as follows:

PART 708a—CONVERSION OF INSURED CREDIT UNIONS TO MUTUAL SAVINGS BANKS

■ 1. The authority citation for part 708a continues to read as follows:

Authority: 12 U.S.C. 1766, 12 U.S.C. 1785(b).

■ 2. Amend § 708a.1 to add a definition of *regional director* in alphabetical order to read as follows:

§ 708a.1 Definitions.

* * * * *

Regional director means either the director of the NCUA regional office for the region where a natural person credit union's main office is located or the director of the NCUA's Office of Consumer Protection. For corporate credit unions, *regional director* means the director of NCUA's Office of Corporate Credit Unions.

* * * * *

PART 708b—MERGERS OF FEDERALLY INSURED CREDIT UNIONS; VOLUNTARY TERMINATION OR CONVERSION OF INSURED STATUS

■ 3. The authority citation for part 708b continues to read as follows:

Authority: 12 U.S.C. 1752(7), 1766, 1785, 1786, 1789.

■ 4. In § 708b.2, redesignate paragraphs (h) through (k) as paragraphs (i) through (*l*) and add new paragraph (h) to read as follows:

§ 708b.2 Definitions.

* * * * *

(h) *Regional director* means either the director of the NCUA regional office for the region where a natural person credit union's main office is located or the director of the NCUA's Office of Consumer Protection. For corporate credit unions, *regional director* means the director of NCUA's Office of Corporate Credit Unions.

* * * * *

[FR Doc. 2010–32308 Filed 12–22–10; 8:45 am]

BILLING CODE 7535–01–P

DEPARTMENT OF TRANSPORTATION

14 CFR Part 97

[Docket No. 30759; Amdt. No. 3405]

Standard Instrument Approach Procedures, and Takeoff Minimums and Obstacle Departure Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This rule establishes, amends, suspends, or revokes Standard Instrument Approach Procedures (SIAPs) and associated Takeoff Minimums and Obstacle Departure Procedures for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, adding new obstacles, or changing air traffic requirements. These changes are designed to provide safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

DATES: This rule is effective December 23, 2010. The compliance date for each SIAP, associated Takeoff Minimums, and ODP is specified in the amendatory provisions.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of December 23, 2010.

ADDRESSES: Availability of matter incorporated by reference in the amendment is as follows:

For Examination—

1. FAA Rules Docket, FAA Headquarters Building, 800 Independence Avenue, SW., Washington, DC 20591;

2. The FAA Regional Office of the region in which the affected airport is located;

3. The National Flight Procedures Office, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 or,

4. 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/code_of_federal_regulations/ibr_locations.html.*

Availability—All SIAPs are available online free of charge. Visit *nfdc.faa.gov* to register. Additionally, individual SIAP and Takeoff Minimums and ODP copies may be obtained from:

1. FAA Public Inquiry Center (APA–200), FAA Headquarters Building, 800 Independence Avenue, SW., Washington, DC 20591; or

2. The FAA Regional Office of the region in which the affected airport is located.

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

SUPPLEMENTARY INFORMATION: This rule amends Title 14, Code of Federal Regulations, Part 97 (14 CFR part 97) by amending the referenced SIAPs. The complete regulatory description of each SIAP is listed on the appropriate FAA Form 8260, as modified by the National Flight Data Center (FDC)/Permanent Notice to Airmen (P–NOTAM), and is incorporated by reference in the amendment under 5 U.S.C. 552(a), 1 CFR part 51, and § 97.20 of Title 14 of the Code of Federal Regulations.

The large number of SIAPs, their complex nature, and the need for a special format make their verbatim publication in the **Federal Register** expensive and impractical. Further, airmen do not use the regulatory text of the SIAPs, but refer to their graphic depiction on charts printed by publishers of aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP contained in FAA form documents is unnecessary. This amendment provides the affected CFR sections and specifies the types of SIAP and the corresponding effective dates. This amendment also identifies the airport and its location, the procedure and the amendment number.

The Rule

This amendment to 14 CFR part 97 is effective upon publication of each separate SIAP as amended in the transmittal. For safety and timeliness of change considerations, this amendment incorporates only specific changes contained for each SIAP as modified by FDC/P–NOTAMs.

The SIAPs, as modified by FDC P–NOTAM, and contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Procedures (TERPS). In developing these changes to SIAPs, the TERPS criteria were applied only to specific conditions existing at the affected airports. All SIAP amendments in this rule have been previously issued by the FAA in a FDC NOTAM as an emergency action of immediate flight safety relating directly to published aeronautical charts. The circumstances which created the need for all these SIAP amendments requires making them effective in less than 30 days.

Because of the close and immediate relationship between these SIAPs and safety in air commerce, I find that notice and public procedure before adopting these SIAPs are impracticable and contrary to the public interest and, where applicable, that good cause exists for making these SIAPs effective in less than 30 days.

Conclusion

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 97

Air Traffic Control, Airports, Incorporation by reference, and Navigation (Air).

Issued in Washington, DC on December 10, 2010.

Ray Towles,

Deputy Director, Flight Standards Service.

Adoption of the Amendment

■ Accordingly, pursuant to the authority delegated to me, title 14, Code of Federal regulations, part 97, 14 CFR part 97, is amended by amending Standard Instrument Approach Procedures, effective at 0901 UTC on the dates specified, as follows:

PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

■ 1. The authority citation for part 97 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44701, 44719, 44721–44722.

■ 2. Part 97 is amended to read as follows:

§§ 97.23, 97.25, 97.27, 97.29, 97.31, 97.33, and 97.35 [Amended]

By amending: § 97.23 VOR, VOR/DME, VOR or TACAN, and VOR/DME or TACAN; § 97.25 LOC, LOC/DME, LDA, LDA/DME, SDF, SDF/DME; § 97.27 NDB, NDB/DME; § 97.29 ILS, ILS/DME, MLS, MLS/DME, MLS/RNAV; § 97.31 RADAR SIAPs; § 97.33 RNAV SIAPs; and § 97.35 COPTER SIAPs, Identified as follows:

**** EFFECTIVE UPON PUBLICATION*

Airac Date	State	City	Airport	FDC No.	FDC Date	Subject
13 Jan–11	IN	La Porte	La Porte Muni	0/7781	11/22/10	VOR A, Amdt 7A.
13 Jan–11	IN	La Porte	La Porte Muni	0/7782	11/22/10	RNAV (GPS) RWY 2, Orig-A.
13 Jan–11	IN	La Porte	La Porte Muni	0/7783	11/22/10	LOC/NDB RWY 2, Amdt 1A.
13 Jan–11	WI	Rhinelander	Rhinelander-Oneida County	0/7784	11/22/10	VOR RWY 9, Amdt 4D.
13 Jan-11	WI	Rhinelander	Rhinelander-Oneida County	0/7789	11/22/10	VOR/DME RWY 27, Orig-E.
13 Jan–11	IA	Cedar Rapids	The Eastern Iowa	0/7827	11/22/10	RNAV (GPS) RWY 9, Amdt 2.
13 Jan–11	IA	Cedar Rapids	The Eastern Iowa	0/7828	11/22/10	ILS OR LOC RWY 9, Amdt 18.
13 Jan–11	IA	Cedar Rapids	The Eastern Iowa	0/7829	11/22/10	VOR/DME RWY 9, Amdt 17.
13 Jan–11	IA	Cedar Rapids	The Eastern Iowa	0/7838	11/22/10	RNAV (GPS) RWY 31, Amdt 1.
13 Jan–11	IA	Cedar Rapids	The Eastern Iowa	0/7839	11/22/10	RNAV (GPS) RWY 13, Amdt 1B.
13 Jan–11	OH	Toledo	Toledo Express	0/7858	11/23/10	ILS OR LOC RWY 25, Amdt 7.
13 Jan–11	MA	Westfield/Springfield.	Barnes Muni	0/8053	11/22/10	VOR RWY 20, Amdt 20B.
13 Jan–11	GA	Gainesville	Gilmer Memorial	0/8308	11/22/10	NDB RWY 5, Amdt 5.
13 Jan–11	GA	Atlanta	Dekalb-Peachtree	0/8310	11/22/10	VOR/DME RWY 27, Amdt 1D.
13 Jan–11	NH	Concord	Concord Muni	0/8327	11/22/10	VOR A, Orig-A.
13 Jan–11	NH	Concord	Concord Muni	0/8344	11/22/10	ILS RWY 35, Amdt 1A.
13 Jan–11	TX	Corsicana	C David Campbell Field-Corsicana Muni.	0/8376	11/23/10	VOR/DME B, Amdt 1.
13 Jan–11	TX	Corsicana	C David Campbell Field-Corsicana Muni.	0/8806	11/23/10	NDB RWY 32, Amdt 3.
13 Jan–11	TX	Corsicana	C David Campbell Field-Corsicana Muni.	0/8807	11/23/10	VOR/DME A, Amdt 1.
13 Jan–11	TX	Corsicana	C David Campbell Field-Corsicana Muni.	0/8810	11/23/10	NDB RWY 14, Amdt 4.
13 Jan–11	NM	Roswell	Roswell Intl Air Center	0/8879	11/23/10	RADAR 1, Orig.
13 Jan–11	NM	Roswell	Roswell Intl Air Center	0/8880	11/23/10	LOC BC RWY 3, Amdt 9B.
13 Jan–11	IA	Milford	Fuller	0/8884	11/23/10	VOR/DME OR GPS A, Orig-A.
13 Jan–11	GA	Atlanta	Dekalb-Peachtree	0/8958	11/22/10	VOR/DME RWY 20L, Amdt 1E.
13 Jan–11	WI	Appleton	Outagamie County Rgnl	0/8998	11/24/10	VOR/DME RWY 21, Amdt 1.
13 Jan–11	WI	Appleton	Outagamie County Rgnl	0/8999	11/24/10	VOR/DME RWY 3, Amdt 8E.

[FR Doc. 2010–32040 Filed 12–22–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 97

[Docket No. 30758; Amdt. No. 3404]

Standard Instrument Approach Procedures, and Takeoff Minimums and Obstacle Departure Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This establishes, amends, suspends, or revokes Standard Instrument Approach Procedures (SIAPs) and associated Takeoff Minimums and Obstacle Departure Procedures for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, adding new obstacles, or changing air traffic requirements. These changes are designed to provide safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

DATES: This rule is effective December 23, 2010. The compliance date for each SIAP, associated Takeoff Minimums, and ODP is specified in the amendatory provisions.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of December 23, 2010.

ADDRESSES: Availability of matters incorporated by reference in the amendment is as follows:

For Examination—

1. FAA Rules Docket, FAA Headquarters Building, 800 Independence Avenue, SW., Washington, DC 20591;

2. The FAA Regional Office of the region in which the affected airport is located;

3. The National Flight Procedures Office, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 or,

4. 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/code_of_federal_regulations/ibr_locations.html.*

Availability—All SIAPs and Takeoff Minimums and ODPs are available online free of charge. Visit *http://www.nfdc.faa.gov* to register. Additionally, individual SIAP and Takeoff Minimums and ODP copies may be obtained from:

1. FAA Public Inquiry Center (APA–200), FAA Headquarters Building, 800 Independence Avenue, SW., Washington, DC 20591; or

2. The FAA Regional Office of the region in which the affected airport is located.

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

SUPPLEMENTARY INFORMATION: This rule amends Title 14 of the Code of Federal Regulations, Part 97 (14 CFR part 97), by establishing, amending, suspending, or revoking SIAPS, Takeoff Minimums and/or ODPS. The complete regulators description of each SIAP and its associated Takeoff Minimums or ODP for an identified airport is listed on FAA form documents which are incorporated by reference in this amendment under 5 U.S.C. 552(a), 1 CFR part 51, and 14 CFR 97.20. The applicable FAA Forms are FAA Forms 8260–3, 8260–4, 8260–5, 8260–15A, and 8260–15B when required by an entry on 8260–15A.

The large number of SIAPs, Takeoff Minimums and ODPs, in addition to their complex nature and the need for a special format make publication in the **Federal Register** expensive and impractical. Furthermore, airmen do not use the regulatory text of the SIAPs, Takeoff Minimums or ODPs, but instead refer to their depiction on charts printed by publishers of aeronautical materials. The advantages of incorporation by reference are realized and publication of the complete description of each SIAP, Takeoff Minimums and ODP listed on FAA forms is unnecessary. This amendment provides the affected CFR sections and specifies the types of SIAPs and the effective dates of the, associated Takeoff Minimums and ODPs. This amendment also identifies the airport and its location, the procedure, and the amendment number.

The Rule

This amendment to 14 CFR part 97 is effective upon publication of each separate SIAP, Takeoff Minimums and ODP as contained in the transmittal. Some SIAP and Takeoff Minimums and textual ODP amendments may have been issued previously by the FAA in a Flight Data Center (FDC) Notice to Airmen (NOTAM) as an emergency action of immediate flight safety relating directly to published aeronautical charts. The circumstances which created the need for some SIAP and Takeoff Minimums and ODP amendments may require making them effective in less than 30 days. For the remaining SIAPS and Takeoff Minimums and ODPS, an effective date at least 30 days after publication is provided.

Further, the SIAPs and Takeoff Minimums and ODPS contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Procedures (TERPS). In developing these SIAPS and Takeoff Minimums and ODPs, the TERPS criteria were applied to the conditions existing or anticipated at the affected airports. Because of the close and immediate relationship between these SIAPs, Takeoff Minimums and ODPs, and safety in air commerce, I find that notice and public procedures before adopting these SIAPS, Takeoff Minimums and ODPs are impracticable and contrary to the public interest and, where applicable, that good cause exists for making some SIAPs effective in less than 30 days.

Conclusion

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) Is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule " under DOT Regulatory Policies and Procedures (44 FR 11034; February 26,1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 97

Air Traffic Control, Airports, Incorporation by reference, and Navigation (Air).

Issued in Washington, DC on December 10, 2010.

Ray Towles,

Deputy Director, Flight Standards Service.

Adoption of the Amendment

■ Accordingly, pursuant to the authority delegated to me, Title 14, Code of Federal Regulations, Part 97 (14 CFR part 97) is amended by establishing, amending, suspending, or revoking Standard Instrument Approach Procedures and/or Takeoff Minimums and/or Obstacle Departure Procedures effective at 0902 UTC on the dates specified, as follows:

PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

■ 1. The authority citation for part 97 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44701, 44719, 44721–44722.

■ 2. Part 97 is amended to read as follows:

Effective 13 JAN 2011

Unalakleet, AK, Unalakleet, LOC/DME RWY 15, Amdt 4
Yakutat, AK, Yakutat, ILS OR LOC/DME RWY 11, Amdt 2
Yakutat, AK, Yakutat, LOC/DME BC RWY 29, Amdt 6
Yakutat, AK, Yakutat, RNAV (GPS) RWY 2, Amdt 2
Yakutat, AK, Yakutat, RNAV (GPS) RWY 11, Amdt 3
Yakutat, AK, Yakutat, RNAV (GPS) RWY 29, Amdt 3
Yakutat, AK, Yakutat, VOR/DME RWY 2, Amdt 4
Yakutat, AK, Yakutat, VOR/DME RWY 11, Amdt 2
Yakutat, AK, Yakutat, VOR/DME RWY 29, Amdt 3
Cullman, AL, Folsom Field, Takeoff Minimums and Obstacle DP, Amdt 2
Talladega, AL, Talladega Muni, Takeoff Minimums and Obstacle DP, Amdt 2
Springdale, AR, Springdale Muni, ILS OR LOC RWY 18, Amdt 8A
Show Low, AZ, Show Low Rgnl, Takeoff Minimums and Obstacle DP, Amdt 1
Novato, CA, Gnoss Field, Takeoff Minimums and Obstacle DP, Amdt 1
Paso Robles, CA, Paso Robles Muni, RNAV (GPS) RWY 19, Amdt 1
Denver, CO, Rocky Mountain Metropolitan, GPS RWY 29L, Orig-B, CANCELLED
Denver, CO, Rocky Mountain Metropolitan, GPS RWY 29R, Orig-B, CANCELLED
Denver, CO, Rocky Mountain Metropolitan, RNAV (GPS) RWY 29L, Orig
Denver, CO, Rocky Mountain Metropolitan, RNAV (GPS) RWY 29R, Orig
Fort Lauderdale, FL, Fort Lauderdale/Hollywood Intl, VOR RWY 27R, Amdt 12A
Jacksonville, FL, Cecil Field, RNAV (GPS) RWY 9R, Orig
Jacksonville, FL, Cecil Field, RNAV (GPS) RWY 27L, Orig
New Smyrna Beach, FL, New Smyrna Beach Muni, Takeoff Minimums and Obstacle DP, Amdt 2
Plant City, FL, Plant City, GPS RWY 10, Orig-B, CANCELLED
Plant City, FL, Plant City, NDB RWY 10, Amdt 1A, CANCELLED
Plant City, FL, Plant City, RNAV (GPS) RWY 10, Orig
Sarasota/Bradenton, FL, Sarasota/Bradenton Intl, ILS OR LOC RWY 14, Amdt 6
Sarasota/Bradenton, FL, Sarasota/Bradenton Intl, ILS OR LOC RWY 32, Amdt 8
Sarasota/Bradenton, FL, Sarasota/Bradenton Intl, RNAV (GPS) RWY 4, Amdt 2
Sarasota/Bradenton, FL, Sarasota/Bradenton Intl, RNAV (GPS) RWY 14, Amdt 3
Sarasota/Bradenton, FL, Sarasota/Bradenton Intl, RNAV (GPS) RWY 22, Amdt 2
Sarasota/Bradenton, FL, Sarasota/Bradenton Intl, RNAV (GPS) RWY 32, Amdt 3
Sarasota/Bradenton, FL, Sarasota/Bradenton Intl, Takeoff Minimums and Obstacle DP, Amdt 2
Sarasota (Bradenton), FL, Sarasota/Bradenton Intl, VOR RWY 14, Amdt 18
Sarasota (Bradenton), FL, Sarasota/Bradenton Intl, VOR RWY 32, Amdt 10
St Petersburg, FL, Albert Whitted, RNAV (GPS) RWY 7, Amdt 2
St Petersburg, FL, Albert Whitted, VOR RWY 18, Amdt 8
St Petersburg-Clearwater, FL, St Petersburg-Clearwater Intl, ILS OR LOC RWY 17L, Amdt 21
St Petersburg-Clearwater, FL, St Petersburg-Clearwater Intl, ILS OR LOC/DME RWY 35R, Amdt 2
St Petersburg-Clearwater, FL, St Petersburg-Clearwater Intl, RNAV (GPS) RWY 17L, Amdt 1
St Petersburg-Clearwater, FL, St Petersburg-Clearwater Intl, RNAV (GPS) RWY 35R, Amdt 2
St Petersburg-Clearwater, FL, St Petersburg-Clearwater Intl, RNAV (GPS)-A, Amdt 2
St Petersburg-Clearwater, FL, St Petersburg-Clearwater Intl, Takeoff Minimums and Obstacle DP, Amdt 2
St Petersburg-Clearwater, FL, St Petersburg-Clearwater Intl, VOR RWY 4, Amdt 1
St Petersburg-Clearwater, FL, St Petersburg-Clearwater Intl, VOR RWY 35R, Amdt 1
St Petersburg-Clearwater, FL, St Petersburg-Clearwater Intl, VOR/DME RWY 17L, Amdt 1
Tampa, FL, Peter O Knight, NDB RWY 4, Amdt 12
Tampa, FL, Peter O Knight, NDB–A, Amdt 1, CANCELLED
Tampa, FL, Peter O Knight, RNAV (GPS) RWY 22, Amdt 1
Tampa, FL, Peter O Knight, RNAV (GPS) RWY 36, Amdt 2
Tampa, FL, Peter O Knight, Takeoff Minimums and Obstacle DP, Amdt 6
Tampa, FL, Tampa Executive, ILS OR LOC RWY 23, Amdt 1
Tampa, FL, Tampa Executive, RNAV (GPS) RWY 23, Amdt 1
Tampa, FL, Tampa Executive, Takeoff Minimums and Obstacle DP, Amdt 1
Tampa, FL, Tampa Intl, ILS OR LOC RWY 1L, ILS RWY 1L (SA CAT I), ILS RWY 1L (CAT II), ILS RWY 1L (CAT III), Amdt 16
Tampa, FL, Tampa Intl, ILS OR LOC RWY 19L, ILS RWY 19L (SA CAT I), ILS RWY 19L, (CAT II), Amdt 40
Tampa, FL, Tampa Intl, ILS OR LOC RWY 19R, Amdt 5
Tampa, FL, Tampa Intl, LOC RWY 1R, Amdt 3
Tampa, FL, Tampa Intl, RNAV (GPS) RWY 1L, Amdt 2
Tampa, FL, Tampa Intl, RNAV (GPS) RWY 1R, Amdt 2
Tampa, FL, Tampa Intl, RNAV (GPS) RWY 10, Amdt 1
Tampa, FL, Tampa Intl, RNAV (GPS) RWY 19R, Amdt 2
Tampa, FL, Tampa Intl, RNAV (GPS) RWY 28, Amdt 1
Tampa, FL, Tampa Intl, RNAV (GPS) Z RWY 19L, Amdt 2
Tampa, FL, Tampa Intl, Takeoff Minimums and Obstacle DP, Amdt 9
Tampa, FL, Tampa Intl, VOR RWY 10, Amdt 9
Venice, FL, Venice Muni, Takeoff Minimums and Obstacle DP, Amdt 2
Zephyrhills, FL, Zephyrhills Muni, GPS RWY 4, Orig, CANCELLED
Zephyrhills, FL, Zephyrhills Muni, GPS RWY 18, Orig CANCELLED
Zephyrhills, FL, Zephyrhills Muni, GPS RWY 22, Orig CANCELLED
Zephyrhills, FL, Zephyrhills Muni, GPS RWY 36, Orig-A, CANCELLED
Zephyrhills, FL, Zephyrhills Muni, NDB RWY 4, Amdt 1
Zephyrhills, FL, Zephyrhills Muni, NDB RWY 18, Amdt 1
Zephyrhills, FL, Zephyrhills Muni, NDB RWY 22, Amdt 1
Zephyrhills, FL, Zephyrhills Muni, NDB RWY 36, Amdt 1
Zephyrhills, FL, Zephyrhills Muni, RNAV (GPS) RWY 4, Orig
Zephyrhills, FL, Zephyrhills Muni, RNAV (GPS) RWY 18, Orig
Zephyrhills, FL, Zephyrhills Muni, RNAV (GPS) RWY 22, Orig
Zephyrhills, FL, Zephyrhills Muni, RNAV (GPS) RWY 36, Orig
Atlanta, GA, Paulding Northwest Atlanta, ILS OR LOC/DME RWY 31, Orig-A
Atlanta, GA, Paulding Northwest Atlanta, RNAV (GPS) RWY 13, Orig-A
Atlanta, GA, Paulding Northwest Atlanta, RNAV (GPS) RWY 31, Orig-A
Atlanta, GA, Paulding Northwest Atlanta, RNAV (GPS)-A, Orig-A
Quitman, GA, Quitman Brooks County, RNAV (GPS) RWY 10, Orig
Quitman, GA, Quitman Brooks County, RNAV (GPS) RWY 28, Orig
Quitman, GA, Quitman Brooks County, Takeoff Minimums and Obstacle DP, Orig
Honolulu, HI, Honolulu Intl, ILS RWY 4R, Amdt 11B, CANCELLED
Honolulu, HI, Honolulu Intl, ILS Y RWY 4R, Orig
Honolulu, HI, Honolulu Intl, ILS Z RWY 4R, Orig
Honolulu, HI, Honolulu Intl, LOC/DME RWY 4R, Orig
Greenfield, IA, Greenfield Muni, Takeoff Minimums and Obstacle DP, Orig
Boise, ID, Boise Air Terminal/Gowen Fld, ILS OR LOC RWY 10R, ILS RWY 10R (CAT II), ILS RWY 10R (CAT III), Amdt 11A

Chicago, IL, Chicago-O'Hare Intl, ILS OR LOC RWY 22, Amdt 8
Herington, KS, Herington Rgnl, Takeoff Minimums and Obstacle DP, Orig
Hutchinson, KS, Hutchinson Muni, GPS RWY 4, Orig-A, CANCELLED
Hutchinson, KS, Hutchinson Muni, GPS RWY 22, Orig-A, CANCELLED
Hutchinson, KS, Hutchinson Muni, RNAV (GPS) RWY 4, Orig
Hutchinson, KS, Hutchinson Muni, RNAV (GPS) RWY 22, Orig
Hutchinson, KS, Hutchinson Muni, Takeoff Minimums and Obstacle DP, Amdt 5
Larned, KS, Larned-Pawnee County, Takeoff Minimums and Obstacle DP, Amdt 3
Meade, KS, Meade Muni, GPS RWY 17, Orig, CANCELLED
Meade, KS, Meade Muni, GPS RWY 35, Orig, CANCELLED
Meade, KS, Meade Muni, RNAV (GPS) RWY 17, Orig
Meade, KS, Meade Muni, RNAV (GPS) RWY 35, Orig
Meade, KS, Meade Muni, Takeoff Minimums and Obstacle DP, Orig
Henderson, KY, Henderson City-County, Takeoff Minimums and Obstacle DP, Amdt 3
De Quincy, LA, De Quincy Industrial Airpark, NDB RWY 15, Amdt 2
De Quincy, LA, De Quincy Industrial Airpark, RNAV (GPS) RWY 15, Amdt 1
De Quincy, LA, De Quincy Industrial Airpark, RNAV (GPS) RWY 33, Amdt 1
De Quincy, LA, De Quincy Industrial Airpark, Takeoff Minimums and Obstacle DP, Orig
De Quincy, LA, De Quincy Industrial Airpark, VOR/DME 33, Amdt 2
Mansfield, LA, C E 'Rusty' Williams, Takeoff Minimums and Obstacle DP, Orig
Monroe, LA, Monroe Rgnl, RNAV (GPS) RWY 4, Orig-A
Shreveport, LA, Shreveport Downtown, Takeoff Minimums and Obstacle DP, Amdt 3
Gardner, MA, Gardner Muni, Takeoff Minimums and Obstacle DP, Amdt 2
Vineyard Haven, MA, Martha's Vineyard, ILS OR LOC RWY 24, Amdt 3
Vineyard Haven, MA, Martha's Vineyard, RNAV (GPS) RWY 24, Amdt 2
Vineyard Haven, MA, Martha's Vineyard, Takeoff Minimums and Obstacle DP, Amdt 1
Vineyard Haven, MA, Martha's Vineyard, VOR RWY 6, Amdt 2
Vineyard Haven, MA, Martha's Vineyard, VOR RWY 24, Amdt 2
Glenwood, MN, Glenwood Muni, GPS RWY 33, Orig, CANCELLED
Glenwood, MN, Glenwood Muni, RNAV (GPS) RWY 33, Orig
Minneapolis, MN, Anoka County-Blaine Airport (Janes Field), RNAV (GPS) RWY 9, Orig-A
Minneapolis, MN, Anoka County-Blaine Airport (Janes Field), RNAV (GPS) RWY 18, Orig-A
Paynesville, MN, Paynesville Muni, Takeoff Minimums and Obstacle DP, Orig
Red Wing, MN, Red Wing Rgnl, Takeoff Minimums and Obstacle DP, Amdt 2
Rush City, MN, Rush City Rgnl, GPS RWY 34, Orig, CANCELLED
Rush City, MN, Rush City Rgnl, RNAV (GPS) RWY 34, Orig
Cuba, MO, Cuba Muni, RNAV (GPS) RWY 18, Orig
Cuba, MO, Cuba Muni, RNAV (GPS) RWY 36, Orig
Cuba, MO, Cuba Muni, Takeoff Minimums and Obstacle DP, Amdt 2
Kansas City, MO, Charles B. Wheeler Downtown, Takeoff Minimums and Obstacle DP, Amdt 3
St. Charles, MO, St. Charles, VOR OR GPS RWY 9, Amdt 4A, CANCELLED
Kalispell, MT, Glacier Park Intl, SKOTT TWO Graphic Obstacle DP
Missoula, MT, Missoula Intl, ILS Y RWY 11, Orig-A
Missoula, MT, Missoula Intl, ILS Z RWY 11, Amdt 12A
Mandan, ND, Mandan Muni, Takeoff Minimums and Obstacle DP, Orig
Rolla ND, Rolla Muni, Takeoff Minimums and Obstacle DP, Orig
Harvard, NE, Harvard State, RNAV (GPS) RWY 35, Orig
Harvard, NE, Harvard State, Takeoff Minimums and Obstacle DP, Orig
Harvard, NE, Harvard State, VOR/DME RNAV OR GPS RWY 35, Orig, CANCELLED
Omaha, NE, Eppley Airfield, ILS OR LOC RWY 32L, Amdt 2
Scribner, NE, Scribner State, Takeoff Minimums and Obstacle DP, Orig
Carlsbad, NM, Cavern City Air Trml, Takeoff Minimums and Obstacle DP, Orig
Akron, OH, Akron-Canton Rgnl, RNAV (GPS) RWY 1, Orig
Akron, OH, Akron-Canton Rgnl, RNAV (GPS) RWY 5, Orig
Akron, OH, Akron-Canton Rgnl, RNAV (GPS) RWY 19, Orig
Kenton, OH, Hardin County, RNAV (GPS) RWY 4, Orig
Kenton, OH, Hardin County, RNAV (GPS) RWY 22, Orig
Kenton, OH, Hardin County, Takeoff Minimums and Obstacle DP, Amdt 3
Kenton, OH, Hardin County, VOR–A, Amdt 4
Kenton, OH, Hardin County, VOR/DME RNAV OR GPS RWY 22, Amdt 1A, CANCELLED
Napoleon, OH, Henry County, RNAV (GPS) RWY 28, Orig
Napoleon, OH, Henry County, VOR RWY 28, Amdt 4
Tulsa, OK, Tulsa Intl, RADAR–1, Amdt 18
Portland, OR, Portland Intl, VOR RWY 28R, Amdt 3
Chattanooga, TN, Lovell Field, RNAV (GPS) RWY 2, Amdt 1
Chattanooga, TN, Lovell Field, RNAV (GPS) RWY 20, Amdt 1
Huntingdon, TN, Carroll County, Takeoff Minimums and Obstacle DP, Amdt 3
Amarillo, TX, Rick Husband Amarillo Intl, RNAV (GPS) Y RWY 4, Amdt 1
Amarillo, TX, Rick Husband Amarillo Intl, RNAV (GPS) Y RWY 13, Amdt 1
Amarillo, TX, Rick Husband Amarillo Intl, RNAV (GPS) Y RWY 22, Amdt 1
Amarillo, TX, Rick Husband Amarillo Intl, RNAV (GPS) Y RWY 31, Amdt 1
Amarillo, TX, Rick Husband Amarillo Intl, RNAV (RNP) Z RWY 4, Orig
Amarillo, TX, Rick Husband Amarillo Intl, RNAV (RNP) Z RWY 13, Orig
Amarillo, TX, Rick Husband Amarillo Intl, RNAV (RNP) Z RWY 22, Orig
Amarillo, TX, Rick Husband Amarillo Intl, RNAV (RNP) Z RWY 31, Orig
Eastland, TX, Eastland Muni, Takeoff Minimums and Obstacle DP, Amdt 1
El Paso, TX, El Paso Intl, LOC/DME RWY 4, Amdt 3
Hondo, TX, Hondo Muni, NDB RWY 35R, Amdt 5
Hondo, TX, Hondo Muni, RNAV (GPS) RWY 17L, Amdt 1
Hondo, TX, Hondo Muni, RNAV (GPS) RWY 35R, Orig
Kerrville, TX, Kerrville Muni/Louis Schreiner Field, Takeoff Minimums and Obstacle DP, Amdt 1
Levelland, TX, Levelland Muni, Takeoff Minimums and Obstacle DP, Amdt 4
Marfa, TX, Marfa Muni, GPS RWY 30, Orig-A, CANCELLED
Marfa, TX, Marfa Muni, RNAV (GPS) RWY 31, Orig
Marfa, TX, Marfa Muni, Takeoff Minimums and Obstacle DP, Amdt 1
Marfa, TX, Marfa Muni, VOR RWY 31, Amdt 6
Mineola, TX, Mineola Wisener Field, VOR/DME–A, Amdt 5
Mount Vernon, TX, Franklin County, Takeoff Minimums and Obstacle DP, Amdt 1
Saint George, UT, St. George Muni, LDA/DME RWY 19, Orig
Saint George, UT, St. George Muni, VOR/DME–A, Orig
Hot Springs, VA, Ingalls Field, Takeoff Minimums and Obstacle DP, Amdt 4
Burlington, VT, Burlington Intl, ILS OR LOC/DME RWY 33, Amdt 1
Ephraim, WI, Ephraim-Gibraltar, GPS RWY 32, Orig, CANCELLED
Ephraim, WI, Ephraim-Gibraltar, RNAV (GPS) RWY 14, Orig
Ephraim, WI, Ephraim-Gibraltar, RNAV (GPS) RWY 32, Orig
Ephraim, WI, Ephraim-Gibraltar, Takeoff Minimums and Obstacle DP, Orig
Merrill, WI, Merrill Muni, NDB RWY 7, Amdt 3A
Merrill, WI, Merrill Muni, NDB RWY 16, Amdt 7A
Pulaski, WI, Carter, Takeoff Minimums and Obstacle DP, Orig
Huntington, WV, Tri-State/Milton J. Ferguson Field, Takeoff Minimums and Obstacle DP, Amdt 1

On November 9, 2010 (75 FR 69332) the FAA published an Amendment in Docket No. 30752, Amdt 3398 to Part 97 of the Federal Aviation Regulations under section 97.33. The following procedure published in TL 10–25, effective for 13 JAN 2011, is hereby *rescinded:*

Bakersfield, CA, Meadows Field, RNAV (GPS) RWY 12L, Amdt 1A

[FR Doc. 2010–32051 Filed 12–22–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 284

[Docket No. RM09–2–001; Order No. 735–A]

Contract Reporting Requirements of Intrastate Natural Gas Companies

Issued December 16, 2010.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Order on rehearing.

SUMMARY: In this Order on Rehearing, the Commission addresses pending requests to reconsider or clarify Order No. 735, in which it reformed its reporting requirements and instituted Form No. 549D—Quarterly Transportation and Storage Report for Intrastate Natural Gas and Hinshaw Pipelines. Order No. 735–A generally reaffirms the Final Rule. It also retracts the increased requirements for contract end dates and per-customer revenue, extends the filing deadlines from 30 days to 60 days after each reporting quarter, and offers clarification on several matters. Simultaneously with this order, the Commission is issuing a Notice of Inquiry under a separate docket to explore reforms to the semi-annual storage reporting requirements for interstate and intrastate storage companies.

DATES: *Effective Date:* The revisions made in this Order on Rehearing are effective April 1, 2011.

FOR FURTHER INFORMATION CONTACT: Vince Mareino (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–6167, *Vince.Mareino@ferc.gov.*

James Sarikas (Technical Information), Office of Energy Markets Regulation, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–6831, *James.Sarikas@ferc.gov.*

Thomas Russo (Technical Information), Office of Enforcement, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–8792, *Thomas.Russo@ferc.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

	Paragraph No.
I. Background	3.
II. Discussion	15.
A. Changes to the Quarterly Reporting Requirement	17.
1. Interruptible Contract End-Dates	17.
2. Customer Revenues	20.
3. Quarterly Reporting Deadlines	24.
B. Justification for Increased Transparency Required by the Rule	26.
1. Statutory Authority To Require Public Disclosure	31.
2. Harm to Storage Providers With Market-Based Rates	39.
3. Evidence	48.
4. Insufficiency of Periodic Rate Review	58.
5. Burden	61.
C. Identification of Receipt Points	64.
D. Identification of Shippers	67.
E. Prior Period Adjustment and Inactive Contracts	70.
F. Semi-Annual Storage Report	74.
G. Effective Date and Technical Workshop	77.
III. Information Collection Statement	79.
IV. Environmental Analysis	82.
V. Regulatory Flexibility Act	83.
VI. Document Availability	84.
VII. Effective Date	87.

Before Commissioners: Jon Wellinghoff, Chairman; Marc Spitzer, Philip D. Moeller, John R. Norris, and Cheryl A. LaFleur.

Order on Rehearing

1. On May 20, 2010, the Commission issued Order No. 735,[1] revising the contract reporting requirements for (1) intrastate natural gas pipelines [2] providing interstate transportation service pursuant to pursuant to section 311 of the Natural Gas Policy Act of 1978 (NGPA) [3] and (2) Hinshaw pipelines providing interstate service subject to the Commission's Natural Gas Act (NGA) section 1(c) jurisdiction pursuant to blanket certificates issued under § 284.224 of the Commission's regulations.[4] Order No. 735 sought to bring the less stringent transactional reporting requirements for section 311 and Hinshaw pipelines closer in line with the reporting requirements for interstate pipelines, without imposing unduly burdensome requirements on the pipelines. Specifically, Order No. 735 revised § 284.126(b) of the Commission's regulations and replaced Form No. 549—Intrastate Pipeline Annual Transportation Report with the new Form No. 549D, so as to (1) increase the reporting frequency from annual to quarterly, (2) include certain additional types of information and cover storage transactions as well as transportation transactions,[5] (3) establish a procedure for Form No. 549D

[1] *Contract Reporting Requirements of Intrastate Natural Gas Companies,* Order No. 735, 75 FR 29404, FERC Stats. & Regs. ¶ 31,310 (2010) (Order No. 735 or Final Rule).

[2] Under section 2(16) of the NGPA, 15 U.S.C. 3301(16), the term "intrastate pipeline" may refer to all entities engaged in natural gas transportation under section 311 of the NGPA or section 1(c) of the NGA. For consistency, this Final Rule will also use the terms "transportation," "pipeline," and "shippers" to refer inclusively to storage activity (except where noted).

[3] 15 U.S.C. 3372.

[4] Section 1(c) of the NGA exempts from the Commission's NGA jurisdiction those pipelines which transport gas in interstate commerce if (1) they receive natural gas at or within the boundary of a state, (2) all the gas is consumed within that state, and (3) the pipeline is regulated by a state Commission. This exemption is referred to as the Hinshaw exemption after the Congressman who introduced the bill amending the NGA to include section 1(c). *See ANR Pipeline Co.* v. *Federal Energy Regulatory Comm'n,* 71 F.3d 897, 898 (1995) (briefly summarizing the history of the Hinshaw exemption).

[5] This Final Rule does not eliminate or revise 18 CFR 284.126(c) and the corresponding Form No. 537, which require a semi-annual storage report.

to be filed in a uniform electronic format and posted on the Commission's web site, and (4) hold that those reports must be public and may not be filed with information redacted as privileged. Order No. 735 also modified Commission policy concerning periodic reviews of the rates charged by section 311 and Hinshaw pipelines to extend the cycle for such reviews from 3 years to 5 years.

2. In this order, the Commission addresses requests for rehearing or clarification of Order No. 735. Five requests for rehearing or clarification of Order No. 735 were timely filed, by Arkansas Oklahoma Gas Corporation (AOG), Enstor Operating Company, LLC (Enstor), Enogex LLC (Enogex), Jefferson Island Storage & Hub, L.L.C. (Jefferson), and the Texas Pipeline Association (TPA). As discussed below, we largely affirm Order No. 735, granting a limited number of rehearing requests and clarifying the order.[6]

I. Background

3. NGPA section 311 authorizes the Commission to allow intrastate pipelines to transport natural gas "on behalf of" interstate pipelines or local distribution companies served by interstate pipelines "under such terms and conditions as the Commission may prescribe."[7] NGPA section 601(a)(2) exempts transportation service authorized under NGPA section 311 from the Commission's NGA jurisdiction. Congress adopted these provisions in order to eliminate the regulatory barriers between the intrastate and interstate markets and to promote the entry of intrastate pipelines into the interstate market. After the adoption of the NGPA, the Commission authorized Hinshaw pipelines to apply for NGA section 7 certificates, authorizing them to transport natural gas in interstate commerce in the same manner as intrastate pipelines may do under NGPA section 311.[8]

4. Subpart C of the Commission's Part 284 open access regulations (18 CFR 284.121–126) implements the provisions of NGPA section 311 concerning transportation by intrastate pipelines. Those regulations require that intrastate pipelines performing interstate service under NGPA section 311 must do so on an open access basis.[9] However, as described in Order No. 735, the Commission has not imposed on intrastate pipelines all of the Part 284 open access transportation requirements imposed on interstate pipelines, consistent with the NGPA's goal of encouraging intrastate pipelines to provide interstate service.[10] Thus, the Commission does not require intrastate pipelines to offer firm open access service, or comply with the requirements of Order No. 636, such as capacity release and flexible receipt and delivery points.[11] Section 284.224 of the Commission's regulations provides for the issuance of blanket certificates to Hinshaw pipelines to provide open access transportation service "to the same extent that, and in the same manner" as intrastate pipelines are authorized to perform such service by Subpart C.

5. The Commission currently has less stringent transactional reporting requirements for NGPA section 311 intrastate pipelines and Hinshaw pipelines, than for interstate pipelines. In Order No. 637,[12] the Commission revised the reporting requirements for interstate pipelines in order to provide more transparent pricing information and to permit more effective monitoring for the exercise of market power and undue discrimination. As adopted by Order No. 637, § 284.13(b) of the Commission's regulations requires interstate pipelines to post on their internet websites basic information on each transportation and storage transaction with individual shippers, no later than the first nomination under a transaction. This information includes:

- The name of the shipper
- The contract number (for firm service)
- The rate charged
- The maximum rate
- The duration (for firm service)
- The receipt and delivery points and zones covered
- The quantity of natural gas covered
- Any special terms or details, such as any deviations from the tariff
- Whether any affiliate relationship exists.

6. In addition, § 284.13(e) of the Commission's regulations requires interstate pipelines to file semi-annual reports of their storage injection and withdrawal activities, including the identities of the customers, the volumes injected into and withdrawn from storage for each customer and the unit charge and total revenues received.

7. The Commission has not imposed any daily transactional posting requirement on section 311 and Hinshaw pipelines comparable to the daily posting requirement in Order No. 637. Until Order No. 735, § 284.126(b) of the Commission's regulations only required intrastate pipelines to file annual reports of their transportation transactions with the Commission, excluding storage transactions. Those reports included the following information:

- The name of the shipper receiving transportation service
- The type of service performed (i.e. firm or interruptible)
- The total volumes transported for the shipper, including for firm service a separate statement of reservation and usage quantities
- Total revenues received for the shipper, including for firm service a separate statement of reservation and usage revenues.

8. Unlike the interstate pipelines' transactional posting requirements adopted by Order No. 637, § 284.126(b) of the Commission's regulations did not require intrastate pipelines to report the rate charged under each contract, the duration of the contract, the receipt and delivery points, and the zones or segments covered by each contract, whether the contract includes any special terms and conditions, or whether there is an affiliate relationship between the pipeline and the shipper.

9. Section 284.126(c) of the Commission's regulations requires section 311 intrastate pipelines and Hinshaw pipelines to file a semi-annual report of their storage activity, within 30 days of the end of each complete storage and injection season. This requirement

[6] The Appendix to this order includes a static PDF version of the draft revised Form No. 549D. The Appendix will not be included in the **Federal Register**, but is available on the Commission's eLibrary site. The draft revised form is being submitted to the Office of Management and Budget (OMB) for review and approval.

[7] 15 U.S.C. 3371(c).

[8] *Certain Transportation, Sales, and Assignments by Pipeline Companies not Subject to Commission Jurisdiction Under Section 1(c) of the Natural Gas Act,* Order No. 63, FERC Stats. & Regs. ¶ 30,118, at 30,824–25 (1980).

[9] *See* 18 CFR 284.7(b), 284.9(b), and 284.122.

[10] *See Associated Gas Distributors* v. *FERC,* 824 F.2d 981, 1002–1003 (D.C. Cir. 1987) (*Associated Gas Distributors*); *Mustang Energy Corp.* v. *Federal Energy Regulatory Comm'n,* 859 F.2d 1447, 1457 (10th Cir. 1988), *cert. denied,* 490 U.S. 1019 (1988); *see also EPGT Texas Pipeline,* 99 FERC ¶ 61,295 (2002).

[11] *Pipeline Service Obligations, and Revisions to Regulations Governing Self-Implementing Transportation Under Part 284 of the Commission's Regulations; Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol,* Order No. 636–B, 61 FERC ¶ 61,272, at 61,992 n.26 (1992), *order on reh'g,* 62 FERC ¶ 61,007 (1993), *aff'd in part and remanded in part sub nom. United Distribution Cos.* v. *FERC,* 88 F.3d 1105 (D.C. Cir. 1996), *order on remand,* Order No. 636–C, 78 FERC ¶ 61,186 (1997).

[12] *Regulation of Short-Term Natural Gas Transportation Services and Regulation of Interstate Natural Gas Transportation Services,* Order No. 637, FERC Stats. & Regs. ¶ 31,091, *clarified,* Order No. 637–A, FERC Stats. & Regs. ¶ 31,099, *reh'g denied,* Order No. 637–B, 92 FERC ¶ 61,062 (2000), *aff'd in part and remanded in part sub nom. Interstate Natural Gas Ass'n of America* v. *FERC,* 285 F.3d 18 (D.C. Cir. 2002), *order on remand,* 101 FERC ¶ 61,127 (2002), *order on reh'g,* 106 FERC ¶ 61,088 (2004), *aff'd sub nom. American Gas Ass'n* v. *FERC,* 428 F.3d 255 (D.C. Cir. 2005).

is substantially the same as the 18 CFR 284.13(e) requirement that interstate pipelines file such semi-annual reports of their storage activity.

10. In November 2008, the Commission denied a request by SG Resources Mississippi, L.L.C. (SGRM), an interstate storage provider with market-based rates, for waiver of the Order No. 637 requirements that interstate pipelines post the rates charged in each transaction no later than first nomination for service. SGRM contended that the Order No. 637 daily posting requirements placed market-based rate interstate storage providers at a competitive disadvantage with market-based rate NGPA section 311 intrastate storage providers, who were subject only to semi-annual storage and annual transportation reporting requirements. The Commission held that the interstate pipeline posting requirements are necessary to provide shippers with the price transparency they need to make informed decisions, and the ability to monitor transactions for undue discrimination and preference.[13] The Commission also found that the requested exemption would be contrary to NGA section 4(c)'s requirement that "every natural gas company * * * keep open * * * for public inspection * * * all rates."[14]

11. However, simultaneously with the denial of SGRM's waiver request, the Commission commenced this proceeding with a Notice of Inquiry (NOI) in order to explore (1) whether the disparate reporting requirements for interstate and intrastate pipelines have an adverse competitive effect on the interstate pipelines and (2) if so, whether the Commission should modify the reporting requirements for section 311 intrastate pipelines and Hinshaw pipelines in order to make them more comparable to the 18 CFR 284.13(b) posting requirements for interstate pipelines.[15] Based upon the comments received in response to the NOI, the Commission issued a Notice of Proposed Rulemaking (NOPR),[16] proposing to revise its transactional reporting requirements for intrastate pipelines. The Commission determined not to impose the full interstate pipeline daily transactional positing requirements on section 311 and Hinshaw pipelines. The Commission was concerned that the burden of a daily internet posting requirement could discourage section 311 and Hinshaw pipelines from performing interstate service, contrary to the purpose of the NGPA. In addition, it did not appear from the comments that there was widespread concern among interstate pipelines that foregoing a daily posting requirement would cause significant adverse competitive effects. However, the Commission proposed increased transactional reporting requirements for section 311 and Hinshaw pipelines in order to provide shippers and the Commission with more timely and useful information concerning the transactions entered into by section 311 and Hinshaw pipelines.

12. As adopted by Order No. 735, the increased transactional reporting requirements for section 311 and Hinshaw pipelines are as follows. First, the Commission modified the existing 18 CFR 284.126(b) annual transportation reporting requirement to require section 311 and Hinshaw pipelines to make the report on a quarterly basis. Second, the Commission required that the reports cover storage transactions as well as transportation transactions. Third, Order No. 735 required that the reports must contain the following information on each transaction, aggregated by contract:

i. The full legal name, and identification number, of the shipper receiving the service, including whether there is an affiliate relationship between the pipeline and the shipper;

ii. The type of service performed (i.e., firm or interruptible transportation, storage, or other service);

iii. The rate charged under each contract, specifying the rate schedule/name of service and docket where the rates were approved. The report should separately state each rate component set forth in the contract (*i.e.,* reservation, usage, and any other charges);

iv. The primary receipt and delivery points covered by the contract, identified by the list of points that the pipeline has published with the Commission, which shall include the industry common code for each point where one has already been established;

v. The quantity of natural gas the shipper is entitled to transport, store, or deliver under each contract;

vi. The duration of the contract, specifying the beginning and ending month and year of the current agreement;

vii. Total volumes transported, stored, injected, or withdrawn for the shipper; and

viii. Total revenues received for the shipper. The report should separately state revenues received under each rate component.

13. Finally, Order No. 735 established a procedure for the Form No. 549D reports to be filed in a uniform electronic format and posted on the Commission's web site, and held that those reports must be public and may not be filed with information redacted as privileged. The Commission found that these transactional reporting requirements appropriately balanced the need for increased transparency of section 311 and Hinshaw pipeline transactions, while avoiding unduly burdensome requirements that might discourage such pipelines from participating in the interstate market.

14. While Order No. 735 revised the 18 CFR 284.126(b) report to include storage transactions, the Commission continued to require section 311 and Hinshaw pipelines to make the semi-annual storage activity reports currently required by § 284.126(c) of the Commission's regulations. The Commission explained in the NOPR that those reports included information that is not contained in the proposed quarterly transactional reports. Specifically, § 284.126(c) of the Commission's regulations requires section 311 and Hinshaw pipelines to report total volumes injected into storage during each complete storage injection season and total volumes withdrawn from storage during each complete storage withdrawal season. Such seasonal information is not captured by the new 18 CFR 284.126(b) quarterly transactional reports, because those reports do not correlate with the typical five-month withdrawal and seven-month injection seasons. The Commission also stated that retaining the 18 CFR 284.126(c) semi-annual storage activity report for section 311 and Hinshaw pipelines is consistent with the Commission's existing requirement, in § 284.13(e) of the Commission's regulations, that interstate pipelines also make such semi-annual storage activity reports in addition to posting transactional information pursuant to § 284.13(c) of the Commission's regulations.

II. Discussion

15. For the reasons discussed below, the Commission generally denies rehearing of Order No. 735. However, the Commission does grant rehearing in several respects. First, the Commission removes the requirement that the new quarterly reports include the contract end-date for interruptible transactions. Second, the Commission eliminates the increased per-customer revenue reporting requirements by requiring

[13] *SG Resources Mississippi, L.L.C.,* 125 FERC ¶ 61,191 (2008) (*SGRM*).

[14] 15 U.S.C. 717c(c).

[15] *Contract Reporting Requirement of Intrastate Natural Gas Companies,* FERC Stats. & Regs. ¶ 35,559 (2008) (NOI).

[16] *Contract Reporting Requirements of Intrastate Natural Gas Companies,* FERC Stats. & Regs. ¶ 32,644 (2009) (NOPR).

such revenues to be reported only on an annual basis and excluding storage revenues from the report. Third, the Commission extends the deadline for submitting the quarterly reports from approximately 30 days after the end of the quarter to 60 days. With these modifications, the Commission reaffirms all other aspects of Order No. 735, including the requirements that the quarterly reports be filed in a uniform electronic format with no information redacted as privileged and be posted on the Commission's Web site. Contemporaneously with this order, the Commission is also issuing an NOI in Docket No. RM11–4–000 to consider issues related the existing semi-annual storage reporting requirement for both interstate pipelines and section 311 and Hinshaw pipelines.

16. Below, we first discuss the modifications to Order No. 735 we are making on rehearing. We then turn to the other objections to Order No. 735.

A. Changes to the Quarterly Reporting Requirement

1. Interruptible Contract End-Dates

17. Section 284.126(b)(1)(vi) of the Commission's regulations, as adopted by Order No. 735, requires that section 311 and Hinshaw pipelines include in their quarterly transactional reports the duration of each active contract for both firm and interruptible service, including the beginning and ending date. Before Order No. 735, 18 CFR 284.126(b) did not require this information from intrastate pipelines. Currently 18 CFR 284.13(b)(1)(v) requires interstate pipelines to post the duration of firm contracts but 18 CFR 284.13(b)(2) has no similar requirement to post the duration of interruptible contracts. In addition, 18 CFR 284.13(c)(2)(iv) requires interstate pipelines to report the effective and expiration dates for firm transportation and storage contracts quarterly as part of their Index of Customers, but not for interruptible contracts.[17] Neither the interstate nor intrastate semi-annual storage reports require this information.

18. On rehearing, Enstor objects to the requirement that section 311 and Hinshaw pipelines reveal the ending dates of their interruptible storage contracts, including contracts for park and loan service. Enstor states that it enters into separate contracts for each interruptible transaction and that the end date of those transactions is commercially sensitive. Despite the time lag between the execution of a contract and its ultimate disclosure in a quarterly report, the ending date of an interruptible transaction may still be in the future when the quarterly report is filed. Enstor states that knowledge of the forward month when a parking or lending transaction will end will enable other market participants to recreate the storage position of individual Enstor customers. Enstor states that, as a result, a potential storage customer interested in a short-term parking arrangement customer will be able to "lowball" Enstor based on its knowledge of Enstor's inventory and pricing information. Enstor argues that requiring market-based intrastate pipelines to reveal this information, while not imposing a similar requirement on interstate pipelines, results in unduly disparate treatment of the two types of pipelines.[18] Enstor urges the Commission to remove the requirement to report the end-date of interruptible transactions in order to maintain its policy in Order No. 735 of equalizing NGA and section 311/Hinshaw reporting requirements. Enogex makes a similar argument from a theoretical perspective, arguing that the expansion of the reporting requirements would indirectly impose a greater burden on section 311 companies than on interstate pipelines which, it argues, is contrary to the intent of the NGPA.[19]

19. The Commission will revise 18 CFR 284.126 (b)(1)(vi) so that section 311 and Hinshaw pipelines are only required to report contract end-dates for firm transportation and firm storage contracts, not for interruptible contracts. Because interstate pipelines are not required to report the end-dates of their interruptible transactions, imposing such a requirement on section 311 and Hinshaw pipelines is contrary to Order No. 735's purpose of making the reporting requirements for the two sets of pipelines more similar. The absence of such a reporting requirement for interstate pipelines does not appear to have hampered the ability of the Commission and other interested parties to monitor the market for undue discrimination. Moreover, some pipelines, unlike Enstor, do not enter into separate contracts for each interruptible transaction, but rather enter into a single master interruptible contract under which multiple individual transactions may occur. In such circumstances, the end-date of the interruptible contract is of limited significance.

2. Customer Revenues

20. Before Order No. 735, § 284.126(b) of the Commission's regulations required section 311 and Hinshaw pipelines to report, on an annual basis, the actual revenues collected from each transportation customer, not including storage.[20] The Commission does not currently require interstate pipelines to report revenues received from each customer for non-storage services. Both the interstate and intrastate semi-annual storage reports, however, do require reporting of the revenues received from each storage customer during storage injection and withdrawal seasons.[21] Section 284.126(b)(1)(viii) of the Commission's regulations, as adopted by Order No. 735, requires section 311 and Hinshaw pipelines to report the total revenues received from each shipper on a quarterly basis for both transportation and storage.

21. In its rehearing request, Enstor urges the Commission to exempt storage providers with market-based rates from the requirement to report per-customer revenues publicly. Among other arguments, Enstor points out that interstate storage providers are not required to report this information in their daily Web site postings. Enstor therefore asserts that, in this respect, the new quarterly reports required by Order No. 735 actually require more information from intrastate than interstate storage providers, contrary to the Commission's stated intent of bringing the intrastate and interstate reporting requirements more in line with each other. Enstor asserts that the requirement would put intrastate storage providers at a competitive disadvantage to interstate storage providers. Enstor also states that while such customer-by-customer revenue information is included in the semi-annual storage reports of both interstate and intrastate pipelines, Enstor and other pipelines file such reports subject to a request for privileged treatment.

22. We grant rehearing in part on this issue, and will revise 18 CFR 284.126(b)(1)(viii) and the analogous lines of Form No. 549D so as to (1) collect per-customer revenue information only on an annual basis and (2) exclude storage revenues from the report. This will return the per-customer revenue reporting requirement to the *status quo* before Order No. 735. As a result, section 311 and Hinshaw storage

[17] 18 CFR 284.13 (c)(2)(iv) (2010, prior to effective date of Order No. 735).

[18] None of the commenters on the NOPR objected specifically to the proposal to require the ending dates of interruptible contracts to be reported, although they did raise concerns generally about commercially sensitive data.

[19] Enogex at 16.

[20] 18 CFR 284.126(b)(4) (2010, prior to effective date of Order No. 735).

[21] 18 CFR 284.13(e)(5), 284.126(c)(5).

providers will not be subject to any greater per-customer revenue reporting requirement than interstate pipelines. Both sets of pipelines will continue to be required to report per-customer revenues for storage services in the semi-annual storage reports, required by 18 CFR 284.126(c)(5) for section 311 and Hinshaw pipelines and by 18 CFR 284.13(e)(5) for interstate pipelines. In a contemporaneous NOI, the Commission is requesting comments on whether the existing semi-annual storage reporting requirements for both interstate pipelines and section 311 and Hinshaw pipelines should be modified. The issue of whether any change is warranted in the current per-customer storage revenue reporting requirement, including the confidentiality of that information, will be considered in that proceeding.

23. The Commission recognizes that the requirement that section 311 and Hinshaw pipelines report annual non-storage revenues imposes a greater reporting requirement on those pipelines, than on interstate pipelines. Interstate pipelines are not required to make any report of per-customer non-storage revenues. However, that is a reporting disparity that exists in the Commission's current regulations. The Commission relies on the existing annual reports of per-customer non-storage revenues to verify information submitted by section 311 and Hinshaw pipelines in their rate cases, and therefore finds that such information should continue to be collected. In addition, the rehearing applicants do not appear to have significant concerns about the commercial sensitivity of non-storage revenue information. Rather, they are primarily concerned that making storage revenue public on a quarterly basis could place storage providers with market-based rates at a competitive disadvantage against their shippers who could use the relatively fresh revenue information to seek lower prices than they might otherwise obtain.

3. Quarterly Reporting Deadlines

24. Order No. 735 required that each quarterly report be filed on the first day of the month one month after the end of the relevant quarter, or roughly 30 days from the end of each quarter. Jefferson and TPA both urge the Commission to extend the due dates for filing quarterly reports. Both parties argue that Form No. 549D is much more detailed than previous reports, and thus will require more time to compile. TPA notes that some pipelines' measurement and accounting systems are designed to only send invoices 30 days after the end of the service month, and so they could not file reports so soon. Jefferson seeks a 90-day window between the close of the reporting period and the date when the report is due; TPA seeks a 60-day window.

25. The Commission will revise 18 CFR 284.126(b)(2) so as to provide a roughly 60-day window. While the Commission has used 30-day windows for other natural gas pipeline reports,[22] Form No. 549D is fairly detailed and may require more time to complete. It may be more comparable in this sense to the Form No. 3–Q quarterly financial report, which uses a 60-day window.[23] Accordingly, 18 CFR 284.126(b)(2) is amended to state that the quarterly Form No. 549D report for the period January 1 through March 31 must be filed on or before June 1; the quarterly report for the period April 1 through June 30 must be filed on or before September 1; the quarterly report for the period July 1 through September 30 must be filed on or before December 1; and the quarterly report for the period October 1 through December 31 must be filed on or before March 1.

B. Justification for Increased Transparency Required by the Rule

26. Order No. 735 adopted increased transactional reporting requirements for section 311 and Hinshaw pipelines in order to provide greater transparency to the market.[24] The Commission found such transparency to be necessary so shippers can make informed purchasing decisions, and also to permit both shippers and the Commission to monitor actual transactions for evidence of possible abuse of market power or undue discrimination. The Commission found that the existing reporting requirements in 18 CFR 284.126 were inadequate for this purpose. For example, the annual reports of transportation transactions required by existing 18 CFR 284.126(b) did not include (1) the rates charged by the pipeline under each contract, (2) the receipt and delivery points and zones or segments covered by each contract, (3) the quantity of natural gas the shipper is entitled to transport, store, or deliver, (4) the duration of the contract, or (5) whether there is an affiliate relationship between the pipeline and the shipper. Similarly, the semi-annual storage reports required by existing 18 CFR 284.126(c) do not include the rates charged by the storage provider in each contract, the duration of each contract, or whether there is an affiliate relationship between the storage provider and its customer.

27. Order No. 735 found that all this information is necessary to allow the Commission, shippers, and others to determine the extent to which particular transactions are comparable to one another for purposes of monitoring for undue discrimination. For example, contracts for service on different parts of a pipeline system or with different durations may not be comparable to one another. The additional information required to be reported by the Final Rule is also necessary to allow shippers to make informed decisions about their capacity purchases. Shippers need to know the price paid for capacity over a particular path to enable them to decide, for instance, how much to offer for the specific capacity they seek.

28. Order No. 735 also held that, as a matter of policy, section 311 and Hinshaw pipelines must file the new quarterly transactional reports as public in order to achieve the Final Rule's purpose of improving transparency, monitoring discrimination, and fostering efficient markets. The Commission recognized the concern of some pipelines that disclosure of commercially sensitive information would enable a shipper to know what the pipeline is charging other shippers and thus prevent the pipeline from being able to negotiate the best price for the services it offers. However, the Commission found that its requirement that the reports be filed quarterly would permit a significant delay between contract execution and disclosure, and that delay should temper any potential adverse effects from disclosure.

29. Order No. 735 concluded that public disclosure of all information in the quarterly reports is necessary to permit all market participants to monitor the market and detect undue discrimination. The Commission also stated that it expects and hopes that market participants will use the information from these reports in order to educate themselves about market conditions. Regardless of any adverse effect on individual entities, public disclosure will improve the market as a whole by improving efficiency and competition.

30. On rehearing, Enogex and Enstor contend that the Commission has failed to support the increased transactional reporting and public disclosure requirements which Order No. 735 imposes on section 311 pipelines. In

[22] Intrastate pipelines must file semi-annual storage reports within 30 days of the end of each complete storage injection and withdrawal season. 18 CFR 284.126(c).

[23] Natural gas companies that file a FERC Form 2 must file the FERC Form 3–Q within 60 days after the reporting quarter, and companies that file a FERC Form 2–A must file the FERC Form 3–Q within 70 days. 18 CFR 260.300(b)(vii), (c)(vii).

[24] Order No. 735, FERC Stats. & Regs. ¶ 31,310 at P 73–79.

general, they contend that (1) the Commission lacks statutory authority under the NGPA to impose these requirements on section 311 pipelines, (2) these requirements will harm section 311 storage providers with market based rates, (3) the Commission has failed to show that there is an industry problem which these requirements will ameliorate, and (4) these requirements impose unnecessary burdens on section 311 pipelines. For the reasons set forth below, we find these contentions unpersuasive and reaffirm the Final Rule.

1. Statutory Authority To Require Public Disclosure

31. In discussing its statutory authority for the increased reporting and public disclosure requirements of Order No. 735, the Commission first addressed its statutory authority with respect to Hinshaw pipelines. The Commission pointed out that it regulates the interstate services of Hinshaw pipelines under the NGA.[25] NGA section 4(c) requires that "under such rules and regulations as the Commission may prescribe, every natural gas company shall * * * keep open for public inspection * * * all rates * * * together with all contracts which in any manner affect or relate to such rates." While the NGA gives the Commission some discretion with respect to how to provide for the disclosure of rate schedules and contracts, clearly the public disclosure of rate schedules and related contracts, in some manner, is required.[26] Therefore, Order No. 735 concluded that its requirement that the quarterly reports of Hinshaw pipelines be posted without any information redacted was simply carrying out NGA section 4(c)'s requirement for public disclosure of rate and contract information "under such rules and regulations as the Commission may prescribe." The Commission also pointed out that NGA section 23(a)(1) directs the Commission "to facilitate price transparency in markets for the sale or transportation of physical natural gas in interstate commerce."[27]

32. Order No. 735 then turned to the Commission's statutory authority with respect to section 311 pipelines. The Commission recognized that the NGPA does not contain an express public disclosure provision similar to NGA section 4(c). However, the Commission stated that NGPA section 311(c) authorizes the Commission to prescribe the "terms and conditions" under which intrastate pipelines perform interstate service. Order No. 735 concluded that requiring NGPA section 311 pipelines to publicly disclose transactional information for the purpose of allowing shippers and others to monitor NGPA section 311 transactions for undue discrimination is well within the Commission's broad conditioning authority under section 311(c).[28]

33. Enogex and Enstor do not contest the Commission's authority under NGA section 4(c) to require Hinshaw pipelines to report and publicly disclose all the information in the quarterly reports adopted by Order No. 735. However, they contend that imposing these requirements on section 311 pipelines goes beyond the Commission's conditioning authority under NGPA section 311(c). Enogex points out that the purpose of the NGPA is to allow intrastate pipelines to compete in the interstate transportation market without bearing the burden of full NGA regulation. It asserts that, when coupled with the existing triennial rate review requirement for section 311 pipelines and other reporting requirements, the new quarterly reporting and disclosure requirements of Order No. 735 would regulate section 311 pipelines on a level nearly equivalent to the regulatory oversight to which interstate pipelines are subject under the NGA. Enstor contends that, in *Associated Gas Distributors,*[29] the court held that the Commission's exercise of its NGPA section 311(c) conditioning authority should conform to the overall purposes of the NGPA, namely "to assure adequate supplies of natural gas at fair prices." Enstor contends that Order No. 735 failed to explain how the new quarterly reports will accomplish that goal.

34. The Commission finds that requiring section 311 pipelines to report and disclose the information contained in the quarterly reports required by Order No. 735, as amended in the preceding sections of this order, is well within the Commission's conditioning authority under NGPA section 311(c). The information contained in these quarterly reports is basic information concerning the terms of the section 311 pipelines' contracts with their shippers.[30] In the NGA and the Federal Power Act (FPA), Congress required the Commission to provide for the public disclosure of the rates and contracts of interstate gas and oil pipelines and public utilities.[31] Public disclosure of jurisdictional contracts is thus at the heart of each statute adopted by Congress prior to the NGPA for regulating the rates, terms, and conditions of entities subject to our jurisdiction.

35. The NGPA does not set forth a comprehensive scheme for Commission regulation of interstate service provided by intrastate pipelines in the manner of the NGA or FPA. Rather, it delegates to the Commission broad authority "by rule or order [to] authorize any intrastate pipeline to transport natural gas on behalf of[] any interstate pipeline [or] local distribution company served by any interstate pipeline."[32] Consistent with that broad authorization, section 311(c) provides that "Any authorization granted under this section shall be under such terms and conditions as the Commission may prescribe." Given that public disclosure of contracts has been a fundamental aspect of the Commission's regulation of all the entities subject its jurisdiction, the Commission finds that requiring section 311 pipelines to report and disclose the terms of their contracts is well within the broad authority Congress delegated to us to determine under what terms intrastate pipelines may perform interstate transportation service.

36. The Commission has recognized throughout this proceeding that Congress intended in the NGPA to encourage intrastate pipelines to participate in the interstate transportation market by enabling them to do so without bearing the burden of full Commission regulation under the NGA.[33] Contrary to Enogex, the reporting requirements adopted in Order No. 735 are substantially less burdensome than the reporting requirements we have imposed on

[25] *Consumers Energy Co.* v. *FERC,* 226 F.3d 777 (6th Cir. 2000) (holding that the Commission must comply with the requirements of NGA section 5 in order to require a Hinshaw pipeline to modify its rates for interstate service).

[26] *SGRM,* 125 FERC ¶ 61,191 at P 23 (quoting Order No. 637–A, FERC Stats. & Regs. ¶ 31,099 at 31,614).

[27] 15 U.S.C. 717t–2(a)(1). *See* Energy Policy Act of 2005, Pub. L. 109–58, section 316 (Natural Gas Market Transparency Rules), 119 Stat. 594 (2005).

[28] *See, e.g., Associated Gas Distributors,* 824 F.2d at 1015–18 (affirming the Commission's use of Section 311(c) to require intrastate pipelines to permit their interstate sales customers to convert to transportation-only service).

[29] 824 F.2d 981 at 1017–18.

[30] Enogex and Enstor do not object to the requirement to state whether the shipper is an affiliate of the pipeline. While the amended requirement to report annual non-storage revenues collected from each customer goes beyond reporting contract terms, both Enogex and Enstor are primarily concerned with Order No. 735's effect on storage providers with market-based rates. Therefore, the removal of the requirement that storage revenues be reported addresses their concern with respect to the per-customer revenue reporting requirement in the Order No. 735 reports.

[31] NGA section 4(c); FPA section 205(c).

[32] NGPA section 311(a)(2)(A).

[33] *Mustang Energy Corp.* v. *Federal Energy Regulatory Comm'n,* 859 F.2d 1447, 1457 (10th Cir. 1988), *cert. denied,* 490 U.S. 1019 (1988); *see also EPGT Texas Pipeline,* 99 FERC ¶ 61,295 (2002).

interstate pipelines regulated under the NGA. The Commission requires interstate pipelines to maintain internet Web sites and post the terms of each contract before the first nomination for service under that contract. By contrast, this rule does not require section 311 pipelines to maintain an internet Web site. Order No. 735 only requires section 311 pipelines to make quarterly reports of the terms of their contracts. Moreover, in this order we have extended the deadline for each report from 30 days after the end of the quarter to 60 days after the end of the quarter. In addition, while the reports must be filed in a standardized electronic format, the Commission has developed the electronic form in a PDF format and an XML Schema that, upon OMB approval, will be available to download from the FERC Web site and save to a user's computer desktop.

37. In *Associated Gas Distributors,*[34] the court affirmed the Commission's use of its NGPA section 311(c) conditioning authority to impose conditions necessary to assure that section 311 intrastate pipelines do not engage in undue discrimination. The court also stated that "Section 311 itself states no explicit standards for the exercise of the power, but the overall purposes of the NGPA provide a standard—somewhat amorphous to be sure—against which we can and must measure the Commission decision."[35] The court further stated that the Supreme Court had declared that the NGPA's "aim * * * was to assure adequate supplies of natural gas at fair prices."[36] Order No. 735's requirement that section 311 pipelines report and disclose transactional information is consistent with this goal, because it will make the market operate more efficiently. The Commission has consistently held that disclosure of transactional information "will benefit the market as a whole, by improving efficiency and competition. Buyers of services need good information in order to make good choices among competing capacity offerings. Without the provision of such information, competition suffers."[37] Similarly, in Order No. 2001, adopting the Electric Quarterly Reports (EQRs) required of public utilities, the Commission held,

> [W]e believe that disclosure will promote competition and make the market operate more efficiently. * * * [E]asy access to contract and transaction data will give customers a basis on which to compare a variety of suppliers and monitor for market power and anti-competitive behavior. This information will allow customers to reap further benefits from open access transmission by giving them improved tools to use in making buying decisions. In addition, the Commission hopes that making this information more understandable and accessible will promote competition and confidence in the fairness of the market.[38]

38. Our statutory authority to require section 311 pipelines to report and disclose transactional information is buttressed by section 23(a)(1) of the NGA, adopted by EPAct 2005. That section directs the Commission to "facilitate price transparency in markets for the * * * transportation of physical natural gas in interstate commerce, having due regard for the public interest, the integrity of those markets, fair competition, and the protection of consumers." This provision applies to all natural gas transportation in interstate commerce, and thus applies to section 311 pipelines as well as pipelines subject to our NGA jurisdiction. Thus, requiring the Order No. 735 quarterly reports by section 311 pipelines to be public is specifically in keeping with this directive.

2. Harm to Storage Providers With Market-based Rates

39. Both Enogex and Enstor argue that the Commission should not require market-based storage companies such as themselves to report information publicly. Enogex argues that "its ability to capture rates that are truly market-based will be severely compromised if non-section 311 competitors have access to the rates Enogex is charging and will charge under specific storage service agreements."[39] Enogex asserts that it must compete with unregulated intrastate pipelines providing purely intrastate service that are not subject to any disclosure requirements. It asserts that Order No. 735 places it at a competitive disadvantage to such pipelines, because the purely intrastate pipelines will have access to a section 311 pipeline's rate and customer information, while the section 311 pipeline will not have access to comparable information concerning the intrastate pipeline.

40. Enogex contends that this is contrary to the directives of NGA section 23. Enogex contends that Order No. 735's public disclosure requirement violates the requirement of section 23(a)(1) that the Commission have due regard for the integrity of markets and fair competition. It also points out that section 23(b)(1) requires the Commission to exempt from disclosure information that would be detrimental to the operation of an effective market, and section 23(b)(2) requires the Commission to "seek to ensure that consumers and competitive markets are protected from the adverse effects of potential collusion or other anti-competitive behaviors that can be facilitated by untimely public disclosure of transaction-specific information."

41. Enstor claims that reporting such commercially sensitive information would distort the markets and discourage infrastructure development. Enstor's primary concern is that Order No. 735 requires section 311 and Hinshaw storage providers with market-based rates to disclose information which interstate storage providers are not required to disclose, specifically the end-date of interruptible transactions and revenue collected from each customer. Enstor asserts that disclosure of this information will place section 311 and Hinshaw storage providers at a competitive disadvantage with interstate pipelines. Enstor asserts that despite the fact there will be a considerable "time lag between the execution of a contract and its ultimate disclosure in a quarterly report," the obligation to report nevertheless "will undermine the very business model that Enstor and other like storage providers have used."[40] Shippers would be able to "recreate the storage positions" of their competitors and "gain valuable insight into" others' market positions, forcing Enstor's prices downward.[41]

42. The Commission has consistently applied its requirements to report and disclose transactional information to shippers with market-based rates on the ground that such disclosure benefits the overall market, and those benefits outweigh any commercial disadvantages to individual entities in the market. As the Commission held in Order No. 637–A:

> The disclosure of greater information regarding capacity transactions is necessary to achieve these dual goals of fostering competition and market monitoring. To foster competition, it is not sufficient merely to

[34] 824 F.2d 981 at 1002–1003.

[35] *Id.* at 1016 (citation omitted).

[36] *Id.* at 1017, *quoting Transcontinental Gas Pipe Line Corp.* v. *State Oil & Gas Board,* 474 U.S. 409, 421 (1986).

[37] Order No. 637–A, FERC Stats. & Regs. ¶ 31,099 at 31,614–615.

[38] *Revised Public Utility Filing Requirements,* Order No. 2001, FERC Stats. & Regs. ¶ 31,127, P 44–46, 74–85, 104–117, *reh'g denied,* Order No. 2001–A, 100 FERC ¶ 61,074, P 13–17, 30–35, *reh'g denied,* Order No. 2001–B, 100 FERC ¶ 61,342, *order directing filing,* Order No. 2001–C, 101 FERC ¶ 61,314 (2002), *order directing filing,* Order No. 2001–D, 102 FERC ¶ 61,334 (2003).

[39] Enogex at 13.

[40] Enstor Request for Rehearing at 15.

[41] *Id.*

ensure there are multiple competitors, there also needs to be good information to enable buyers to make informed choices among the competitors. Difficulty in obtaining information can reduce competition because buyers may not be aware of potential alternatives and cannot compare prices between alternatives. The reporting requirements will expand shippers' knowledge of alternative offerings by providing more information about the capacity available from the pipeline * * *.[42]

43. Thus, Order No. 637–A concluded that "while disclosure of the transactional information may cause some commercial disadvantage to individual entities, it will benefit the market as a whole, by improving efficiency and competition."[43] The Commission reached the same conclusion in Order No. 2001, requiring public utilities to report and disclose similar transactional information. Thus, the requirement that section 311 and Hinshaw pipelines with market-based rates publicly disclose transactional information is consistent with longstanding Commission policy.

44. The Commission also rejects Enogex's contention that Order No. 735's public disclosure requirement violates the requirements of NGA sections 23(a)(1) and 23(b) that any transparency requirements avoid detrimental effects on competitive markets. Enogex appears to read these provisions as requiring the Commission to exempt from public disclosure any information that might have some effect on the competitive position of a particular participant in the natural gas market. However, these provisions only provide that, in requiring public disclosure, the Commission should seek to avoid detrimental effects on the operation of the market as a whole and protect against "potential collusion or other anti-competitive behaviors." As the First Circuit stated in *Town of Concord* v. *Boston Edison Co.,*

> a practice is not "anticompetitive" simply because it harms competitors. After all, almost all business activity, desirable and undesirable alike, seeks to advance a firm's fortunes at the expense of its competitors. Rather, a practice is "anticompetitive" only if it harms the competitive process. It harms that process when it obstructs the achievement of competition's basic goals—lower prices, better products, and more efficient production methods.[44]

45. Neither Enogex nor Enstor have shown that Order No. 735's public disclosure requirements harm the competitive process or encourage anti-competitive behaviors. Enogex focuses on the fact that intrastate pipelines engaging in purely intrastate business are not subject to similar disclosure requirements. However, this fact does not justify exempting intrastate pipelines from the Order No. 735 disclosure requirements when they perform interstate service. As Order No. 735 clarified, the revised reporting requirements adopted by this rule apply only to a section 311 pipeline's contracts for interstate service, not its purely intrastate contracts. Therefore, section 311 pipelines need not disclose the rates they charge in intrastate transactions. While Enogex asserts that the same customers likely take both intrastate and section 311 services, a contract for section 311 service allows the shipper access to the interstate natural gas markets, while a strictly intrastate contract does not. This fact would generally suggest a contract for section 311 interstate service would have a different value than a contract for purely intrastate service. Thus, a section 311 pipeline's disclosure of pricing information concerning its contracts for interstate service is not necessarily indicative of the pipeline's pricing policies for its purely intrastate services. Moreover, in this order, the Commission is extending the deadline for the filing of quarterly reports to two months after the end of the relevant quarter. Thus, for example, contracts entered into during the period January through March need not be disclosed until June 1. This allows a delay in disclosure of from two to five months after contract execution, depending upon when in the quarter a contract was entered into, thereby minimizing any harm from disclosure of the contract's terms.

46. In these circumstances, the Commission finds that the benefits to the interstate market of Order No. 735's public disclosure requirements outweigh any harm arising from the fact that there is no similar public disclosure requirement for purely intrastate pipelines. That a state may not have imposed disclosure requirements for services within its jurisdiction should not prevent the Commission from adopting public disclosure requirements for the services within our jurisdiction and thereby providing the interstate market with the benefit of greater transparency.

47. Enstor's primary concern is that Order No. 735 requires section 311 storage providers to disclose certain information that interstate storage providers are not required to disclose, specifically the end-date for interruptible contracts and per-customer revenues. However, we are eliminating that disparity in this order, by removing both requirements from the quarterly reports that section 311 pipelines are required to submit by this Final Rule. As revised, we are confident that the transactional reporting requirements appropriately balance the need for increased transparency of section 311 and Hinshaw pipeline transactions, while avoiding unduly burdensome market distortions that might discourage such pipelines from participating in the interstate market.

3. Evidence

48. Citing the standards for reasoned decision-making and abuse of discretion,[45] Enogex argues that the Commission failed to support the Final Rule with any evidence of market abuse requiring an expansion of the scope and frequency of the existing contract reporting requirements. Enogex argues that this is contrary to the D.C. Court's decision in *National Fuel Gas Supply Corp.* v. *FERC,* where the court reversed a Commission rule on the ground that the Commission was "professing that an order ameliorates a real industry problem but then citing no evidence that there is in fact an industry problem."[46] Enogex claims that the Order No. 735 failed to cite any examples of market abuse, only potential abuse. It also argues that while the Commission seeks to increase transparency, "[i]ncreased transparency in of itself is not a sufficient basis to impose a substantial new reporting burden."[47]

49. Enstor makes a similar argument, also citing the court's decision in *National Fuel Gas,* although it only argues for reconsidering the Final Rule "to the extent that it has imposed reporting requirements on intrastate storage providers that provide service at market-based rates under the NPGA."[48] Enstor notes that the record material in the Final Rule concerns allegations about intrastate pipeline transportation, but none "on the part of storage companies," especially those that "do not possess market power."[49] Enstor argues that the Commission's exercise of its conditioning authority under section 311 of the NGPA cannot be justified by "the potential for undue discrimination."[50]

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[42] Order No. 637–A, FERC Stats. & Regs. ¶ 31,099 at 31,611–2.

[43] *Id.,* at 31,614–615.

[44] 915 F.2d 17, 21–22 (1st Cir. 1990), *cert. denied,* 499 U.S. 931 (1991).

[45] Enogex at 5, 7–10 (citing, *inter alia,* Administrative Procedure Act, 5 U.S.C. 706(2)(A), (E)).

[46] Enogex at 7 (quoting *National Fuel Gas Supply Corp.* v. *FERC,* 468 F.3d 831, 843 (D.C. Cir 2006) (*National Fuel Gas*)).

[47] Enogex at 9.

[48] Enstor at 3.

[49] Enogex at 9.

[50] Enstor at 10.

50. We disagree with both Enogex and Enstor. In arguing that the Commission must present evidence of market abuses by section 311 pipelines in order to support the new disclosure requirements, Enogex and Enstor miss the point that the purpose of this rule is not solely to minimize market abuses and undue discrimination. As explained above, a primary purpose of this rule is to provide shippers better information about relative prices and other terms of different capacity offerings so that they can make more informed choices among competitors. This will make the market operate more efficiently. As the D.C. Circuit held in *Alabama Power Co.,*

> Perfect information available to all buyers and sellers is, indeed, one of the conditions of the economic model of "perfect competition," and where the remaining conditions are satisfied, dissemination of information tends to facilitate prompt adjustment to the market clearing price by all parties to transactions.[51]

51. It is not necessary to present evidence to support the well-accepted principle that better information enables purchasers to make better decisions and improves the overall efficiency of the market. Indeed, in the same *National Fuel Gas* case that Enogex quotes, the court explains that if the Commission seeks to justify a new regulation based solely on theoretical grounds, it may do so.[52] Therefore, increased transparency of transactions subject to the Commission's jurisdiction in order to help shippers make informed purchasing decisions is a sufficient basis to impose a substantial new reporting duty, regardless of whether some section 311 of Hinshaw pipelines have engaged in market abuses. Indeed, this was a primary ground on which the Commission justified the Final Rule. The Commission argued, and we continue to hold, that the increased transparency that the Final Rule brings should improve the natural gas transportation market's efficiency.[53]

52. The Commission is also requiring the new quarterly transactional reports in order to permit both shippers and the Commission to monitor section 311 and Hinshaw pipelines' jurisdictional interstate transactions for evidence of possible abuse of market power or undue discrimination. As previously discussed, public disclosure of the terms of jurisdictional contracts in order to ensure against undue discrimination among shippers is a standard part of the regulatory regimes established by the NGA and the FPA, in which Congress has directed the Commission to require such public disclosure. Therefore, the Commission does not believe that requiring the same method of enabling shippers and the Commission to monitor the contracts of section 311 pipelines for abuse of market power and undue discrimination requires the establishment of a record showing extensive abuses by section 311 pipelines. This is particularly the case since section 23 of the NGA now directs the Commission to "facilitate price transparency in markets for the * * * transportation of physical natural gas in interstate commerce," including such transportation by section 311 pipelines. In any event, the comments in this proceeding do indicate that the preexisting reporting regime was not performing as well as it could be. For example, the Final Rule noted that "Clayton Williams provides a detailed narrative suggesting that it could have pursued allegations that a pipeline has been engaging in unlawful business practices, if only it had more publicly available information to support its allegation" as evidence in favor of improved reporting requirements.[54] Given this testimony alleging concerns with the preexisting reporting regime, plus the Commission's theoretical framework suggesting that increased transparency would improve conditions in the transportation and storage market, we find the Final Rule adequately justified.

53. With regard to Enstor's argument that these concerns do not apply to market-based storage, we remind Enstor that a Commission finding that a service provider lacks market power should not be read to mean that its shippers are at no risk of undue discrimination or other unlawful practices. "It is even more critical for the Commission to review pricing when the Commission is relying on competition to regulate rates, rather than scrutinizing the underlying cost of service." [55]

54. The court's decision in *National Fuel Gas* addressed a different type of rule than is at issue here. In that case, the Commission adopted a rule modifying its Standards of Conduct governing natural gas pipelines' interactions with their marketing affiliates so that the Standards of Conduct would also apply to non-marketing affiliates. These included producers, processors, and local distribution companies who might not hold any capacity on their affiliated pipeline. The purpose of the rule was to guard against pipelines giving non-marketing affiliates undue preference or other market abuses by non-marketing affiliates. The Standards of Conduct required that the affiliates function independently and limit the information that may be shared among them.

55. In reversing the Commission, the court first emphasized that vertical integration between a pipeline and its affiliates produces benefits for consumers. The court stated that both the sharing of information between pipelines and affiliates and integration of functions have efficiency benefits. Therefore, the court found that the Commission cannot impede vertical integration between a pipeline and its affiliates without adequate justification. The court found that the Commission had not provided such justification either by presenting evidence of market abuses by non-marketing affiliates or providing a sufficient explanation of a theoretical danger that pipelines will favor their non-marketing affiliates.

56. The rule at issue here differs from the rule at issue in *National Fuel Gas* in a number of respects. First, as already discussed, the purpose of this rule is not limited to preventing certain types of market abuses, as was the case with the rule in *National Fuel Gas;* rather a primary purpose of this rule also is to provide all market participants better information in order to make informed purchasing decisions, and thereby improve the efficiency of the market. Second, this rule does not impede activities by pipelines (or their affiliates) which the courts have found to create market efficiencies and thus benefit consumers, such as the vertical integration at issue in *National Fuel Gas.* To the contrary, as discussed above, the courts have found that public disclosure of contract terms generally benefits the overall market and consumers. Third, the public disclosure requirements adopted in Order No. 735 apply only to pipelines and transactions directly subject to our jurisdiction under the NGA and NGPA and do not affect the corporate structure of entities, such as non-marketing affiliates, not directly subject to our jurisdiction. Finally, the instant rule is carrying out Congress's directives in NGA section 4 to require public disclosure of Hinshaw pipelines' jurisdictional contracts and in NGA section 23 to provide for price transparency of all interstate transportation transactions. For these

[51] *Alabama Power Co.* v. *Federal Power Comm'n,* 511 F.2d 383, 391 n.13 (D.C. Cir. 1974).

[52] *See National Fuel Gas,* 468 F.3d at 839.

[53] *See* Order No. 735, FERC Stats. & Regs. ¶ 31,310 at P 35.

[54] Order No. 735, FERC Stats. & Regs. ¶ 31,310 at P 28.

[55] *Revisions to Uniform System of Accounts, Forms, Statements, and Reporting Requirements for Natural Gas Companies,* Order No. 581, 60 FR 53019, 53051, FERC Stats. & Regs. ¶ 31,026 (1995), *order on reh'g,* Order No. 581–A, FERC Stats. & Regs. ¶ 31,032 (1996).

reasons, the Commission finds that our adoption of Order No. 735 is not inconsistent with *National Fuel Gas.*

57. Accordingly, we find sufficient cause to apply the Final Rule to both cost-based and market-based transactions.

4. Insufficiency of Periodic Rate Review

58. Enogex further argues that "the Commission erred in concluding that the new Form No. 549D is necessary to meet its statutory obligation to ensure that rates for section 311 service are 'fair and equitable', in view of the fact that it already requires a triennial rate review requirement." [56] Enogex claims the "the adequacy of the triennial rate review requirement is evident," and even more stringent than NGA rate review "because interstate pipelines are no longer subject to a periodic rate review." [57] Therefore, Enogex argues, the reporting requirement is unnecessary.

59. We reject Enogex's bare assertions about periodic rate review. The triennial rate review requirement does not render Order No. 735's increased reporting requirements unnecessary. The primary purposes of the two requirements are different. The Commission requires section 311 pipelines with cost-based rates to make periodic rate filings so that the Commission can review whether the pipeline's maximum rates applicable to all transactions continue to be fair and equitable. In those rate review proceedings, the Commission determines whether the pipeline's maximum rates allow it to collect revenues in excess of its cost-of-service, and, if so, the Commission may require a reduction in the pipeline's maximum rates. Thus, the focus of a rate review filing is on the pipeline's generally applicable maximum rates, not the rates charged in individual transactions.

60. By contrast, the primary purpose of the Order No. 735 reporting requirements is to enable individual shippers to make more informed decisions as to the prices they agree to pay in their own individual transactions, including with market-based rate pipelines that are not subject to the periodic rate review requirement. The reporting requirements also allow better monitoring by the Commission and shippers for instances of undue discrimination among shippers, a matter not generally addressed in rate review proceedings. While periodic rate review is necessary in order to ensure that a pipeline's generally applicable maximum rates are fair and equitable, it does not accomplish the goals of this rulemaking. For that purpose, it is necessary to require public reports of the terms of the individual contracts a pipeline enters into with each of its shippers, which the Commission and market participants may review in order to detect and mitigate against possible abuse of market power or undue discrimination. Such reporting does not occur in a periodic rate review filing.

5. Burden

61. Enogex also argues that the Commission should not have implemented the Final Rule "after acknowledging that the new quarterly report would be unduly burdensome when coupled with the periodic cost of service rate review requirement," [58] and that the Commission "erred in concluding that the new * * * requirement would not be unduly burdensome from a cost and administrative standpoint." [59] Enogex refers to Form No. 549D's "seventy five data elements" as an "extraordinary level of detail," and claims that "because Enogex may provide for both Section 311 and intrastate services in a single contract, existing contract methods * * * may have to be * * * modified in order to report the required information." [60] Finally, Enogex argues that "the Commission inadvertently demonstrated that the triennial rate review requirement is more than sufficient," and urges that Commission to "reverse course and terminate this rulemaking proceeding, even if this results in the triennial rate review requirement being reinstituted." [61]

62. Enogex misstates the record in claiming that the Commission found "that the new quarterly report would be unduly burdensome when coupled with the periodic cost of service rate review requirement." [62] Rather, the Commission stated that it "is sensitive to concerns that the improved reporting requirements could prove too burdensome, when considered in aggregation with other burdens such as triennial rate review." [63] In other words, the Commission reduced the periodic rate review requirement not because it was obligated to do so by the undue burden standard, but because the Commission was exercising its discretion to lessen pipelines' overall burden of complying with all the Commission's various regulatory requirements. We also reject Enogex's implication of burden by the fact that there are seventy-five data elements. Burden is more properly weighed by the content of the data requested. The first eighteen of those data elements, for instance, are little more than the company filling out its name and contact information; using numerous but smaller data elements is useful for making the completed form more amenable to electronic searches.

63. Furthermore, as the Commission has explained, its regulatory oversight is not merely limited to reviewing rate filings. In order to carry out our "responsibility to ensure rates and charges are fair and equitable * * * it is important for rates charged to be reported" as well.[64] The Commission seeks to empower shippers "to determine the extent to which particular transactions are comparable to one another" [65] in order to protect themselves from undue discrimination. The previous reporting requirements in 18 CFR 284.126, for both transportation and storage, were inadequate for providing potential shippers with sufficient information to make well informed purchasing decisions. We also note that while other parties on rehearing request changes to specific elements or argue for special attention to certain market sectors, Enogex is alone among all Respondents in arguing that filing the new reports would be unduly burdensome. The benefits to the functioning of the market, by ensuring transportation and storage customers are aware of the actual prices charged just as American customers have long come to expect in the retail sector, far outweigh Enogex's inchoate claims of undue administrative burden.

C. Identification of Receipt Points

64. AOG urges the Commission to amend or clarify Order No. 735's requirement, codified at 18 CFR 284.126(b)(1)(iv), that Respondents must state the primary receipt points covered by each contract that is reported on Form No. 549D. AOG is a small local distribution company for a ten-county rural area along the Arkansas-Oklahoma border. Its system includes roughly 400 production wells, which ordinarily serve AOG's non-jurisdictional distribution customers. When demand is not at peak, AOG delivers excess production gas to the interstate markets under an Order No. 63 blanket certificate.[66] AOG states that the current

[56] Enogex at 6.

[57] Enogex at 9–10.

[58] Enogex at 19.

[59] Enogex at 6.

[60] Enogex at 18.

[61] Enogex at 19.

[62] Enogex at 19.

[63] Order No. 735, FERC Stats. & Regs. ¶ 31,310 at P 96.

[64] Order No. 581, 60 FR 53019 at 53,050–51; FERC Stats. & Regs. at 31,501.

[65] NOPR, FERC Stats. & Regs. ¶ 32,644 at 19.

[66] *See Arkansas Oklahoma Gas Corp.,* 33 FERC ¶ 61,197, at 61,401–02 (1985) (An Order No. 63

set-up of its system does not allow it to identify the receipt point of each transaction.[67] AOG argues that even if it could, "the information would be meaningless" because AOG does not deliver to the interstate markets directly; rather, all five of its delivery points interconnect with third-party gathering systems that would not be covered by the reporting requirements.[68]

65. Because of the high difficulty and limited usefulness of tracking receipt points on such a system, AOG recommends that the Commission clarify the receipt point reporting requirement. AOG requests that:

> respondents, such as AOG, who perform basically a gathering service, are located in a production area, have hundreds of wells attached to their system, deliver only production gas to other gathering facilities * * *, and are physically unable to identify a receipt point for each transaction be [allowed] to designate 'production pool' as the receipt point in their quarterly reports.[69]

66. AOG's request is narrowly tailored to its own circumstances, which appear to be quite rare. Accordingly, we find that this request does not justify a modification of the generally applicable reporting requirements adopted in this rulemaking proceeding. However, AOG may re-file its request in a separate docket, and request a case-specific waiver of the 18 CFR 284.126(b)(1)(iv) requirement to identify individual receipt points based on its own circumstances. While we do not anticipate many other pipelines to qualify for waivers, the Commission will consider other requests for waiver on a case-by-case basis, as the moving party's individual circumstances so warrant.

D. Identification of Shippers

67. TPA argues that, "[t]he Commission erred by requiring Section 311 and Hinshaw pipelines to identify shippers by D–U–N–S number in Form No. 549D."[70] TPA claims that the Commission has not explained why an identification number is useful, given that pipelines must report publicly the names of its shippers.

68. We affirm that "standardized shipper identification is not unduly burdensome in comparison to the benefit to the Commission and market participants of being certain of the true identity of a pipeline's shippers."[71] For some persons interested in reading Form No. 549D data, TPA may be correct that the shipper's full legal name will be sufficient. For entities using the data to engage in market research, however, a standardized identification number is necessary for at least two reasons. First, identification numbers facilitate the process of creating reliable, robust databases, which in turn help market participants to gain the most value out of the information in these public reports. Without standard identification numbers, a small typographic change, such as referring to "Shipper A, LLC" as "Shipper A, L.L.C.," could be misinterpreted by a computer system as two different entities. Second, identification numbers greatly reduce the administrative burden (both to Respondents and to all readers of the reports) in the common situation where a shipper changes its legal name but is otherwise the same entity. Identification numbers allow for data from before and after the shipper's name change to be considered properly as part of a continuous set, without the need for the Respondent to engage in tedious manual intervention. Accordingly, all Respondents are required to use a standard shipper identification number for Form No. 549D.

69. TPA also argues that while Respondents "can ask their shippers to obtain D–U–N–S numbers, they have no authority to require them to do so and should not be held accountable for a shipper's failure to obtain a D–U–N–S number."[72] We disagree. As a general matter, it would be fair and equitable for a pipeline to include in its Statement of Operating Conditions a requirement that shippers must provide the pipeline with information that is necessary in order to comply with any state or federal reporting requirements. Currently, assignment of a D–U–N–S number is free for all entities required to register with the federal government by a regulatory agency.[73] The Commission and the North American Energy Standards Board have been requiring shipper D–U–N–S numbers for years in the Index of Customers without serious complaint.[74]

E. Prior Period Adjustment and Inactive Contracts

70. TPA asks the Commission to clarify how prior period adjustments should be reported. Since "volumetric measurement is an inexact science,"[75] TPA argues, inevitably pipelines will discover measurement errors in prior records of volumes shipped, injected, or withdrawn. TPA states that it is not clear how to report these adjustments on Form No. 549D. TPA recommends that Respondents should report a prior period adjustment as part of the data for the quarter when it is discovered rather than revising previously reported data, which TPA claims is how pipelines book such adjustments for accounting purposes.

71. The Commission clarifies that Form No. 549D reports should reflect the data on the billing statements to customers. If a pipeline's billing policy for prior period adjustments is to revise the prior bill, then that pipeline should resubmit its Form No. 549D for that prior quarterly time period. If, however, a pipeline's billing policy for prior period adjustments is to bill for the quarter when the discrepancy is discovered, as TPA suggests, then that pipeline should submit the adjusted data as part of its upcoming report rather than revising prior reports. Either way, the Form No. 549D data should match the data in the pipeline's own billing systems, so as to reduce the pipeline's recordkeeping burden and also to avoid systemic discrepancies in the event of an audit. Furthermore, in order to aid Respondents who may need to correct a previous Form No. 549D report for any reason, the Commission will insert a Field 3A in the report, in which Respondents may provide a short explanation of why they are resubmitting a prior report.

72. TPA also requests that the Commission clarify how Respondents should handle contracts that were not active during a given quarter. TPA cites the appendix to the Final Rule as explaining that "pipelines that did not provide any interstate services to any shipper" at all need only fill out the initial fields in Form No. 549D, and not the remainder of the form.[76] TPA states that it is unclear, however, how to respond if "gas flows under some contracts but not others," and

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blanket certificate "permits a local distribution company that is served by an interstate pipeline * * * to sell and transport gas in interstate commerce under the same conditions as apply to those transactions when engaged in by intrastate pipelines under sections 311 and 312 of the NGPA.").

[67] AOG's request includes an affidavit from its president elaborating on its specific factual circumstances, along with a system map.

[68] AOG at 9.

[69] AOG at 7.

[70] TPA at 3, 7.

[71] Order No. 735, FERC Stats. & Regs. ¶ 31,310 at P 61.

[72] TPA at 8.

[73] *See Electric Quarterly Report Submission Software Users Guide* at 11–12 (January 2008), *available at http://www.ferc.gov/docs-filing/eqr/soft-tools/userguide.pdf. See also* Dun & Bradstreet Web site, *http://fedgov.dnb.com/webform.*

[74] *See Instruction Manual for Electronic Filing of the Index of Customers,* OMB Form No. 1902–0169 at 5 (June 2000), *available at http://www.ferc.gov/docs-filing/forms/form-549b/elec-inst.pdf.*

[75] TPA at 9.

[76] TPA at 10.

recommends that pipelines only "report the contracts where [jurisdictional] gas flowed."[77]

73. The Commission grants the requested clarification. Respondents need not include in their quarterly reports any contracts for which no Commission-jurisdictional gas has flowed in that quarter.

F. Semi-Annual Storage Report

74. Enogex, Jefferson, and TPA all argue that the semi-annual storage report (Form No. 537, required by 18 CFR 284.126(c)) will be duplicative and burdensome as soon as section 311 and Hinshaw pipelines begin reporting on Form No. 549D. They argue that since the Commission "will be able to distill all of the relevant information presently reported on the existing Form No. 537 from the new Form No. 549D,"[78] there is "no justification for"[79] collecting "this duplicative storage activity information in dissimilar formats."[80] Accordingly, they urge the Commission to eliminate the semi-annual storage report.

75. While there is substantial overlap between Form No. 537 and Form No. 549D, it remains unclear whether the new quarterly report renders the semi-annual storage report obsolete. The semi-annual storage report collects certain information that the quarterly reports do not. This includes the volumes actually injected and withdrawn during the injection and withdrawal seasons. In addition, as discussed above, the quarterly reports required by this rule will not require per-customer revenue data to be reported. Moreover, since the semi-annual reporting periods are tied to the injection and withdrawal season, the time periods covered also do not correspond precisely to two Form No. 549D quarterly reports. Thus, we will not eliminate Form No. 537 at this time.

76. However, we find that the Commission should reconsider the utility of the semi-annual storage reports for interstate and intrastate storage companies. As Enogex, Jefferson, and TPA argue, the Commission should seek to eliminate truly duplicative reporting requirements. Throughout this rulemaking proceeding, the Commission has also sought to standardize and equalize reporting requirements for interstate and intrastate providers wherever it is warranted. Thus, any consideration of abolishing or reforming the intrastate semi-annual storage report should be accompanied by a similar review of the interstate semi-annual storage report. Finally, the semi-annual storage reports are now anomalous among Commission reports in their respondents' liberal use of requests for privileged treatment, which has recently led to calls that these reports be made public. Accordingly, simultaneously with this order, the Commission is issuing a Notice of Inquiry under a separate docket, Docket No. RM11–4–000, to explore reforms to the semi-annual storage reporting requirements for interstate and intrastate storage companies.

G. Effective Date and Technical Workshop

77. Jefferson argues on rehearing that the Commission should delay the effective date of Order No. 735 from April 1, 2011 until October 1, 2011. Jefferson also requests that the Commission hold a technical workshop at least 6 months before the effective date, and post the XML Schema as soon as possible. Jefferson argues that since the Commission has not yet posted a version of the XML Schema that is compatible for electronic submission, it cannot yet determine the procedures that it will use to collect data and compile its first report.

78. The draft revisions to Form No. 549D[81] are being submitted to OMB for review and approval. Above in this order, we have pushed back the due date of the first quarterly report under the new regulations from May 1, 2011 to June 1, 2011. A print only version of the PDF form is provided in the Appendix to this order, and Commission Staff will post the XML Schema and fillable PDF to the FERC website as soon as available and permitted by OMB. We consider this to be sufficient advance notice, considering that Jefferson is the only pipeline to have expressed concern on rehearing that the effective date is too soon. We also direct Commission Staff to hold a technical workshop on issues of implementation, the time and date of which will be announced in a separate notice in this docket after we receive OMB approval of the revised Form No. 549D.[82]

III. Information Collection Statement

79. OMB regulations require that OMB approve certain reporting, recordkeeping, and public disclosure (collections of information) imposed by an agency.[83] The information collection requirements included in Commission Order No. 735 for Form No. 549D were approved under OMB Control No. 1902–0253. This order further revises the requirements in order to retract the increased requirements for contract end dates and per-customer revenue, to more clearly state the obligations imposed in Order No. 735, and to extend the reporting deadlines. Because the Commission has made "substantive or material modifications" to the information collection requirement, we will submit Form No. 549D to OMB for review and approval under the Paperwork Reduction Act.[84]

80. The Commission identifies the information provided under Part 284 as contained in FERC Form No. 549D. The Commission solicited comments on the need for this information, whether the information would provide useful transparency, ways to enhance the quality, utility, and clarity of the information to be collected, and any suggested methods for minimizing Respondents' burden. Where commenters raised concerns that information collection requirements would be burdensome to implement, the Commission has addressed those concerns above in this order. The Commission does not change its burden estimate from that provided in Order No. 735.[85]

81. 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], e-mail: *DataClearance@ferc.gov,* Phone: (202) 502–8663, Fax: (202) 273–0873. For submitting comments concerning the collection of information, please send your comments to the Commission and to: 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] Phone: (202) 395–4638, Fax: (202) 395–7285. Due to security concerns, comments should be sent electronically to OMB at the following e-mail address: *oira_submission@omb.eop.gov.* Please

[77] *Id.*

[78] TPA at 6.

[79] Enogex at 20.

[80] Jefferson at 8.

[81] The previous Form No. 549D was approved under OMB Control No. 1902–0253.

[82] The technical workshop shall be to discuss implementation of the draft reporting requirements. The technical workshop will not address legal or policy issues that are more appropriately raised through requests for rehearing or clarification, including any changes to the form, instructions, and definitions that would require OMB approval, nor will it address the semi-annual storage reports.

[83] 5 CFR 1320.

[84] *See* 44 U.S.C. 3507(h)(3).

[85] *See* Order No. 735, FERC Stats. & Regs. ¶ 31,310 at P 106–108.

reference OMB Control No. 1902–0253 and the docket number of this order in your submission.

IV. Environmental Analysis

82. 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.[86] The Commission has categorically excluded certain actions from these requirements as not having a significant effect on the human environment.[87] The actions taken here fall within categorical exclusions in the Commission's regulations for rules that are corrective; clarifying or procedural; for information gathering, analysis, and dissemination; and for sales, exchange, and transportation of natural gas that requires no construction of facilities.[88] Therefore an environmental review is unnecessary and has not been prepared in this rulemaking.

V. Regulatory Flexibility Act

83. The Regulatory Flexibility Act of 1980 (RFA) [89] generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities. The Commission is not required to make such analysis if proposed regulations would not have such an effect. For the reasons stated in Order No. 735,[90] the Commission certifies that this Final Rule's amendments to the regulations will not have a significant impact on a substantial number of small entities.

VI. Document Availability

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

85. From FERC'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. The report and instructions also will be made available through the Commission's Forms page, *http://www.ferc.gov/docs-filing/forms.asp,* upon approval by OMB.

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

VII. Effective Date

87. These further revisions to the reporting regulations will be effective April 1, 2011, the same date as in the Final Rule. The quarterly report for transactions occurring during the period January 1, 2011 through March 31, 2011, must be filed on or before June 1, 2011. The Commission has determined that this rule is not a "major rule" as defined in section 351 of the Small Business Regulatory Enforcement Fairness Act of 1996.

List of Subjects in 18 CFR Part 284

Continental shelf, Natural gas, Reporting and recordkeeping requirements.

By the Commission.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

■ In consideration of the foregoing, the Commission amends part 284, Chapter I, Title 18, *Code of Federal Regulations,* as amended at 75 FR 29404 on May 26, 2010, as follows.

PART 284—CERTAIN SALES AND TRANSPORTATION OF NATURAL GAS UNDER THE NATURAL GAS POLICY ACT OF 1978 AND RELATED AUTHORITIES

■ 1. The authority citation for part 284 continues to read as follows:

Authority: 15 U.S.C. 717–717w, 3301–3432; 42 U.S.C. 7101–7352; 43 U.S.C. 1331–1356.

■ 2. In § 284.126, as amended at 75 FR 29419 on May 26, 2010, paragraphs (b)(1)(vi), (b)(1)(viii), and (b)(2) are revised to read as follows:

§ 284.126 Reporting requirements.

* * * * *

(b) * * *

(1) * * *

(vi) The duration of the contract, specifying the beginning and (for firm contracts only) ending month and year of the current agreement;

* * * * *

(viii) Annual revenues received for each shipper, excluding revenues from storage services. The report should separately state revenues received under each component, and need only be reported every fourth quarter.

(2) The quarterly Form No. 549D report for the period January 1 through March 31 must be filed on or before June 1. The quarterly report for the period April 1 through June 30 must be filed on or before September 1. The quarterly report for the period July 1 through September 30 must be filed on or before December 1. The quarterly report for the period October 1 through December 31 must be filed on or before March 1.

* * * * *

[FR Doc. 2010–32112 Filed 12–22–10; 8:45 am]

BILLING CODE 6717–01–P

[86] Order No. 486, *Regulations Implementing the National Environmental Policy Act,* 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs. ¶ 30,783 (1987).

[87] 18 CFR 380.4.

[88] *See* 18 CFR 380.4(a)(2)(ii), 380.4(a)(5), and 380.4(a)(27).

[89] 5 U.S.C. 601–612.

[90] *See* Order No. 735, FERC Stats. & Regs. ¶ 31,310 at P 111.

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 602

[TD 9512]

RIN 1545–BF08

Nuclear Decommissioning Funds

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations and removal of temporary regulations.

SUMMARY: This document contains final regulations under section 468A of the Internal Revenue Code relating to deductions for contributions to trusts maintained for decommissioning nuclear power plants. These final regulations affect taxpayers that own an interest in a nuclear power plant and reflect recent statutory changes. The corresponding temporary regulations are removed.

DATES: *Effective Date:* These regulations are effective on December 23, 2010.

Applicability Dates: For dates of applicability, *see* §§ 1.468A–9, 1.468A–3, and 1.468A–8.

FOR FURTHER INFORMATION CONTACT: Patrick S. Kirwan, (202) 622–3110 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in these final regulations has

been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under control number 1545–2091. The collections of information in these final regulations are contained in §§ 1.468A–3, 1.468A–4, 1.468A–7, and 1.468A–8. Responses to these collections of information are required to obtain a tax benefit.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

On December 31, 2007, the IRS and Treasury Department issued a notice of proposed rulemaking (REG–147290–05, 2008–10 IRB 576 [72 FR 74213]) regarding section 468A of the Internal Revenue Code of 1986 (Code). This proposed rulemaking consisted of a general updating of the prior regulations under section 468A and, in particular, reflected the changes to section 468A made by section 1310 of the Energy Policy Act of 2005 (the Energy Policy Act), Public Law 109–58 (119 Stat. 594).

Written, electronic, and oral comments responding to the notice of proposed rulemaking were received. A public hearing was held on June 17, 2008. After consideration of all of the comments received as well as those comments made at the hearing, these final regulations generally adopt the rules of the proposed regulations with certain clarifications and modifications. The significant comments and modifications are discussed in this preamble.

1. Definitional Matters

A. Definition of Nuclear Decommissioning Costs

One commentator on the proposed regulations suggested that the definition of "nuclear decommissioning costs" be expanded to explicitly include two types of costs that have generally been recognized by the IRS in letter rulings to be included within the ambit of nuclear decommissioning costs. Those two types of costs are (1) costs to decommission structures, systems, and components from a nuclear power plant that continues to produce electric energy; and (2) costs to store spent nuclear fuel pending delivery to a permanent repository. The IRS and Treasury agree that changes such as those proposed by this commentator bring clarity to the final regulations. Accordingly, § 1.468A–1(b)(6) of the final regulations provides that costs for the final decommissioning of structures, systems, and components from a nuclear power plant that continues to produce electric energy and costs associated with facilities to store spent nuclear fuel pending delivery to a permanent repository are included within the definition of nuclear decommissioning costs.

B. Estimated Useful Life

Several commentators observed that the term "estimated useful life" was used for two different purposes in the proposed regulations, and that the date on which such estimated useful life would end might differ, depending on the purpose for which the term was used. Estimated useful life of a nuclear power plant is used to calculate the schedule of ruling amounts in § 1.468A–3(c)(1). In addition, the same term is used in § 1.468A–8(b)(1) and (c)(1) to determine the years over which a taxpayer may deduct a special transfer made under § 1.468A–8. One commentator suggested that the IRS add a provision recognizing that the term is used for more than one purpose and that the date of the end of such period may differ depending on the use of the term. The IRS and Treasury agree with this suggestion and have incorporated that change in § 1.468A–3(c)(2)(iii) of the final regulations.

2. Matters Relating to Special Transfers and Schedules of Deduction Amounts

A. General Comment

One commentator suggested that the proposed requirement that a taxpayer obtain a schedule of deduction amounts with respect to a special transfer was not required by the statute and indeed such requirement constituted an impermissible overreaching by the IRS and Treasury. The commentator suggested that, in lieu of a schedule of deduction amounts, the final regulations simply provide that the IRS will rule on the maximum special transfer amount and allow the taxpayer to calculate the pro rata portion of that amount over the remaining estimated useful life of the nuclear power plant. The commentator expressed concern that the ruling from the IRS might provide a schedule of deduction amounts in excess of the actual appropriate deductible amounts or, alternatively, that the schedule would not allow a taxpayer to deduct more than a pro rata share of the amount that the taxpayer may choose to contribute, even if that amount is less than the maximum special transfer amount. The IRS and Treasury do not believe that these concerns justify a change in the regulations. Section 468A permits deduction of the amount of a special transfer and requires the taxpayer to obtain from the Secretary a new schedule of ruling amounts in connection with the transfer. The IRS and Treasury believe that the schedule of deduction amounts is an appropriate adjunct to the schedule of ruling amounts required in connection with the special transfer. Moreover, concerns regarding the deduction amounts provided in the schedule of deduction amounts are unwarranted. When the IRS issues a schedule of deduction amounts, that schedule allocates the requested special transfer amount (or the maximum allowable special transfer amount if the taxpayer has requested an excessive amount) over the remaining estimated useful life of the nuclear power plant. Thus, the schedule will not provide for deductions in excess of the actual appropriate deductible amounts. With respect to the commentator's alternative concern, the IRS and Treasury believe that the rule limiting deductions to a pro rata share of the amount of the special transfer (rather than a pro rata share of the maximum amount that could have been transferred) is consistent with section 468A(f)(2)(A), which provides that the deduction allowed "for any transfer" shall be allowed ratably over the remaining useful life.

B. Deemed Payment Date for Special Transfers

Several commentators observed that the proposed regulations did not specify the deemed payment date for special transfers. While taxpayers generally assumed that the deemed payment date for special transfers was the same as that for the contributions of ruling amounts, they requested that the IRS resolve the ambiguity. The IRS and Treasury agree that this possible ambiguity should be resolved and, therefore, clarifying changes are included in §§ 1.468A–7(b)(4) and 1.468A–8(a).

C. Extension of Deadline for Actual Payment of Special Transfers

Several commentators requested that the IRS and Treasury provide certain transitional relief for taxpayers seeking to make special transfers relating to taxable years in which taxpayers did not have the benefit of the clarifications provided in these regulations. The

transitional relief requested included an extension of the time to request a ruling regarding the special transfer for a taxable year as well as a rule allowing the special transfer to relate back to that year. The final regulations provide the requested transitional relief. Under § 1.468A–8 (d)(1) the ruling request for a special transfer relating to a taxable year beginning in 2006, 2007, 2008, or 2009 is timely if filed with the IRS within 60 days after the date of publication of these final regulations in the **Federal Register**. Under § 1.468A–8(a), a special transfer that the taxpayer designates as relating to such a year is deemed made during the year provided that the special transfer amount is transferred to the qualified fund within 90 days after the taxpayer receives a ruling from the Secretary allowing such special transfer.

One commentator noted that the proposed regulations do not address the case of a taxpayer that has requested a schedule of deduction amounts from the IRS but has not received the necessary ruling prior to the payment deadline. Under § 1.468A–3(g), a taxpayer that has requested a ruling from the IRS on a schedule of ruling amounts may contribute the ruling amount proposed in its ruling request in those circumstances. The commentator requested a similar rule for special transfers. The final regulations provide such a rule for special transfers in § 1.468A–8(c).

D. Special Transfers With Respect to Nuclear Power Plants That Have Been Transferred

A commentator suggested that the owner of a nuclear power plant that had a qualifying percentage of less than 100 percent under pre-2005 law should be allowed to make a special transfer so that the entire cost of decommissioning the plant can be covered by the qualified fund even if the current owner purchased the plant and was not the owner prior to the enactment of section 468A. The final regulations clarify that when § 1.468A–6 (relating to nonrecognition of gain or loss on certain fund transfers) applies to the transfer of a qualified fund (or part or all of its assets) the transferee succeeds to the transferor's qualifying percentage. If § 1.468A–6 does not apply to the transfer and the transferee's fund is treated as a completely new fund, the transferee cannot make a special transfer but the entire cost of decommissioning the plant can be funded by increasing annual deductible contributions over the remaining useful life of the plant through a schedule of ruling amounts that is determined without regard to the qualifying percentage limitation that applied under pre-2005 law.

E. Special Transfer Over More Than One Year

A commentator suggested that the regulations should allow a taxpayer making a special transfer over several years to get a single ruling for the entire special transfer. It has been the ruling policy of the IRS to provide, in a single ruling, multiple schedules of deduction amounts where a taxpayer requests rulings on special transfers made over several years. The final regulations incorporate this ruling policy in § 1.468A–8(c)(2).

F. Acceleration of Special Transfer Deduction

Although deductions for special transfers are generally allowed ratably over the plant's remaining useful life, a special rule applies if the fund is transferred before the end of the remaining useful life. In that case, the entire remaining deduction for the special transfer is allowed in the year the fund is transferred. This acceleration allows the taxpayer to close its books on the asset. Section 1.468A–8T(b)(3)(ii) of the temporary regulations provides that, in the case of a transfer of a qualified nuclear decommissioning fund to a related person, the transferee's ruling amounts will be adjusted to the extent necessary to offset the benefit provided by the acceleration of deductions. One commentator suggested that the acceleration of the special transfer deduction should be viewed as on offset to the timing detriment the transferor previously incurred because it was unable to fully fund decommissioning costs under pre-2005 law. The commentator further suggested that transfers to affiliates should not be treated less favorably than transfers to non-affiliates. The IRS and Treasury recognize that the transferor may have incurred a timing detriment, but section 468A clearly provides that this detriment is to be offset ratably over the remaining estimated useful life of the plant rather than all at once. While the statute provides for acceleration of the deduction when the fund is transferred, the IRS and Treasury continue to believe that such acceleration provides an inappropriate benefit to a taxpayer that directly or indirectly retains an interest in the plant and that failure to recapture the benefit in those circumstances would frustrate the intent of Congress in providing for the ratable deduction of the special transfer amount. Thus, the final regulations retain the limitation on the acceleration of the deduction for special transfers where the plant is transferred to an affiliated party.

G. Basis of Property Contributed in a Special Transfer

Taxpayers may make special transfers of property other than cash. Section 468A(f)(2)(D) provides that no gain or loss is recognized on the transfer and that for transfers of appreciated property the amount of the deduction shall not exceed the adjusted basis of the property. The legislative history (footnote 16 of H. Rep. 109–45) includes the following discussion relating to such transfers:

> A taxpayer recognizes no gain or loss on the contribution of property to a qualified fund under this special rule. The qualified fund will take a transferred (carryover) basis in such property. Correspondingly, a taxpayer's deduction (over the estimated life of the powerplant) is to be based on the adjusted tax basis of the property contributed rather than the fair market value of such property.

Although the legislative history does not distinguish between appreciated property and property with a value less than its basis (built-in loss property), the statutory language makes it clear that the rule basing the deduction on the property's adjusted tax basis applies only to appreciated property. Accordingly, the proposed regulations provided that the deduction for property contributed in a special transfer is limited to the lesser of fair market value or the transferor's adjusted basis in the property. One commentator disagreed with this rule and recommended that the regulations allow a deduction equal to basis for contributions of built-in loss property. The commentator noted that section 362, a nonrecognition provision similar to section 468A, provides for a stepped-down basis in the hands of the transferee for built-in loss property. The commentator argued for adoption of rules similar to those in section 362 so that the transferor would get a deduction of its adjusted basis in the property and the qualified fund would get a "stepped-down" basis of the fair market value at the time of transfer. The commentator also noted the unfairness of limiting the deduction for built-in loss property to fair market value where the transferee is taxed at a higher rate than the qualified fund.

The IRS and Treasury recognize that the transferor and the fund could achieve generally the same result as the commentator proposes by selling the loss property and contributing the proceeds to the qualified fund which could use the proceeds to repurchase the property. To eliminate the need for such transactions, the final regulations

provide that the transferor may deduct the adjusted basis of built-in loss property contributed to a fund if the fund elects to treat the fair market value of the property as its adjusted basis. Further, the final regulations provide that this election may be made and a deduction equal to basis will be allowed for built-in loss property contributed before December 23, 2010. In such cases, the election may be made and the deduction equal to basis may be claimed by filing an amended tax return.

H. Miscellaneous Special Transfer Issues

(i) One commentator noted that the schedule of deduction amounts is calculated based on the "pre-2005 nonqualifying amount" and recommends that this be changed to the pre-2006 nonqualifying amount. The commentator correctly notes that, while the changes to section 468A were made by the Energy Policy Act of 2005, those changes were effective for tax years beginning after December 31, 2005. The modifier "pre-2005" refers to the state of section 468A prior to the changes made by the Energy Policy Act of 2005. The pre-2005 nonqualifying amount referred to in the proposed regulations was fixed years before and was not determined by reference to the effective date of the Energy Policy Act of 2005. Thus, the modifier "pre-2005 nonqualifying amount" is retained in the final regulations.

(ii) Section 1.468A–3(f)(1)(iii) of the proposed regulations requires that a taxpayer request a new schedule of ruling amounts when requesting a schedule of deduction amounts. The revised schedule of ruling amounts must apply beginning with the first taxable year for which a deduction is allowed under the schedule of deduction amounts. One commentator suggested that the new schedule of ruling amounts should not apply until the following year because the special transfer may actually occur at any time during the first taxable year in which a deduction is allowed under the schedule of deduction amounts (and under the deemed payment rules may occur during the first two-and-a-half months of the following taxable year). Section 1.468A–3(f)(1)(iii) of the final regulations adopts this suggestion.

(iii) Section 1.468A–8(a)(2) of the proposed regulations provides that the present value of estimated future decommissioning costs is determined as of the first day of the taxable year of the taxpayer in which the special transfer is made. One commentator noted that the special transfer may be made after the first day of the taxable year and suggested that the regulations permit determinations of present value as of an alternative date. The final regulations permit the use of an alternative date that is not later than the date on which the special transfer is made if the taxpayer establishes that the determination of present value as of such date is reasonable and consistent with the principles and provisions of § 1.468A–8.

3. Transfers of Nuclear Power Plants and Their Associated Qualified Funds

A. Ambiguity Relating to a Plant That has Ceased Producing Electric Energy

The proposed regulations, at § 1.468A–6(a), provide that, for purposes of determining the tax consequences of the transfer of a qualified fund associated with a nuclear power plant, a nuclear power plant includes a plant that previously qualified as a nuclear power plant but that has permanently ceased producing electric energy. One commentator notes that this provision apparently allows the tax-free transfer of a qualified fund associated with a plant that has permanently ceased producing electric energy if all the other requirements of § 1.468A–6 are satisfied. That was the intended effect of the provision and it is retained in the final regulations.

B. Tax-Free Transfer of a Qualified Fund

The proposed regulations, at § 1.468A–6(b)(3)(i), require that, in order to qualify as a tax-free transfer of a qualified fund, the transferee of a nuclear power plant and its associated qualified fund must acquire that portion of the qualified fund equal to the proportionate amount of the nuclear power plant acquired. One commentator expressed disagreement with this rule, arguing that the rule as it exists requires a choice between potential disqualification of the entire fund and over-funding the qualified fund.

The commentator's position would allow for the removal of assets at transfer when their value is high and perhaps leave the fund without sufficient assets to provide for decommissioning. This is contrary to the general rule of section 468A, which does not permit withdrawals from a qualified fund except to pay for decommissioning and the cost of administering the fund. The IRS and Treasury believe a primary purpose of section 468A is to ensure that adequate assets will be available to decommission the nuclear power plant. Given the long life of nuclear power plants and the variability of investment returns, what may appear to be overfunding in one decade may be inadequate in the next. Moreover, the IRS and Treasury believe that overfunding can be adequately addressed by reducing future payments to the qualified funds.

4. Miscellaneous Matters

A. Minor Changes in Wording To Reflect Deregulation in Certain Jurisdictions

The proposed regulations, in §§ 1.468A–3(a)(2)(i) and 1.468A–3(e)(2)(vi)(H), refer to "amounts collected for" the qualified fund. One commentator noted that in certain jurisdictions that have undergone deregulation, amounts are no longer collected for the qualified funds. The final regulations refer, instead, to the "assets of" the qualified fund.

B. New Schedule of Ruling Amounts When License is Extended

Section 1.468A–3(f)(1)(iv) of the proposed regulations requires that a taxpayer request a revised schedule of ruling amounts by the deemed payment deadline for the year in which the operating license for the nuclear power plant is extended by the Nuclear Regulatory Commission (NRC). One commentator requested that the deadline for requesting a revised schedule of ruling amounts be extended to the deemed payment deadline for the year following the year in which the operating license is extended by the NRC. The commentator argued that the NRC could act late in the year and give the taxpayer little time to prepare the request for the revised schedule of ruling amounts. The IRS and Treasury believe that the deadline in the proposed regulations provides sufficient time to prepare and submit a request for a revised schedule of ruling amounts and it is retained in the final regulations.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) and (d) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. It is hereby certified that this regulation will not have a significant economic impact on a substantial number of small entities. The proposed regulations do not impose a collection of information on small entities. Accordingly, a regulatory flexibility analysis is not required. Pursuant to section 7805(f) of the 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 their impact on small business.

Drafting Information

The principal author of these regulations is Patrick S. Kirwan, Office of Associate Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 602

Reporting and recordkeeping requirements.

Amendments to the Regulations

■ Accordingly, 26 CFR parts 1 and 602 are amended as follows:

PART 1—INCOME TAXES

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

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

Section 1.468A–5 also issued under 26 U.S.C. 468A(e)(5). * * *

1.468A–0T through 1.468A–9T [Removed]

■ **Par. 2.** Sections 1.468A–0T through 1.468A–9T are removed.

■ **Par. 3.** Sections 1.468A–0 through 1.468A–9 are added to read as follows:

§ 1.468A–0 Nuclear decommissioning costs; table of contents.

This section lists the paragraphs contained in §§ 1.468A–1 through 1.468A–9.

§ 1.468A–1 Nuclear decommissioning costs; general rules.

(a) Introduction.
(b) Definitions.
(c) Special rules applicable to certain experimental nuclear facilities.

§ 1.468A–2 Treatment of electing taxpayer.

(a) In general.
(b) Limitation on payments to a nuclear decommissioning fund.
(1) In general.
(2) Excess contributions not deductible.
(c) Deemed payment rules.
(1) In general.
(2) Cash payment by customer.
(d) Treatment of distributions.
(1) In general.
(2) Exceptions to inclusion in gross income.
(i) Payment of administrative costs and incidental expenses.
(ii) Withdrawals of excess contributions.
(iii) Actual distributions of amounts included in gross income as deemed distributions.
(e) Deduction when economic performance occurs.

§ 1.468A–3 Ruling amount.

(a) In general.
(b) Level funding limitation.
(c) Funding period.
(d) Decommissioning costs allocable to a fund.
(1) General rule.
(2) Total estimated cost of decommissioning.
(3) Taxpayer's share.
(e) Manner of requesting schedule of ruling amounts.
(1) In general.
(2) Information required.
(3) Administrative procedures.
(f) Review and revision of schedule of ruling amounts.
(1) Mandatory review.
(2) Elective review.
(3) Determination of revised schedule of ruling amounts.
(g) Special rule permitting payments to a nuclear decommissioning fund before receipt of an initial or revised ruling amount applicable to a taxable year.

§ 1.468A–4 Treatment of nuclear decommissioning fund.

(a) In general.
(b) Modified gross income.
(c) Special rules.
(1) Period for computation of modified gross income.
(2) Gain or loss upon distribution of property by a fund.
(3) Denial of credits against tax.
(4) Other corporate taxes inapplicable.
(d) Treatment as corporation for purposes of subtitle F.

§ 1.468A–5 Nuclear decommissioning fund—miscellaneous provisions.

(a) Qualification requirements.
(1) In general.
(2) Limitation on contributions.
(3) Limitation on use of fund.
(i) In general.
(ii) Definition of administrative costs and expenses.
(4) Trust provisions.
(b) Prohibitions against self-dealing.
(1) In general.
(2) Self-dealing defined.
(3) Disqualified person defined.
(c) Disqualification of nuclear decommissioning fund.
(1) In general.
(2) Exception to disqualification.
(i) In general.
(ii) Excess contribution defined.
(iii) Taxation of income attributable to an excess contribution.
(3) Effect of disqualification.
(4) Further effects of disqualification.
(d) Termination of nuclear decommissioning fund upon substantial completion of decommissioning.
(1) In general.
(2) Additional rules.
(3) Substantial completion of decommissioning defined.

§ 1.468A–6 Disposition of an interest in a nuclear power plant.

(a) In general.
(b) Requirements.
(c) Tax consequences.
(1) The transferor and its Fund.
(2) The transferee and its Fund.
(3) Basis.
(d) Determination of proportionate amount.
(e) Calculation of schedule of ruling amounts and schedule of deduction amounts for dispositions described in this section.
(1) Transferor.
(i) Taxable year of disposition.
(ii) Taxable years after the disposition.
(2) Transferee.
(i) Taxable year of disposition.
(ii) Taxable years after the disposition.
(3) Examples.
(f) Anti-abuse provision.

§ 1.468A–7 Manner of and time for making election.

(a) In general.
(b) Required information.

§ 1.468A–8 Special transfers to qualified funds pursuant to section 468A(f).

(a) General rule.
(1) In general.
(2) Pre-2005 nonqualifying amount.
(i) In general.
(ii) Pre-2005 nonqualifying amount of transferee.
(3) Transfers in multiple years.
(4) Deemed payment rules.
(i) In general.
(ii) Special rule for certain transfers.
(b) Deduction for amounts transferred.
(1) In general.
(2) Amount of deduction.
(i) General Rule.
(ii) Election.
(A) In general.
(B) Manner of making election.
(C) Election allowed for property transferred prior to December 23, 2010.
(3) Denial of deduction for previously deducted amounts.
(4) Transfers of qualified nuclear decommissioning funds.
(5) Special rules.
(i) Gain or loss not recognized on transfers to fund.

(ii) Taxpayer basis in fund.

(iii) Fund basis in transferred property.

(A) In general.

(B) Basis in case of election.

(c) Schedule of deductions required.

(1) In general.

(2) Transfers in multiple taxable years.

(3) Transfer of partial interest in fund.

(4) Special transfer permitted before receipt of schedule.

(d) Manner of requesting schedule of deduction amounts.

(1) In general.

(2) Information required.

(3) Statement required.

(4) Administrative procedures.

§ 1.468A–9 Effective/applicability date.

§ 1.468A–1 Nuclear decommissioning costs; general rules.

(a) *Introduction.* Section 468A provides an elective method for taking into account nuclear decommissioning costs for Federal income tax purposes. In general, an eligible taxpayer that elects the application of section 468A pursuant to the rules contained in § 1.468A–7 is allowed a deduction (as determined under § 1.468A–2) for the taxable year in which the taxpayer makes a cash payment to a nuclear decommissioning fund. Taxpayers using an accrual method of accounting that do not elect the application of section 468A are not allowed a deduction for nuclear decommissioning costs prior to the taxable year in which economic performance occurs with respect to such costs (*see* section 461(h)).

(b) *Definitions.* The following terms are defined for purposes of section 468A and §§ 1.468A–1 through 1.468A–9:

(1) The term *eligible taxpayer* means any taxpayer that possesses a qualifying interest in a nuclear power plant (including a nuclear power plant that is under construction).

(2) The term *qualifying interest* means—

(i) A direct ownership interest; and

(ii) A leasehold interest in any portion of a nuclear power plant if—

(A) The holder of the leasehold interest is primarily liable under Federal or State law for decommissioning such portion of the nuclear power plant; and

(B) No other person establishes a nuclear decommissioning fund with respect to such portion of the nuclear power plant.

(3) The term *direct ownership interest* includes an interest held as a tenant in common or joint tenant, but does not include stock in a corporation that owns a nuclear power plant or an interest in a partnership that owns a nuclear power plant. Thus, in the case of a partnership that owns a nuclear power plant, the election under section 468A must be made by the partnership and not by the partners. In the case of an unincorporated organization described in § 1.761–2(a)(3) that elects under section 761(a) to be excluded from the application of subchapter K, each taxpayer that is a co-owner of the nuclear power plant is eligible to make a separate election under section 468A.

(4) The terms *nuclear decommissioning fund* and *qualified nuclear decommissioning fund* mean a fund that satisfies the requirements of § 1.468A–5. The term *nonqualified fund* means a fund that does not satisfy those requirements.

(5) The term *nuclear power plant* means any nuclear power reactor that is used predominantly in the trade or business of the furnishing or sale of electric energy. Each unit (that is, nuclear reactor) located on a multi-unit site is a separate nuclear power plant. The term *nuclear power plant* also includes the portion of the common facilities of a multi-unit site allocable to a unit on that site.

(6) The term *nuclear decommissioning costs* or *decommissioning costs* includes all otherwise deductible expenses to be incurred in connection with the entombment, decontamination, dismantlement, removal and disposal of the structures, systems and components of a nuclear power plant, whether that nuclear power plant will continue to produce electric energy or has permanently ceased to produce electric energy. Such term includes all otherwise deductible expenses to be incurred in connection with the preparation for decommissioning, such as engineering and other planning expenses, and all otherwise deductible expenses to be incurred with respect to the plant after the actual decommissioning occurs, such as physical security and radiation monitoring expenses. Such term also includes costs incurred in connection with the construction, operation, and ultimate decommissioning of a facility used solely to store, pending acceptance by the government for permanent storage or disposal, spent nuclear fuel generated by the nuclear power plant or plants located on the same site as the storage facility. Such term does not include otherwise deductible expenses to be incurred in connection with the disposal of spent nuclear fuel under the Nuclear Waste Policy Act of 1982 (Pub. L. 97–425). An expense is otherwise deductible for purposes of this paragraph (b)(6) if it would be deductible under chapter 1 of the Internal Revenue Code without regard to section 280B.

(7) The term *public utility commission* means any State or political subdivision thereof, any agency, instrumentality or judicial body of the United States, or any judicial body, commission or other similar body of the District of Columbia or of any State or any political subdivision thereof that establishes or approves rates for the furnishing or sale of electric energy.

(8) The term *ratemaking proceeding* means any proceeding before a public utility commission in which rates for the furnishing or sale of electric energy are established or approved. Such term includes a generic proceeding that applies to two or more taxpayers that are subject to the jurisdiction of a single public utility commission.

(9) The term *special transfer* means any transfer of funds to a qualified nuclear decommissioning fund pursuant to § 1.468A–8.

(c) *Special rules applicable to certain experimental nuclear facilities.* (1) The owner of a qualifying interest in an experimental nuclear facility possesses a qualifying interest in a nuclear power plant for purposes of paragraph (b) of this section if such person is engaged in the trade or business of the furnishing or sale of electric energy.

(2) An owner of stock in a corporation that owns an experimental nuclear facility possesses a qualifying interest in a nuclear power plant for purposes of paragraph (b)(1) of this section if—

(i) Such stockholder satisfies the conditions of paragraph (c)(1) of this section; and

(ii) The corporation that directly owns the facility is not engaged in the trade or business of the furnishing or sale of electric energy.

(3) For purposes of this paragraph (c), an experimental nuclear facility is a nuclear power reactor that is used predominantly for the purpose of conducting experimentation and research.

§ 1.468A–2 Treatment of electing taxpayer.

(a) *In general.* An eligible taxpayer that elects the application of section 468A pursuant to the rules contained in § 1.468A–7 (an electing taxpayer) is allowed a deduction for the taxable year in which the taxpayer makes a cash payment (or is deemed to make a cash payment as provided in paragraph (c) of this section) to a nuclear decommissioning fund and for any taxable year in which a deduction is allowed for a special transfer described in § 1.468A–8. The amount of the deduction for any taxable year equals

the total amount of cash payments made (or deemed made) by the electing taxpayer to a nuclear decommissioning fund (or nuclear decommissioning funds) during such taxable year under this section, plus any amount allowable as a deduction in that taxable year for a special transfer described in § 1.468A–8. The amount of a special transfer permitted under § 1.468A–8 is not treated as a cash payment for purposes of this paragraph (a), and a taxpayer making a special transfer is allowed a ratable deduction in each taxable year during the remaining useful life of the nuclear power plant for the special transfer. A payment may not be made (or deemed made) to a nuclear decommissioning fund before the first taxable year in which all of the following conditions are satisfied:

(1) The construction of the nuclear power plant to which the nuclear decommissioning fund relates has commenced.

(2) A ruling amount is applicable to the nuclear decommissioning fund (*see* § 1.468A–3).

(b) *Limitation on payments to a nuclear decommissioning fund*—(1) *In general.* For purposes of paragraph (a) of this section, the maximum amount of cash payments made (or deemed made) to a nuclear decommissioning fund under paragraph (a) of this section during any taxable year shall not exceed the ruling amount applicable to the nuclear decommissioning fund for such taxable year (as determined under § 1.468A–3).

(2) *Excess contributions not deductible.* If the amount of cash payments made (or deemed made) to a nuclear decommissioning fund during any taxable year exceeds the limitation of paragraph (b)(1) of this section, the excess is not deductible by the electing taxpayer. In addition, *see* paragraph (c) of § 1.468A–5 for rules which provide that the Internal Revenue Service may disqualify a nuclear decommissioning fund if the amount of cash payments made (or deemed made) to a nuclear decommissioning fund during any taxable year exceeds the limitation of paragraph (b)(1) of this section.

(3) *Special transfer disregarded.* The amount of a special transfer permitted under § 1.468A–8 is not treated as a cash payment for purposes of this paragraph (b).

(c) *Deemed payment rules*—(1) *In general.* The amount of any cash payment made by an electing taxpayer to a nuclear decommissioning fund on or before the 15th day of the third calendar month after the close of any taxable year (the deemed payment deadline date) shall be deemed made during such taxable year if the electing taxpayer irrevocably designates the amount as relating to such taxable year on its timely filed Federal income tax return for such taxable year (*see* § 1.468A–7(b)(4)(iii) and (iv) for rules relating to such designation).

(2) *Cash payment by customer.* The amount of any cash payment made by a customer of an electing taxpayer to a nuclear decommissioning fund of such electing taxpayer shall be deemed made by the electing taxpayer if the amount is included in the gross income of the electing taxpayer in the manner prescribed by section 88 and § 1.88–1.

(d) *Treatment of distributions*—(1) *In general.* Except as otherwise provided in paragraph (d)(2) of this section, the amount of any actual or deemed distribution from a nuclear decommissioning fund shall be included in the gross income of the electing taxpayer for the taxable year in which the distribution occurs. The amount of any distribution of property equals the fair market value of the property on the date of the distribution. *See* § 1.468A–5(c) and (d) for rules relating to the deemed distribution of the assets of a nuclear decommissioning fund in the case of a disqualification or termination of the fund. A distribution from a nuclear decommissioning fund shall include an expenditure from the fund or the use of the fund's assets—

(i) To satisfy, in whole or in part, the liability of the electing taxpayer for decommissioning costs of the nuclear power plant to which the fund relates; and

(ii) To pay administrative costs and other incidental expenses of the fund.

(2) *Exceptions to inclusion in gross income*—(i) *Payment of administrative costs and incidental expenses.* The amount of any payment by a nuclear decommissioning fund for administrative costs or other incidental expenses of such fund (as defined in § 1.468A–5(a)(3)(ii)) shall not be included in the gross income of the electing taxpayer unless such amount is paid to the electing taxpayer (in which case the amount of the payment is included in the gross income of the electing taxpayer under section 61).

(ii) *Withdrawals of excess contributions.* The amount of a withdrawal of an excess contribution (as defined in § 1.468A–5(c)(2)(ii)) by an electing taxpayer pursuant to the rules of § 1.468A–5(c)(2) shall not be included in the gross income of the electing taxpayer. *See* paragraph (b)(2) of this section, which provides that the payment of such amount to the nuclear decommissioning fund is not deductible by the electing taxpayer.

(iii) *Actual distributions of amounts included in gross income as deemed distributions.* If the amount of a deemed distribution is included in the gross income of the electing taxpayer for the taxable year in which the deemed distribution occurs, no further amount is required to be included in gross income when the amount of the deemed distribution is actually distributed by the nuclear decommissioning fund. The amount of a deemed distribution is actually distributed by a nuclear decommissioning fund as the first actual distributions are made by the nuclear decommissioning fund on or after the date of the deemed distribution.

(e) *Deduction when economic performance occurs.* An electing taxpayer using an accrual method of accounting is allowed a deduction for nuclear decommissioning costs no earlier than the taxable year in which economic performance occurs with respect to such costs (*see* section 461(h)(2)). The amount of nuclear decommissioning costs that is deductible under this paragraph (e) is determined without regard to section 280B (*see* § 1.468A–1(b)(6)). A deduction is allowed under this paragraph (e) whether or not a deduction was allowed with respect to such costs under section 468A(a) and paragraph (a) of this section for an earlier taxable year.

§ 1.468A–3 Ruling amount.

(a) *In general.* (1) Except as otherwise provided in paragraph (g) of this section or in § 1.468A–8 (relating to deductions for special transfers into a nuclear decommissioning fund), an electing taxpayer is allowed a deduction under section 468A(a) for the taxable year in which the taxpayer makes a cash payment (or is deemed to make a cash payment) to a nuclear decommissioning fund only if the taxpayer has received a schedule of ruling amounts for the nuclear decommissioning fund that includes a ruling amount for such taxable year. Except as provided in paragraph (a)(4) or (5) of this section, a schedule of ruling amounts for a nuclear decommissioning fund (*schedule of ruling amounts*) is a ruling (within the meaning of § 601.201(a)(2) of this chapter) specifying the annual payments (ruling amounts) that, over the taxable years remaining in the funding period as of the date the schedule first applies, will result in a projected balance of the nuclear decommissioning fund as of the last day of the funding period equal to (and in no event greater than) the amount of decommissioning costs allocable to the fund. The projected balance of a nuclear decommissioning

fund as of the last day of the funding period shall be calculated by taking into account the fair market value of the assets of the fund as of the first day of the first taxable year to which the schedule of ruling amounts applies and the estimated rate of return to be earned by the assets of the fund after payment of the estimated administrative costs and incidental expenses to be incurred by the fund (as defined in § 1.468A–5(a)(3)(ii)), including all Federal, State and local income taxes to be incurred by the fund (the after-tax rate of return). *See* paragraph (c) of this section for a definition of funding period and paragraph (d) of this section for guidance with respect to the amount of decommissioning costs allocable to a fund.

(2) Each schedule of ruling amounts must be consistent with the principles and provisions of this section and must be based on reasonable assumptions concerning—

(i) The after-tax rate of return to be earned by the assets of the qualified nuclear decommissioning fund;

(ii) The total estimated cost of decommissioning the nuclear power plant (*see* paragraph (d)(2) of this section); and

(iii) The frequency of contributions to a nuclear decommissioning fund for a taxable year (for example, monthly, quarterly, semi-annual or annual contributions).

(3) The Internal Revenue Service (IRS) shall provide a schedule of ruling amounts that is identical to the schedule of ruling amounts proposed by the taxpayer in connection with the taxpayer's request for a schedule of ruling amounts (*see* paragraph (e)(2)(viii) of this section), but no schedule of ruling amounts shall be provided unless the taxpayer's proposed schedule of ruling amounts is consistent with the principles and provisions of this section and is based on reasonable assumptions. If a proposed schedule of ruling amounts is not consistent with the principles and provisions of this section or is not based on reasonable assumptions, the taxpayer may propose an amended schedule of ruling amounts that is consistent with such principles and provisions and is based on reasonable assumptions.

(4) The taxpayer bears the burden of demonstrating that the proposed schedule of ruling amounts is consistent with the principles and provisions of this section and is based on reasonable assumptions. If a public utility commission established or approved the currently applicable rates for the furnishing or sale by the taxpayer of electricity from the plant, the taxpayer can generally satisfy this burden of proof by demonstrating that the schedule of ruling amounts is calculated using the assumptions used by the public utility commission in its most recent order. In addition, a taxpayer that owns an interest in a deregulated nuclear plant may submit assumptions used by a public utility commission that formerly had regulatory jurisdiction over the plant as support for the assumptions used in calculating the taxpayer's proposed schedule of ruling amounts, with the understanding that the assumptions used by the public utility commission may be given less weight if they are out of date or were developed in a proceeding for a different taxpayer. The use of other industry standards, such as the assumptions underlying the taxpayer's most recent financial assurance filing with the NRC, are an alternative means of demonstrating that the taxpayer has calculated its proposed schedule of ruling amounts on a reasonable basis. Consistency with financial accounting statements is not sufficient, in the absence of other supporting evidence, to meet the taxpayer's burden of proof under this paragraph (a)(4).

(5) The IRS will approve, at the request of the taxpayer, a formula or method for determining a schedule of ruling amounts (rather than providing a schedule specifying a dollar amount for each taxable year) if the formula or method is consistent with the principles and provisions of this section and is based on reasonable assumptions. *See* paragraph (f)(1)(ii) of this section for a special rule relating to the mandatory review of ruling amounts that are determined pursuant to a formula or method.

(6) The IRS may, in its discretion, provide a schedule of ruling amounts that is determined on a basis other than the rules of paragraphs (a) through (d) of this section if—

(i) In connection with its request for a schedule of ruling amounts, the taxpayer explains the need for special treatment and sets forth an alternative basis for determining the schedule of ruling amounts; and

(ii) The IRS determines that special treatment is consistent with the purpose of section 468A.

(b) *Level funding limitation.* (1) Except as otherwise provided in paragraph (b)(3) of this section, the ruling amount specified in a schedule of ruling amounts for any taxable year in the funding period (as defined in paragraph (c) of this section) shall not be less than the ruling amount specified in such schedule for any earlier taxable year.

(2) The ruling amount specified in a schedule of ruling amounts for a taxable year after the end of the funding period may be less than the ruling amount specified in such schedule for an earlier taxable year.

(3) The ruling amount specified in a schedule of ruling amounts for the last taxable year in the funding period may be less than the ruling amount specified in such schedule for an earlier taxable year if, when annualized, the amount specified for the last taxable year is not less than the amount specified for such earlier taxable year. The amount specified for the last taxable year is annualized by—

(i) Determining the number of days between the beginning of the taxable year and the end of the plant's estimated useful life;

(ii) Dividing the amount specified for the last taxable year by such number of days; and

(iii) Multiplying the result by the number of days in the last taxable year (generally 365).

(c) *Funding period*—(1) *In general.* For purposes of this section, the funding period for a nuclear decommissioning fund is the period that—

(i) Begins on the first day of the first taxable year for which a deductible payment is made (or deemed made) to such nuclear decommissioning fund (*see* § 1.468A–2(a) for rules relating to the first taxable year for which a payment may be made (or deemed made) to a nuclear decommissioning fund); and

(ii) Ends on the last day of the taxable year that includes the last day of the estimated useful life of the nuclear power plant to which the nuclear decommissioning fund relates.

(2) *Estimated useful life.* The last day of the estimated useful life of a nuclear power plant is determined under the following rules:

(i) Except as provided in paragraph (c)(2)(ii) of this section—

(A) The last day of the estimated useful life of a nuclear power plant that has been included in rate base for ratemaking purposes in any ratemaking proceeding that established rates for a period before January 1, 2006, is the date used in the first such ratemaking proceeding as the estimated date on which the nuclear power plant will no longer be included in the taxpayer's rate base for ratemaking purposes;

(B) The last day of the estimated useful life of a nuclear power plant that is not described in paragraph (c)(2)(i)(A) of this section is the last day of the estimated useful life of the plant determined as of the date it is placed in service;

(C) A taxpayer with an interest in a plant that is not described in paragraph (c)(2)(i)(A) of this section may use any reasonable method for determining the last day of such estimated useful life; and

(D) A reasonable method for purposes of paragraph (c)(2)(i)(C) of this section may include use of the period for which a public utility commission has included a comparable nuclear power plant in rate base for ratemaking purposes.

(ii) If it can be established that the estimated useful life of the nuclear power plant will end on a date other than the date determined under paragraph (c)(2)(i) of this section, the taxpayer may use such other date as the last day of the estimated useful life but is not required to do so. If the last day of the estimated useful life was determined under paragraph (c)(2)(i)(A) of this section and the most recent ratemaking proceeding used an alternative date as the estimated date on which the nuclear power plant will no longer be included rate base, the most recent ratemaking proceeding will generally be treated as establishing such alternative date as the last day of the estimated useful life.

(iii) The estimated useful life of a nuclear power plant determined for purposes of paragraph (c)(1) of this section may end on a different date from the estimated useful life of a nuclear power plant determined for purposes of § 1.468A–8(b)(1) and (c)(1).

(d) *Decommissioning costs allocable to a fund.* The amount of decommissioning costs allocable to a nuclear decommissioning fund is determined for purposes of this section by applying the following rules and definitions:

(1) *General rule.* The amount of decommissioning costs allocable to a nuclear decommissioning fund is the taxpayer's share of the total estimated cost of decommissioning the nuclear power plant to which the fund relates.

(2) *Total estimated cost of decommissioning.* Under paragraph (a)(2) of this section, the taxpayer must demonstrate the reasonableness of the assumptions concerning the total estimated cost of decommissioning the nuclear power plant.

(3) *Taxpayer's share.* The taxpayer's share of the total estimated cost of decommissioning a nuclear power plant equals the total estimated cost of decommissioning such nuclear power plant multiplied by the percentage of such nuclear power plant that the qualifying interest of the taxpayer represents. (*See* § 1.468A–1(b)(2) for circumstances in which a taxpayer possesses a qualifying interest in a nuclear power plant).

(e) *Manner of requesting schedule of ruling amounts*—(1) *In general.* (i) In order to receive a ruling amount for any taxable year, a taxpayer must file a request for a schedule of ruling amounts that complies with the requirements of this paragraph (e), the applicable procedural rules set forth in § 601.201(e) of this chapter (Statement of Procedural Rules), and the requirements of any applicable revenue procedure that is in effect on the date the request is filed.

(ii) A separate request for a schedule of ruling amounts is required for each nuclear decommissioning fund established by a taxpayer. (*See* paragraph (a) of § 1.468A–5 for rules relating to the number of nuclear decommissioning funds that a taxpayer can establish.)

(iii) Except as provided by §§ 1.468A–5(a)(1)(iv) (relating to certain unincorporated organizations that may be taxable as corporations) and 1.468A–8 (relating to a special transfer under section 468A(f)(1)), a request for a schedule of ruling amounts must not contain a request for a ruling on any other issue, whether the issue involves section 468A or another section of the Internal Revenue Code.

(iv) In the case of an affiliated group of corporations that join in the filing of a consolidated return, the common parent of the group may request a schedule of ruling amounts for each member of the group that possesses a qualifying interest in the same nuclear power plant by filing a single submission with the IRS.

(v) The IRS will not provide or revise a ruling amount applicable to a taxable year in response to a request for a schedule of ruling amounts that is filed after the deemed payment deadline date (as defined in § 1.468A–2(c)(1)) for such taxable year. In determining the date when a request is filed, the principles of sections 7502 and 7503 shall apply.

(vi) Except as provided in paragraph (e)(1)(vii) of this section, a request for a schedule of ruling amounts shall be considered filed only if such request complies substantially with the requirements of this paragraph (e).

(vii) If a request does not comply substantially with the requirements of this paragraph (e), the IRS will notify the taxpayer of that fact. If the information or materials necessary to comply substantially with the requirements of this paragraph (e) are provided to the IRS within 30 days after this notification, the request will be considered filed on the date of the original submission. In addition, the request will be considered filed on the date of the original submission in a case in which the information and materials are provided more than 30 days after the notification if the IRS determines that the electing taxpayer made a good faith effort to provide the applicable information or materials within 30 days after notification and also determines that treating the request as filed on the date of the original submission is consistent with the purposes of section 468A. In any other case in which the information or materials necessary to comply substantially with the requirements of this paragraph (e) are not provided within 30 days after the notification, the request will be considered filed on the date that all information or materials necessary to comply with the requirements of this paragraph (e) are provided.

(2) *Information required.* A request for a schedule of ruling amounts must contain the following information:

(i) The taxpayer's name, address, and taxpayer identification number.

(ii) Whether the request is for an initial schedule of ruling amounts, a mandatory review of the schedule of ruling amounts (*see* paragraph (f)(1) of this section), or an elective review of the schedule of ruling amounts (*see* paragraph (f)(2) of this section).

(iii) The name and location of the nuclear power plant with respect to which a schedule of ruling amounts is requested.

(iv) A description of the taxpayer's qualifying interest in the nuclear power plant and the percentage of such nuclear power plant that the qualifying interest of the taxpayer represents.

(v) Where applicable, an identification of each public utility commission that establishes or approves rates for the furnishing or sale by the taxpayer of electric energy generated by the nuclear power plant, and, for each public utility commission identified—

(A) Whether the public utility commission has determined the amount of decommissioning costs to be included in the taxpayer's cost of service for ratemaking purposes;

(B) The amount of decommissioning costs that are to be included in the taxpayer's cost of service for each taxable year under the current determination and amounts that otherwise are required to be included in the taxpayer's income under section 88 and the regulations thereunder;

(C) A description of the assumptions, estimates and other factors used by the public utility commission to determine the amount of decommissioning costs;

(D) A copy of such portions of any order or opinion of the public utility commission as pertain to the public

utility commission's most recent determination of the amount of decommissioning costs to be included in cost of service; and

(E) A copy of each engineering or cost study that was relied on or used by the public utility commission in determining the amount of decommissioning costs to be included in the taxpayer's cost of service under the current determination.

(vi) A description of the assumptions, estimates and other factors that were used by the taxpayer to determine the amount of decommissioning costs, including each of the following if applicable:

(A) A description of the proposed method of decommissioning the nuclear power plant (for example, prompt removal/dismantlement, safe storage entombment with delayed dismantlement, or safe storage mothballing with delayed dismantlement).

(B) The estimated year in which substantial decommissioning costs will first be incurred.

(C) The estimated year in which the decommissioning of the nuclear power plant will be substantially complete (*see* § 1.468A–5(d)(3) for a definition of substantial completion of decommissioning).

(D) The total estimated cost of decommissioning expressed in current dollars (that is, based on price levels in effect at the time of the current determination).

(E) The total estimated cost of decommissioning expressed in future dollars (that is, based on anticipated price levels when expenses are expected to be paid).

(F) For each taxable year in the period that begins with the year specified in paragraph (e)(2)(vi)(B) of this section (the estimated year in which substantial decommissioning costs will first be incurred) and ends with the year specified in paragraph (e)(2)(vi)(C) of this section (the estimated year in which the decommissioning of the nuclear power plant will be substantially complete), the estimated cost of decommissioning expressed in future dollars.

(G) A description of the methodology used in converting the estimated cost of decommissioning expressed in current dollars to the estimated cost of decommissioning expressed in future dollars.

(H) The assumed after-tax rate of return to be earned by the assets of the qualified nuclear decommissioning fund.

(I) A copy of each engineering or cost study that was relied on or used by the taxpayer in determining the amount of decommissioning costs.

(vii) A proposed schedule of ruling amounts for each taxable year remaining in the funding period as of the date the schedule of ruling amounts will first apply.

(viii) A description of the assumptions, estimates and other factors that were used in determining the proposed schedule of ruling amounts, including, if applicable—

(A) The funding period (as such term is defined in paragraph (c) of this section);

(B) The assumed after-tax rate of return to be earned by the assets of the nuclear decommissioning fund;

(C) The fair market value of the assets (if any) of the nuclear decommissioning fund as of the first day of the first taxable year to which the schedule of ruling amounts will apply;

(D) The amount expected to be earned by the assets of the nuclear decommissioning fund (based on the after-tax rate of return applicable to the fund) over the period that begins on the first day of the first taxable year to which the schedule of ruling amounts will apply and ends on the last day of the funding period;

(E) The amount of decommissioning costs allocable to the nuclear decommissioning fund (as determined under paragraph (d) of this section);

(F) The total estimated cost of decommissioning (as determined under paragraph (d)(2) of this section); and

(G) The taxpayer's share of the total estimated cost of decommissioning (as such term is defined in paragraph (d)(3) of this section).

(ix) If the request is for a revised schedule of ruling amounts, the after-tax rate of return earned by the assets of the nuclear decommissioning fund for each taxable year in the period that begins with the date of the initial contribution to the fund and ends with the first day of the first taxable year to which the revised schedule of ruling amounts applies.

(x) If applicable, an explanation of the need for a schedule of ruling amounts determined on a basis other than the rules of paragraphs (a) through (d) of this section and a description of an alternative basis for determining a schedule of ruling amounts (*see* paragraph (a)(5) of this section).

(xi) A chart or table, based upon the assumed after-tax rate of return to be earned by the assets of the nuclear decommissioning fund, setting forth the years the fund will be in existence, the annual contribution to the fund, the estimated annual earnings of the fund and the cumulative total balance in the fund.

(xii) If the request is for a revised schedule of ruling amounts, a copy of the schedule of ruling amounts that the revised schedule would replace.

(xiii) If the request for a schedule of ruling amounts contains a request, pursuant to § 1.468A–5(a)(1)(iv), that the IRS rule whether an unincorporated organization through which the assets of the fund are invested is an association taxable as a corporation for Federal tax purposes, a copy of the legal documents establishing or otherwise governing the organization.

(xiv) Any other information required by the IRS that may be necessary or useful in determining the schedule of ruling amounts.

(3) *Administrative procedures.* The IRS may prescribe administrative procedures that supplement the provisions of paragraph (e)(1) and (2) of this section. In addition, the IRS may, in its discretion, waive the requirements of paragraph (e)(1) and (2) of this section under appropriate circumstances.

(f) *Review and revision of schedule of ruling amounts*—(1) *Mandatory review.* (i) Any taxpayer that has obtained a schedule of ruling amounts pursuant to paragraph (e) of this section must file a request for a revised schedule of ruling amounts on or before the deemed payment deadline date for the 10th taxable year that begins after the taxable year in which the most recent schedule of ruling amounts was received. If the taxpayer calculated its most recent schedule of ruling amounts on any basis other than an order issued by a public utility commission, the taxpayer must file a request for a revised schedule of ruling amounts on or before the deemed payment deadline date for the 5th taxable year that begins after the taxable year in which the most recent schedule of ruling amounts was received.

(ii)(A) Any taxpayer that has obtained a formula or method for determining a schedule of ruling amounts for any taxable year under paragraph (a)(5) of this section must file a request for a revised schedule on or before the earlier of the deemed payment deadline for the 5th taxable year that begins after its taxable year in which the most recent formula or method was approved or the deemed payment deadline for the first taxable year that begins after a taxable year in which there is a substantial variation in the ruling amount determined under the most recent formula or method. There is a substantial variation in the ruling amount determined under the formula or method in effect for a taxable year if the ruling amount for the year and the

ruling amount for any earlier year since the most recent formula or method was approved differ by more than 50 percent of the smaller amount.

(B) Any taxpayer that has determined its ruling amount for any taxable year under a formula prescribed by § 1.468A–6 (which prescribes ruling amounts for the taxable year in which there is a disposition of a qualifying interest in a nuclear power plant) must file a request for a revised schedule of ruling amounts on or before the deemed payment deadline for its first taxable year that begins after the disposition.

(iii) A taxpayer requesting a schedule of deduction amounts for a nuclear decommissioning fund under § 1.468A–8 must also request a revised schedule of ruling amounts for the fund. The revised schedule of ruling amounts must apply beginning with the first taxable year following the first year in which a deduction is allowed under the schedule of deduction amounts.

(iv) If the operating license of the nuclear power plant to which a nuclear decommissioning fund relates is renewed, the taxpayer maintaining the fund must request a revised schedule of ruling amounts. The request for the revised schedule must be submitted on or before the deemed payment deadline for the taxable year that includes the date on which the operating license is renewed.

(v) A request for a schedule of ruling amounts required by this paragraph (f)(1) must be made in accordance with the rules of paragraph (e) of this section. If a taxpayer does not properly file a request for a revised schedule of ruling amounts by the date provided in paragraph (f)(1)(i), (ii) or (iv) of this section (whichever is applicable), the taxpayer's ruling amount for the first taxable year to which the revised schedule of ruling amounts would have applied and for all succeeding taxable years until a new schedule is obtained shall be zero dollars, unless, in its discretion, the IRS provides otherwise in such new schedule of ruling amounts. Thus, if a taxpayer is required to request a revised schedule of ruling amounts under any provision of this section, and each ruling amount in the revised schedule would equal zero dollars, the taxpayer may, instead of requesting a new schedule of ruling amounts, begin treating the ruling amounts under its most recent schedule as equal to zero dollars.

(2) *Elective review.* Any taxpayer that has obtained a schedule of ruling amounts pursuant to paragraph (e) of this section can request a revised schedule of ruling amounts. Such a request must be made in accordance with the rules of paragraph (e) of this section; thus, the IRS will not provide a revised ruling amount applicable to a taxable year in response to a request for a schedule of ruling amounts that is filed after the deemed payment deadline date for such taxable year (*see* paragraph (e)(1)(vi) of this section).

(3) *Determination of revised schedule of ruling amounts.* A revised schedule of ruling amounts for a nuclear decommissioning fund shall be determined under this section without regard to any schedule of ruling amounts for such nuclear decommissioning fund that was issued prior to such revised schedule. Thus, a ruling amount specified in a revised schedule of ruling amounts for any taxable year in the funding period can be less than one or more ruling amounts specified in a prior schedule of ruling amounts for a prior taxable year.

(g) *Special rule permitting payments to a nuclear decommissioning fund before receipt of an initial or revised ruling amount applicable to a taxable year.* (1) If an electing taxpayer has filed a timely request for an initial or revised ruling amount for a taxable year beginning on or after January 1, 2006, and does not receive the ruling amount on or before the deemed payment deadline date for such taxable year, the taxpayer may make a payment to a nuclear decommissioning fund on the basis of the ruling amount proposed in the taxpayer's request. Thus, under the preceding sentence, an electing taxpayer may make a payment to a nuclear decommissioning fund for such taxable year that does not exceed the ruling amount proposed by the taxpayer for such taxable year in a timely filed request for a schedule of ruling amounts.

(2) If an electing taxpayer makes a payment to a nuclear decommissioning fund for any taxable year pursuant to paragraph (g)(1) of this section and the ruling amount that is provided by the IRS is greater than the ruling amount proposed by the taxpayer for such taxable year, the taxpayer is not allowed to make an additional payment to the fund for such taxable year after the deemed payment deadline date for such taxable year.

(3) If the payment or transfer that an electing taxpayer makes to a nuclear decommissioning fund for any taxable year pursuant to paragraph (g)(1) of this section exceeds the ruling amount that is provided by the IRS for such taxable year, the following rules apply:

(i) The amount of the excess is an excess contribution (as defined in § 1.468A–5(c)(2)(ii)) for such taxable year.

(ii) The amount of the excess contribution is not deductible (*see* § 1.468A–2(b)(2)) and must be withdrawn by the taxpayer pursuant to the rules of § 1.468A–5(c)(2)(i).

(iii) The taxpayer must withdraw the after-tax earnings on the excess contribution.

(iv) If the taxpayer claimed a deduction for the excess contribution, the taxpayer should file an amended return for the taxable year.

§ 1.468A–4 Treatment of nuclear decommissioning fund.

(a) *In general.* A nuclear decommissioning fund is subject to tax on all of its modified gross income (as defined in paragraph (b) of this section). The rate of tax is 20 percent for taxable years beginning after December 31, 1995. This tax is in lieu of any other tax that may be imposed under subtitle A of the Internal Revenue Code (Code) on the income earned by the assets of the nuclear decommissioning fund.

(b) *Modified gross income.* For purposes of this section, the term *modified gross income* means gross income as defined under section 61 computed with the following modifications:

(1) The amount of any payment or special transfer to the nuclear decommissioning fund with respect to which a deduction is allowed under section 468A(a) or section 468A(f) is excluded from gross income.

(2) A deduction is allowed for the amount of administrative costs and other incidental expenses of the nuclear decommissioning fund (including taxes, legal expenses, accounting expenses, actuarial expenses and trustee expenses, but not including decommissioning costs) that are otherwise deductible and that are paid by the nuclear decommissioning fund to any person other than the electing taxpayer. An expense is otherwise deductible for purposes of this paragraph (b)(2) if it would be deductible under chapter 1 of the Code in determining the taxable income of a corporation. For example, because Federal income taxes are not deductible under chapter 1 of the Code in determining the taxable income of a corporation, the tax imposed by section 468A(e)(2) and paragraph (a) of this section is not deductible in determining the modified gross income of a nuclear decommissioning fund. Similarly, because certain expenses allocable to tax-exempt interest income are not deductible under section 265 in determining the taxable income of a corporation, such expenses are not deductible in determining the modified

gross income of a nuclear decommissioning fund.

(3) A deduction is allowed for the amount of an otherwise deductible loss that is sustained by the nuclear decommissioning fund in connection with the sale, exchange or worthlessness of any investment. A loss is otherwise deductible for purposes of this paragraph (b)(3) if such loss would be deductible by a corporation under section 165(f) or (g) and sections 1211(a) and 1212(a).

(4) A deduction is allowed for the amount of an otherwise deductible net operating loss of the nuclear decommissioning fund. For purposes of this paragraph (b), the net operating loss of a nuclear decommissioning fund for a taxable year is the amount by which the deductions allowable under paragraphs (b)(2) and (3) of this section exceed the gross income of the nuclear decommissioning fund computed with the modification described in paragraph (b)(1) of this section. A net operating loss is otherwise deductible for purposes of this paragraph (b)(4) if such a net operating loss would be deductible by a corporation under section 172(a).

(c) *Special rules*—(1) *Period for computation of modified gross income.* The modified gross income of a nuclear decommissioning fund must be computed on the basis of the taxable year of the electing taxpayer. If an electing taxpayer changes its taxable year, each nuclear decommissioning fund of the electing taxpayer must change to the new taxable year. *See* section 442 and § 1.442–1 for rules relating to the change to a new taxable year.

(2) *Gain or loss upon distribution of property by a fund.* A distribution of property by a nuclear decommissioning fund (whether an actual distribution or a deemed distribution) shall be considered a disposition of property by the nuclear decommissioning fund for purposes of section 1001. In determining the amount of gain or loss from such disposition, the amount realized by the nuclear decommissioning fund shall be the fair market value of the property on the date of disposition.

(3) *Denial of credits against tax.* The tax imposed on the modified gross income of a nuclear decommissioning fund under paragraph (a) of this section is not to be reduced or offset by any credits against tax provided by part IV of subchapter A of chapter 1 of the Code other than the credit provided by section 31(c) for amounts withheld under section 3406 (back-up withholding).

(4) *Other corporate taxes inapplicable.* Although the modified gross income of a nuclear decommissioning fund is subject to tax at the rate specified by section 468A(e)(2) and paragraph (a) of this section, a nuclear decommissioning fund is not subject to the other taxes imposed on corporations under subtitle A of the Code. For example, a nuclear decommissioning fund is not subject to the alternative minimum tax imposed by section 55, the accumulated earnings tax imposed by section 531, the personal holding company tax imposed by section 541, and the alternative tax imposed on a corporation under section 1201(a).

(d) *Treatment as corporation for purposes of subtitle F.* For purposes of subtitle F of the Code and §§ 1.468A–1 through 1.468A–9, a nuclear decommissioning fund is to be treated as if it were a corporation and the tax imposed by section 468A(e)(2) and paragraph (a) of this section is to be treated as a tax imposed by section 11. Thus, for example, the following rules apply:

(1) A nuclear decommissioning fund must file a return with respect to the tax imposed by section 468A(e)(2) and paragraph (a) of this section for each taxable year (or portion thereof) that the fund is in existence even though no amount is included in the gross income of the fund for such taxable year. The return is to be made on Form 1120–ND in accordance with the instructions relating to such form. For purposes of this paragraph (d)(1), a nuclear decommissioning fund is in existence for the period that—

(i) Begins on the date that the first deductible payment is actually made to such nuclear decommissioning fund; and

(ii) Ends on the date of termination (*see* § 1.468A–5(d)), the date that the entire fund is disqualified (*see* § 1.468A–5(c)), or the date that the electing taxpayer disposes of its entire qualifying interest in the nuclear power plant to which the nuclear decommissioning fund relates (other than in connection with the transfer of the entire fund to the person acquiring such interest), whichever is applicable.

(2) For each taxable year of the nuclear decommissioning fund, the return described in paragraph (d)(1) of this section must be filed on or before the 15th day of the third month following the close of such taxable year unless the nuclear decommissioning fund is granted an extension of time for filing under section 6081. If such an extension is granted for any taxable year, the return for such taxable year must be filed on or before the extended due date for such taxable year.

(3) A nuclear decommissioning fund must provide its employer identification number on returns, statements and other documents as required by the forms and instructions relating thereto. The employer identification number is obtained by filing a Form SS–4, Application for Employer Identification Number, in accordance with the instructions relating thereto.

(4) A nuclear decommissioning fund must deposit all payments of tax imposed by section 468A(e)(2) and paragraph (a) of this section (including any payments of estimated tax) with an authorized government depositary in accordance with § 1.6302–1.

(5) A nuclear decommissioning fund is subject to the addition to tax imposed by section 6655 in case of a failure to pay estimated income tax. For purposes of section 6655 and this section—

(i) The tax with respect to which the amount of the underpayment is computed in the case of a nuclear decommissioning fund is the tax imposed by section 468A(e)(2) and paragraph (a) of this section; and

(ii) The taxable income with respect to which the nuclear decommissioning fund's status as a large corporation is measured is modified gross income (as defined by paragraph (b) of this section).

§ 1.468A–5 Nuclear decommissioning fund qualification requirements; prohibitions against self-dealing; disqualification of nuclear decommissioning fund; termination of fund upon substantial completion of decommissioning.

(a) *Qualification requirements*—(1) *In general.* (i) A nuclear decommissioning fund must be established and maintained at all times in the United States pursuant to an arrangement that qualifies as a trust under State law. Such trust must be established for the exclusive purpose of providing funds for the decommissioning of one or more nuclear power plants, but a single trust agreement may establish multiple funds for such purpose. Thus, for example—

(A) Two or more nuclear decommissioning funds can be established and maintained pursuant to a single trust agreement; and

(B) One or more funds that are to be used for the decommissioning of a nuclear power plant and that do not qualify as nuclear decommissioning funds under this paragraph (a) can be established and maintained pursuant to a trust agreement that governs one or more nuclear decommissioning funds.

(ii) A separate nuclear decommissioning fund is required for each electing taxpayer and for each

nuclear power plant with respect to which an electing taxpayer possesses a qualifying interest. The Internal Revenue Service (IRS) will issue a separate schedule of ruling amounts with respect to each nuclear decommissioning fund, and each nuclear decommissioning fund must file a separate income tax return even if other nuclear decommissioning funds or nonqualified funds are established and maintained pursuant to the trust agreement governing such fund or the assets of other nuclear decommissioning funds or nonqualified funds are pooled with the assets of such fund.

(iii) An electing taxpayer can maintain only one nuclear decommissioning fund for each nuclear power plant with respect to which the taxpayer elects the application of section 468A. If a nuclear power plant is subject to the ratemaking jurisdiction of two or more public utility commissions and any such public utility commission requires a separate fund to be maintained for the benefit of ratepayers whose rates are established or approved by the public utility commission, the separate funds maintained for such plant (whether or not established and maintained pursuant to a single trust agreement) shall be considered a single nuclear decommissioning fund for purposes of section 468A and §§ 1.468A–1 through 1.468A–4, this section and §§ 1.468A–7 through 1.468A–9. Thus, for example, the IRS will issue one schedule of ruling amounts with respect to such nuclear power plant, the nuclear decommissioning fund must file a single income tax return (*see* § 1.468A–4(d)(1)), and, if the IRS disqualifies the nuclear decommissioning fund, the assets of each separate fund are treated as distributed on the date of disqualification (*see* paragraph (c)(3) of this section).

(iv) If assets of a nuclear decommissioning fund are (or will be) invested through an unincorporated organization, within the meaning of § 301.7701–2 of this chapter, the IRS will rule, if requested, whether the organization is an association taxable as a corporation for Federal tax purposes. A request for this ruling may be made by the electing taxpayer as part of its request for a schedule of ruling amounts or as part of a request under § 1.468A–8 for a schedule of deduction amounts.

(2) *Limitation on contributions.* Except as otherwise provided in § 1.468A–8 (relating to special transfers under section 468A(f)), a nuclear decommissioning fund is not permitted to accept any contributions in cash or property other than cash payments with respect to which a deduction is allowed under section 468A(a) and § 1.468A–2(a). Thus, for example, except in the case of a special transfer pursuant to § 1.468A–8, securities may not be contributed to a nuclear decommissioning fund even if the taxpayer or a fund established by the taxpayer previously held such securities for the purpose of providing funds for the decommissioning of a nuclear power plant.

(3) *Limitation on use of fund*—(i) *In general.* The assets of a nuclear decommissioning fund are to be used exclusively—

(A) To satisfy, in whole or in part, the liability of the electing taxpayer for decommissioning costs of the nuclear power plant to which the nuclear decommissioning fund relates;

(B) To pay administrative costs and other incidental expenses of the nuclear decommissioning fund; and

(C) To the extent that the assets of the nuclear decommissioning fund are not currently required for the purposes described in paragraph (a)(3)(i)(A) or (B) of this section, to make investments.

(ii) *Definition of administrative costs and expenses.* For purposes of paragraph (a)(3)(i) of this section, the term *administrative costs and other incidental expenses of a nuclear decommissioning fund* means all ordinary and necessary expenses incurred in connection with the operation of the nuclear decommissioning fund. Such term includes the tax imposed by section 468A(e)(2) and § 1.468A–4(a), any State or local tax imposed on the income or the assets of the fund, legal expenses, accounting expenses, actuarial expenses and trustee expenses. Such term does not include decommissioning costs or the payment of insurance premiums on a policy to pay for the nuclear decommissioning costs of a nuclear power plant. Such term also does not include the excise tax imposed on the trustee or other disqualified person under section 4951 or the reimbursement of any expenses incurred in connection with the assertion of such tax unless such expenses are considered reasonable and necessary under section 4951(d)(2)(C) and it is determined that the trustee or other disqualified person is not liable for the excise tax.

(4) *Trust provisions.* Each qualified nuclear decommissioning fund trust agreement must provide that assets in the fund must be used as authorized by section 468A and §§ 1.468A–1 through 1.468A–9 and that the agreement may not be amended so as to violate section 468A or §§ 1.468A–1 through 1.468A–9.

(b) *Prohibitions against self-dealing*—(1) *In general.* Except as otherwise provided in this paragraph (b), the excise taxes imposed by section 4951 shall apply to each act of self-dealing between a disqualified person and a nuclear decommissioning fund.

(2) *Self-dealing defined.* For purposes of this paragraph (b), the term *self-dealing* means any act described in section 4951(d), except—

(i) A payment by a nuclear decommissioning fund for the purpose of satisfying, in whole or in part, the liability of the electing taxpayer for decommissioning costs of the nuclear power plant to which the nuclear decommissioning fund relates;

(ii) A withdrawal of an excess contribution by the electing taxpayer pursuant to the rules of paragraph (c)(2) of this section;

(iii) A withdrawal by the electing taxpayer of amounts that have been treated as distributed under paragraph (c)(3) of this section;

(iv) A payment of amounts remaining in a nuclear decommissioning fund to the electing taxpayer after the termination of such fund (as determined under paragraph (d) of this section);

(v) Any act described in section 4951(d)(2)(B) or (C);

(vi) Any act that is described in § 53.4951–1(c) of this chapter and is undertaken to facilitate the temporary investment of assets or the payment of reasonable administrative expenses of the nuclear decommissioning fund; or

(vii) A payment by a nuclear decommissioning fund for the performance of trust functions and certain general banking services by a bank or trust company that is a disqualified person if the banking services are reasonable and necessary to carry out the purposes of the fund and the compensation paid to the bank or trust company for such services, taking into account the fair interest rate for the use of the funds by the bank or trust company, is not excessive.

(3) *Disqualified person defined.* For purposes of this paragraph (b), the term *disqualified person* includes each person described in section 4951(e)(4) and § 53.4951–1(d).

(4) *General banking services.* The general banking services allowed by paragraph (b)(2)(vii) of this section are—

(i) Checking accounts, as long as the bank does not charge interest on any overwithdrawals;

(ii) Savings accounts, as long as the fund may withdraw its funds on no more than 30 days' notice without subjecting itself to a loss of interest on its money for the time during which the money was on deposit; and

(iii) Safekeeping activities (*see* § 53.4941(d)–3(c)(2), *Example 3,* of this chapter).

(c) *Disqualification of nuclear decommissioning fund*—(1) *In general*—(i) *Disqualification events.* Except as otherwise provided in paragraph (c)(2) of this section, the IRS may, in its discretion, disqualify all or any portion of a nuclear decommissioning fund if at any time during a taxable year of the fund—

(A) The fund does not satisfy the requirements of paragraph (a) of this section; or

(B) The fund and a disqualified person engage in an act of self-dealing (as defined in paragraph (b)(2) of this section).

(ii) *Date of disqualification.* (A) Except as otherwise provided in this paragraph (c)(1)(ii), the date on which a disqualification under this paragraph (c) will take effect (date of disqualification) is the date that the fund does not satisfy the requirements of paragraph (a) of this section or the date on which the act of self-dealing occurs, whichever is applicable.

(B) If the IRS determines, in its discretion, that the disqualification should take effect on a date subsequent to the date specified in paragraph (c)(1)(ii)(A) of this section, the date of disqualification is such subsequent date.

(iii) *Notice of disqualification.* The IRS will notify the electing taxpayer of the disqualification of a nuclear decommissioning fund and the date of disqualification by registered or certified mail to the last known address of the electing taxpayer (the notice of disqualification). For further guidance regarding the definition of last known address, *see* § 301.6212–2 of this chapter.

(2) *Exception to disqualification*—(i) *In general.* A nuclear decommissioning fund will not be disqualified under paragraph (c)(1) of this section by reason of an excess contribution or the withdrawal of such excess contribution by an electing taxpayer if the amount of the excess contribution is withdrawn by the electing taxpayer on or before the date prescribed by law (including extensions) for filing the return of the nuclear decommissioning fund for the taxable year to which the excess contribution relates. In the case of an excess contribution that is the result of a payment made pursuant to § 1.468A–3(g)(1), a nuclear decommissioning fund will not be disqualified under paragraph (c)(1) of this section if the amount of the excess contribution is withdrawn by the electing taxpayer on or before the later of—

(A) The date prescribed by law (including extensions) for filing the return of the nuclear decommissioning fund for the taxable year to which the excess contribution relates; or

(B) The date that is 30 days after the date that the taxpayer receives the ruling amount for such taxable year.

(ii) *Excess contribution defined.* For purposes of this section, an excess contribution is the amount by which cash payments made (or deemed made) to a nuclear decommissioning fund during any taxable year exceed the payment limitation contained in section 468A(b) and § 1.468A–2(b). The amount of a special transfer permitted under § 1.468A–8 is not treated as a cash payment for this purpose.

(iii) *Taxation of income attributable to an excess contribution.* The income of a nuclear decommissioning fund attributable to an excess contribution is required to be included in the gross income of the nuclear decommissioning fund under § 1.468A–4(b).

(3) *Disqualification treated as distribution.* If all or any portion of a nuclear decommissioning fund is disqualified under paragraph (c)(1) of this section, the portion of the nuclear decommissioning fund that is disqualified is treated as distributed to the electing taxpayer on the date of disqualification. Such a distribution shall be treated for purposes of section 1001 as a disposition of property held by the nuclear decommissioning fund (*see* § 1.468A–4(c)(2)). In addition, the electing taxpayer must include in gross income for the taxable year that includes the date of disqualification an amount equal to the fair market value of the distributable assets of the nuclear decommissioning fund multiplied by the fraction of the nuclear decommissioning fund that was disqualified under paragraph (c)(1) of this section. For this purpose, the fair market value of the distributable assets of the nuclear decommissioning fund is equal to the fair market value of the assets of the fund determined as of the date of disqualification, reduced by—

(i) The amount of any excess contribution that was not withdrawn before the date of disqualification if no deduction was allowed with respect to such excess contribution;

(ii) The amount of any deemed distribution that was not actually distributed before the date of disqualification (as determined under § 1.468A–2(d)(2)(iii)) if the amount of the deemed distribution was included in the gross income of the electing taxpayer for the taxable year in which the deemed distribution occurred; and

(iii) The amount of any tax that—

(A) Is imposed on the income of the fund;

(B) Is attributable to income taken into account before the date of disqualification or as a result of the disqualification; and

(C) Has not been paid as of the date of disqualification.

(4) *Further effects of disqualification.* Contributions made to a disqualified fund after the date of disqualification are not deductible under section 468A(a) and § 1.468A–2(a), or, if the fund is disqualified only in part, are deductible only to the extent provided in the notice of disqualification. In addition, if any assets of the fund that are deemed distributed under paragraph (c)(3) of this section are held by the fund after the date of disqualification (or if additional assets are acquired with nondeductible contributions made to the fund after the date of disqualification), the income earned by such assets after the date of disqualification must be included in the gross income of the electing taxpayer (*see* section 671) to the extent that such income is otherwise includible under chapter 1 of the Internal Revenue Code (Code). An electing taxpayer can establish a nuclear decommissioning fund to replace a fund that has been disqualified in its entirety only if the IRS specifically consents to the establishment of a replacement fund in connection with the issuance of an initial schedule of ruling amounts for such replacement fund.

(d) *Termination of nuclear decommissioning fund upon substantial completion of decommissioning*—(1) *In general.* Upon substantial completion of the decommissioning of a nuclear power plant to which a nuclear decommissioning fund relates, such nuclear decommissioning fund shall be considered terminated and treated as having distributed all of its assets on the date the termination occurs (the termination date). Such a distribution shall be treated for purposes of section 1001 as a disposition of property held by the nuclear decommissioning fund (*see* § 1.468A–4(c)(2)). In addition, the electing taxpayer shall include in gross income for the taxable year in which the termination occurs an amount equal to the fair market value of the assets of the fund determined as of the termination date, reduced by—

(i) The amount of any deemed distribution that was not actually distributed before the termination date if the amount of the deemed distribution was included in the gross income of the electing taxpayer for the taxable year in which the deemed distribution occurred; and

(ii) The amount of any tax that—

(A) Is imposed on the income of the fund;

(B) Is attributable to income taken into account before the termination date or as a result of the termination; and

(C) Has not been paid as of the termination date.

(2) *Additional rules.* Contributions made to a nuclear decommissioning fund after the termination date are not deductible under section 468A(a) and § 1.468A–2(a). In addition, if any assets are held by the fund after the termination date, the income earned by such assets after the termination date must be included in the gross income of the electing taxpayer (*see* section 671) to the extent that such income is otherwise includible under chapter 1 of the Code. Finally, under § 1.468A–2(e), an electing taxpayer using an accrual method of accounting is allowed a deduction for nuclear decommissioning costs that are incurred during any taxable year even if such costs are incurred after substantial completion of decommissioning (for example, expenses incurred to monitor or safeguard the plant site).

(3) *Substantial completion of decommissioning and termination date.* (i) The substantial completion of the decommissioning of a nuclear power plant occurs on the date that the maximum acceptable radioactivity levels mandated by the Nuclear Regulatory Commission with respect to a decommissioned nuclear power plant are satisfied (the substantial completion date). Except as otherwise provided in paragraph (d)(3)(ii) of this section, the substantial completion date is also the termination date.

(ii) If a significant portion of the total estimated decommissioning costs with respect to a nuclear power plant are not incurred on or before the substantial completion date, an electing taxpayer may request, and the IRS will issue, a ruling that designates a date subsequent to the substantial completion date as the termination date. The termination date designated in the ruling will not be later than the last day of the third taxable year after the taxable year that includes the substantial completion date. The request for a ruling under this paragraph (d)(3)(ii) must be filed during the taxable year that includes the substantial completion date and must comply with the procedural rules in effect at the time of the request.

§ 1.468A–6 Disposition of an interest in a nuclear power plant.

(a) *In general.* This section describes the Federal income tax consequences of a transfer of the assets of a nuclear decommissioning fund (Fund) within the meaning of § 1.468A–1(b)(4) in connection with a sale, exchange, or other disposition by a taxpayer (transferor) of all or a portion of its qualifying interest in a nuclear power plant to another taxpayer (transferee). This section also explains how a schedule of ruling amounts will be determined for the transferor and transferee. For purposes of this section, a nuclear power plant includes a plant that previously qualified as a nuclear power plant and that has permanently ceased to produce electricity.

(b) *Requirements.* This section applies if—

(1) Immediately before the disposition, the transferor maintained a Fund with respect to the interest disposed of;

(2) Immediately after the disposition—

(i) The transferee maintains a Fund with respect to the interest acquired;

(ii) The interest acquired is a qualifying interest of the transferee in the nuclear power plant;

(3) In connection with the disposition, either—

(i) The transferee acquires part or all of the transferor's qualifying interest in the plant and a proportionate amount of the assets of the transferor's Fund (all such assets if the transferee acquires the transferor's entire qualifying interest in the plant) is transferred to a Fund of the transferee; or

(ii) The transferee acquires the transferor's entire qualifying interest in the plant and the transferor's entire Fund is transferred to the transferee; and

(4) The transferee continues to satisfy the requirements of § 1.468A–5(a)(1)(iii), which permits an electing taxpayer to maintain only one Fund for each plant.

(c) *Tax consequences.* A disposition that satisfies the requirements of paragraph (b) of this section will have the following tax consequences at the time it occurs:

(1) *The transferor and its Fund.* (i) Except as provided in paragraph (c)(1)(ii) of this section, neither the transferor nor the transferor's Fund will recognize gain or loss or otherwise take any income or deduction into account by reason of the transfer of a proportionate amount of the assets of the transferor's Fund to the transferee's Fund (or by reason of the transfer of the transferor's entire Fund to the transferee). For purposes of §§ 1.468A–1 through 1.468A–9, this transfer (or the transfer of the transferor's Fund) will not be considered a distribution of assets by the transferor's Fund.

(ii) Notwithstanding paragraph (c)(1)(i) of this section, if the transferor has made a special transfer under § 1.468A–8 prior to the transfer of the Fund or Fund assets, any deduction with respect to that special transfer allowable under section 468A(f)(2) for a taxable year ending after the date of the transfer of the Fund or Fund assets (the unamortized special transfer deduction) is allowed under section 468A(f)(2)(C) for the taxable year that includes the date of the transfer of the Fund or Fund assets. If the taxpayer transfers only a portion of its interest in a nuclear power plant, only the corresponding portion of the unamortized special transfer deduction qualifies for the acceleration under section 468A(f)(2)(C).

(2) *The transferee and its Fund.* Neither the transferee nor the transferee's Fund will recognize gain or loss or otherwise take any income or deduction into account by reason of the transfer of a proportionate amount of the assets of the transferor's Fund to the transferee's Fund (or by reason of the transfer of the transferor's Fund to the transferee). For purposes of §§ 1.468A–1 through 1.468A–9, this transfer (or the transfer of the transferor's Fund) will not constitute a payment or a contribution of assets by the transferee to its Fund.

(3) *Basis.* Transfers of assets of a Fund to which this section applies do not affect basis. Thus, the transferee's Fund will have a basis in the assets received from the transferor's Fund that is the same as the basis of those assets in the transferor's Fund immediately before the disposition.

(d) *Determination of proportionate amount.* For purposes of this section, a transferor of a qualifying interest in a nuclear power plant is considered to transfer a proportionate amount of the assets of its Fund to a Fund of a transferee of the interest if, on the date of the transfer of the interest, the percentage of the fair market value of the Fund's assets attributable to the assets transferred equals the percentage of the transferor's qualifying interest that is transferred.

(e) *Calculation of schedule of ruling amounts and schedule of deduction amounts for dispositions described in this section*—(1) *Transferor.* If a transferor disposes of all or a portion of its qualifying interest in a nuclear power plant in a transaction to which this section applies, the transferor's schedule of ruling amounts with respect to the interests disposed of and retained (if any) and, if applicable, the amount allowable as a deduction for a special transfer under § 1.468A–8 will be determined under the following rules:

(i) *Taxable year of disposition; ruling amount.* If the transferor does not file a

request for a revised schedule of ruling amounts on or before the deemed payment deadline for the taxable year of the transferor in which the disposition of its interest in the nuclear power plant occurs (that is, the date that is two and one-half months after the close of that year), the transferor's ruling amount with respect to that plant for that year will equal the sum of—

(A) The ruling amount contained in the transferor's current schedule of ruling amounts with respect to that plant for that taxable year multiplied by the portion of the qualifying interest that is retained (if any); and

(B) The ruling amount contained in the transferor's current schedule of ruling amounts with respect to that plant for that taxable year multiplied by the product of—

(*1*) The portion of the transferor's qualifying interest that is disposed of; and

(*2*) A fraction, the numerator of which is the number of days in that taxable year that precede the date of disposition, and the denominator of which is the number of days in that taxable year.

(ii) *Taxable year of disposition; deduction under § 1.468A–8.* If the transferor has elected to make a special transfer under section 468A(f), the amount allowable as a deduction under § 1.468A–8 for the taxable year in which it transfers a portion of its interest in the nuclear plant is equal to the deduction amount for that taxable year from its existing schedule of deduction amounts multiplied by the percentage of its interest that it retains. This deduction is in addition to the deduction described in paragraph (c)(1)(ii) of this section.

(iii) *Taxable years after the year of disposition.* A transferor that retains a qualifying interest in a nuclear power plant must file a request for a revised schedule of ruling amounts (and, if applicable, a revised schedule of deduction amounts) with respect to that interest on or before the deemed payment deadline for the first taxable year of the transferor beginning after the disposition. *See* §§ 1.468A–3(f)(1)(ii)(B) and 1.468A–8(c)(3). If the transferor does not timely file such a request, the transferor's ruling amount and the transferor's deduction amount under § 1.468A–8 with respect to that interest for the affected year or years will be zero, unless the Internal Revenue Service (IRS) waives the application of this paragraph (e)(1)(iii) upon a showing of good cause for the delay.

(2) *Transferee.* If a transferee acquires all or a portion of a transferor's qualifying interest in a nuclear power plant in a transaction to which this section applies, the transferee's schedule of ruling amounts with respect to the interest acquired will be determined under the following rules:

(i) *Taxable year of disposition.* If the transferee does not file a request for a schedule of ruling amounts on or before the deemed payment deadline for the taxable year of the transferee in which the disposition occurs (that is, the date that is two and one-half months after the close of that year), the transferee's ruling amount with respect to the interest acquired in the nuclear power plant for that year is equal to the amount contained in the transferor's current schedule of ruling amounts for that plant for the taxable year of the transferor in which the disposition occurred, multiplied by the product of—

(A) The portion of the transferor's qualifying interest that is transferred; and

(B) A fraction, the numerator of which is the number of days in the taxable year of the transferor including and following the date of disposition, and the denominator of which is the number of days in that taxable year.

(ii) *Taxable years after the year of disposition.* A transferee of a qualifying interest in a nuclear power plant must file a request for a revised schedule of ruling amounts with respect to that interest on or before the deemed payment deadline for the first taxable year of the transferee beginning after the disposition. *See* § 1.468A–3(f)(1)(ii)(B). If the transferee does not timely file such a request, the transferee's ruling amount with respect to that interest for the affected year or years will be zero, unless the IRS waives the application of this paragraph (e)(2)(ii) upon a showing of good cause for the delay.

(3) *Examples.* The following examples illustrate the provisions of this paragraph (e):

Example 1. (i) X Corporation is a calendar year taxpayer engaged in the sale of electric energy generated by a nuclear power plant. The plant is owned entirely by X. On May 27, 2010, X transfers a 60-percent qualifying interest in the plant to Y Corporation, a calendar year taxpayer. Before the transfer, X had received a schedule of ruling amounts containing an annual ruling amount of $10 million for the taxable years 2005 through 2025. For 2010, neither X nor Y files a request for a revised schedule of ruling amounts.

(ii) Under paragraph (e)(1)(i) of this section, X's ruling amount for 2010 is calculated as follows: ($10,000,000 × .40) + ($10,000,000 × .60 × 146/365)=$6,400,000. Under paragraph (e)(2)(i) of this section, Y's ruling amount for 2010 is calculated as follows: $10,000,000 × .60 × 219/365=$3,600,000. Under paragraphs (e)(1)(iii) and (e)(2)(ii) of this section, X and Y must file requests for revised schedules of ruling amounts by March 15, 2012.

Example 2. Y Corporation, the sole owner of a nuclear power plant, is a calendar year taxpayer. In year 1, Y elects to make a special transfer under section 468A(f)(1) to the nuclear decommissioning fund Y maintains with respect to the plant. The amount of the special transfer is $100×, and the remaining useful life of the plant is 20 years. Y obtains a schedule of deduction amounts under § 1.468A–8T(c) permitting a $5× deduction each year over the 20-year remaining useful life, and deducts $5× of the special transfer amount in year 1, year 2, year 3, and year 4. On the first day of year 5, Y transfers a 25% interest in the plant to an unrelated party. Under paragraph (c)(1)(ii) of this section, Y may deduct in Year 5 the unamortized special transfer deduction corresponding to the portion of the plant transferred (25 percent of $80× or $20×). In addition, under paragraph (e)(1)(ii) of this section, Y may deduct the portion of the deduction amount for year 5 from the schedule of deduction amounts corresponding to its retained interest in the plant (75 percent of $5× or $3.75×). Pursuant to paragraph (e)(1)(iii) of this section, Y must file a request for a revised schedule of ruling amounts by March 15 of year 6.

(f) *Anti-abuse provision.* The IRS may treat a disposition as satisfying the requirements of this section if the IRS determines that this treatment is necessary or appropriate to carry out the purposes of section 468A and §§ 1.468A–1 through 1.468A–9.

§ 1.468A–7 Manner of and time for making election.

(a) *In general.* An eligible taxpayer is allowed a deduction for the taxable year in which the taxpayer makes a cash payment (or is deemed to make a cash payment) to a nuclear decommissioning fund or for a special transfer under § 1.468A–8 only if the taxpayer elects the application of section 468A. A separate election is required for each nuclear decommissioning fund and for each taxable year with respect to which payments are to be deducted under section 468A or a special transfer is made under § 1.468A–8. In the case of an affiliated group of corporations that join in the filing of a consolidated return for a taxable year, the common parent must make a separate election on behalf of each member whose payments to a nuclear decommissioning fund during such taxable year are to be deducted under section 468A and each member that makes a special transfer under § 1.468A–8 with respect to such year. The election under section 468A for any taxable year is irrevocable and must be made by attaching a statement (Election Statement) and a copy of the schedule of ruling amounts provided pursuant to the rules of § 1.468A–3 to the taxpayer's Federal income tax return (or, in the

case of an affiliated group of corporations that join in the filing of a consolidated return, the consolidated return) for such taxable year. The return to which the Election Statement and a copy of the schedule of ruling amounts is attached must be filed on or before the time prescribed by law (including extensions) for filing the return for the taxable year with respect to which payments are to be deducted under section 468A.

(b) *Required information.* The Election Statement must include the following information:

(1) The legend "Election Under Section 468A" typed or legibly printed at the top of the first page.

(2) The electing taxpayer's name, address and taxpayer identification number (or, in the case of an affiliated group of corporations that join in the filing of a consolidated return, the name, address and taxpayer identification number of each electing taxpayer).

(3) The taxable year for which the election is made.

(4) For each nuclear decommissioning fund for which an election is made—

(i) The name and location of the nuclear power plant to which the fund relates;

(ii) The name and employer identification number of the nuclear decommissioning fund;

(iii) The total amount of actual cash payments made to the nuclear decommissioning fund during the taxable year that were not treated as deemed cash payments under § 1.468A–2(c)(1) for a prior taxable year;

(iv) The total amount of cash payments deemed made to the nuclear decommissioning fund under § 1.468A–2(c)(1) for the taxable year;

(v) The total amount of any special transfers (whether in cash or property) made to the nuclear decommissioning fund under § 1.468A–8 during the taxable year that were not treated as deemed transfers under § 1.468A–8(a)(4) for a prior taxable year;

(vi) The total amount of any special transfers (whether in cash or property) deemed made to the nuclear decommissioning fund under § 1.468A–8(a)(4) for the taxable year; and

(vii) For each item of property included in the amounts described in paragraph (b)(4)((v) or (vi) of this section, the amount of the item of property and whether the basis of the item of property is determined under § 1.468A–8(b)(5)(iii)(A) or § 1.468A–8(b)(5)(iii)(B).

§ 1.468A–8 Special transfers to qualified funds pursuant to section 468A(f).

(a) *General rule*—(1) *In general.* Under section 468A(f), a taxpayer maintaining a qualified nuclear decommissioning fund with respect to a nuclear power plant may transfer cash or property into the fund (a special transfer). The special transfer is not subject to the ruling amount limitation in section 468A(b) and is not treated as a cash payment for purposes of that limitation. Thus, a taxpayer may, in the same taxable year, pay the ruling amount and make a special transfer into the fund. A special transfer may be made in cash, property, or both cash and property. The amount of a special transfer (that is, the amount of cash and the fair market value of property transferred) may not exceed the present value of the pre-2005 nonqualifying amount of nuclear decommissioning costs with respect to the nuclear power plant. The taxpayer is entitled to a deduction against income for a special transfer, as described in paragraph (b) of this section. A special transfer may not be made to a nuclear decommissioning fund before the first taxable year in which a deduction amount is applicable to the nuclear decommissioning fund (*see* paragraph (c) of this section).

(2) *Pre-2005 nonqualifying amount*—(i) *In general.* The present value of the pre-2005 nonqualifying amount of nuclear decommissioning costs with respect to a nuclear power plant is the amount equal to the pre-2005 nonqualifying percentage of the present value of the estimated future decommissioning costs (as defined in § 1.468A–1(b)(6)) with respect to the nuclear power plant as of the first day of the taxable year of the taxpayer in which the special transfer is made or deemed made (or a later date that is on or before the date on which the special transfer is expected to be made if the taxpayer establishes to the satisfaction of the IRS that the determination of present value as of such date is reasonable and consistent with the principles and provisions of this section). For this purpose, the pre-2005 nonqualifying percentage for the plant is 100 percent reduced by the sum of—

(A) The qualifying percentage (within the meaning of § 1.468A–3(d)(4) as in effect on December 31, 2005) used in determining the taxpayer's last schedule of ruling amounts for the nuclear decommissioning fund under the law in effect before the enactment of the Energy Policy Act of 2005 (that is, the percentage of the plant's total nuclear decommissioning costs that were permitted to be funded through the fund under the law in effect before the enactment of the Energy Policy Act of 2005); and

(B) The percentage of decommissioning costs transferred in any previous special transfer (that is, the amount transferred as a percentage of the present value of the estimated future costs of decommissioning as of the first day of the taxable year in which such previous transfer was made).

(ii) *Pre-2005 nonqualifying amount of transferee.* If there is a transfer of a nuclear decommissioning fund or part or all of its assets and § 1.468A–6 applies to the transfer, the pre-2005 nonqualifying amount determined with respect to the transferee is equal to the pre-2005 nonqualifying amount (or a proportionate part of the pre-2005 nonqualifying amount) that would have been determined with respect to the transferor but for such transfer.

(3) *Transfers in multiple years.* A taxpayer making a special transfer is not required to transfer the entire eligible amount in a single year. The requirements of paragraph (c) of this section apply separately to each year in which a special transfer is made. In calculating the amount of any subsequent transfer, the taxpayer must reduce the pre-2005 nonqualifying percentage under paragraph (a)(2) of this section to take into account all previous transfers. For example, if a taxpayer has a pre-2005 nonqualifying percentage of 40 percent, and transfers half of the eligible amount in a special transfer, any subsequent transfer must be calculated on the basis of a pre-2005 nonqualifying percentage of 20 percent.

(4) *Deemed payment rules*—(i) *In general.* The amount of any special transfer (whether in cash or property) described in § 1.468A–8 and made by an electing taxpayer to a nuclear decommissioning fund on or before the 15th day of the third calendar month after the close of any taxable year (the deemed payment deadline date) shall be deemed made during such taxable year if the electing taxpayer irrevocably designates the amount as relating to such taxable year on its timely filed Federal income tax return for such taxable year or, in the case of special transfers described in paragraph (a)(4)(ii) of this section, on an amended return for such taxable year (*see* § 1.468A–7(b)(4)(v) and (vi) for rules relating to such designation).

(ii) *Special rule for certain special transfers.* Special transfers that the electing taxpayer designates as relating to a taxable year beginning after December 31, 2005, and ending before January 1, 2010, which are actually made within 90 days after the electing taxpayer receives a ruling from the

Secretary relating to the special transfer are deemed made during the taxable year designated as the year to which the special transfer relates.

(b) *Deduction for amounts transferred*—(1) *In general.* (i) Except as provided in this paragraph (b), the deduction for any special transfer is allowed ratably over the remaining useful life of the nuclear power plant. The amount of the deduction for any taxable year is the deduction amount for such year specified in the schedule of deduction amounts required under paragraph (c) of this section.

(ii) For purposes of this paragraph (b), the remaining useful life of the nuclear power plant is the period beginning on the first day of the taxable year during which the transfer is made and ending on the last day of the taxable year that includes the last day of the estimated useful life of the nuclear power plant. The last day of the estimated useful life of the nuclear power plant is determined for this purpose under the rules of § 1.468A–3(c)(2).

(2) *Amount of deduction*—(i) *General rule.* Except as provided in this paragraph (b)(2), the deduction for property contributed in a special transfer is limited to the lesser of the fair market value of the property contributed or the taxpayer's basis in that property.

(ii) *Election*—(*A*) *In general.* If the fair market value of the property contributed is less than the taxpayer's adjusted basis in such property as of the date the property is contributed and the fund elects to treat the fair market value of the property as its adjusted basis in the property, the taxpayer may deduct an amount equal to the adjusted basis of the contributed property.

(B) *Manner of making election.* The election described in paragraph (b)(2)(ii)(A) of this section is made for property contributed in a special transfer by attaching a description of the property and a statement that the fund is making an election under § 1.468A–8(b)(2)(ii) with respect to the property to the return of the fund for the taxable year in which the property is contributed to the fund.

(*C*) *Election allowed for property transferred prior to December 23, 2010.* The election described in paragraph (b)(2)(ii)(A) of this section may be made and a deduction equal to adjusted basis will be allowed for property contributed in a special transfer prior to December 23, 2010. The election in such a case may be made on an amended return of the fund for the taxable year in which the property is contributed to the fund and the transferor may amend previously filed returns to claim a deduction calculated by reference to the adjusted basis of the property.

(3) *Denial of deduction for previously deducted amounts.* If a deduction (other than a deduction under section 468A) has been allowed to the taxpayer (or a predecessor) on account of expected decommissioning costs for a nuclear power plant (a nonconforming deduction) or an amount otherwise includible in income has been excluded from the gross income of the taxpayer (or a predecessor) on account of such expected decommissioning costs (a nonconforming exclusion), the deduction allowed for a special transfer to the nuclear decommissioning fund maintained with respect to the plant is reduced. In the case of a single special transfer of the full eligible amount, the reduction is equal to the aggregate amount of all nonconforming deductions and nonconforming exclusions. In the case of a transfer of less than the full eligible amount, the reduction is a ratable portion of such aggregate amount.

(4) *Transfers of qualified nuclear decommissioning funds.* (i) If a special transfer is made to any qualified nuclear decommissioning fund, there is a subsequent transfer of the fund or the assets of the fund (a fund transfer), and § 1.468–6 applies to the fund transfer, any amount of the deduction under paragraph (b) of this section allocable to taxable years ending after the date of the fund transfer will be allowed as a current deduction to the transferor for the taxable year that includes the date of the fund transfer. *See* § 468A–6(c) for additional rules concerning transfers of decommissioning funds, including the transfer of a portion of the taxpayer's interest in a nuclear power plant. If a taxpayer transfers only part of the fund or the fund's assets, the rules in this paragraph (b)(4) apply only to the corresponding portion of the deduction under paragraph (b) of this section.

(ii) If a deduction is allowed to the transferor under paragraph (b)(4)(i) of this section and the transferee is related to the transferor, the Internal Revenue Service (IRS) will not approve the transferee's schedule of ruling amounts for taxable years beginning after the date of the transfer unless the ruling amounts are deferred in a manner that results in recapture of the acceleration amount. For this purpose—

(A) The acceleration amount is the difference between the deduction allowed under this paragraph (b)(4) and the present value as of the beginning of the acceleration period of the deductions that, but for the transfer, would have been allowed under this paragraph (b) for taxable years during the acceleration period;

(B) The acceleration amount is recaptured if the aggregate present value of the ruling amounts at the beginning of the acceleration period is equal to the amount by which the aggregate present value of the ruling amounts that would have been approved but for this paragraph (b)(4)(ii) exceeds the acceleration amount;

(C) The acceleration period is the period from the first day of the transferor's first taxable year beginning after the date of the transfer until the end of the plant's remaining useful life;

(D) Present values will be determined using the assumptions that are used in determining the transferee's first schedule of ruling amounts; and

(E) A transferor and a transferee are related if their relationship is specified in section 267(b) or section 707(b)(1) or they are treated as a single taxpayer under section 41(f)(1)(A) or (B).

(5) *Special rules*—(i) *Gain or loss not recognized on transfers to fund.* No gain or loss will be recognized on any special transfer.

(ii) *Taxpayer basis in fund.* Notwithstanding any other provision of the Internal Revenue Code (Code) and regulations, the taxpayer's basis in the fund is not increased by reason of the special transfer.

(iii) *Fund basis in transferred property*—(*A*) *In general.* Except as provided in paragraph (b)(5)(iii)(B) of this section, the fund's basis in any property transferred in a special transfer is the same as the transferor's basis in the property immediately before the transfer.

(*B*) *Basis in case of election.* If a fund makes the election described in paragraph (b)(2)(ii) of this section, the fund's basis in the property transferred is the fair market value of the property on the date of transfer.

(c) *Schedule of deductions required*—(1) *In general.* A taxpayer may not make a special transfer to a qualified nuclear decommissioning fund unless the taxpayer requests from the IRS a schedule of deduction amounts in connection with such transfer. A schedule of deduction amounts for a nuclear decommissioning fund (schedule of deduction amounts) is a ruling (within the meaning of § 601.201(a)(2) of this chapter) specifying the annual deductions (deduction amounts) that, over the taxable years in the remaining useful life of the nuclear power plant, will result in the deduction of the entire amount of the special transfer. Such a request may be combined with a request for a schedule of ruling amounts under

§ 1.468A–3(a). In the case of a combined request, the schedule of deduction amounts requested under this paragraph (c)(1) must be stated separately from the schedule of ruling amounts requested under § 1.468A–3(a) and approval of the schedule of deduction amounts under this section will constitute a separate ruling. A request for a schedule of deduction amounts must comply with all provisions of paragraph (d) of this section.

(2) *Transfers in multiple taxable years.* A taxpayer making a special transfer in more than one taxable year pursuant to paragraph (a)(3) of this section must request a separate schedule of deduction amounts in connection with each special transfer. More than one schedule of deduction amounts can be requested in a single ruling request to the Secretary and the Secretary will provide, in a single ruling, separate schedules of deduction amounts for each of a series of special transfers provided that each request for a separate schedule of deduction amounts complies with all requirements of this paragraph.

(3) *Transfer of partial interest in fund.* If a taxpayer transfers part of a fund or a fund's assets and is allowed a deduction under paragraph (b)(3) of this section, the taxpayer must request a new schedule of deduction amounts in connection with the transfer.

(4) *Special transfer permitted before receipt of schedule.* If an electing taxpayer has filed a timely request for a schedule of deduction amounts in connection with a special transfer for a taxable year and does not receive the schedule of deduction amounts before the deemed payment deadline for such taxable year, the taxpayer may make a special transfer to the nuclear decommissioning fund on the basis of the special transfer amount proposed in the taxpayer's request. If the schedule of deduction amounts provided by the Secretary is based on a special transfer amount that differs from the special transfer amount proposed in the taxpayer's request, rules similar to the rules of § 1.468A–3(g)(2) and (3) shall apply.

(d) *Manner of requesting schedule of deduction amounts*—(1) *In general.* (i) In order to receive a deduction amount for any taxable year, a taxpayer must file a request for a schedule of deduction amounts that complies with the requirements of this paragraph (d), the applicable procedural rules set forth in § 601.201(e) of this chapter (Statement of Procedural Rules) and the requirements of any applicable revenue procedure that is in effect on the date the request is filed.

(ii) A separate request for a schedule of deduction amounts is required for each nuclear decommissioning fund established by a taxpayer (*see* § 1.468A–5(a) for rules relating to the number of nuclear decommissioning funds that a taxpayer can establish).

(iii) Except as provided by § 1.468A–5(a)(1)(iv) (relating to certain unincorporated organizations that may be taxable as corporations) and § 1.468A–3 (relating to a request for a schedule of ruling amounts), a request for a schedule of deduction amounts must not contain a request for a ruling on any other issue, whether the issue involves section 468A or another section of the Code.

(iv) In the case of an affiliated group of corporations that join in the filing of a consolidated return, the common parent of the group may request a schedule of deduction amounts for each member of the group that possesses a qualifying interest in the same nuclear power plant by filing a single submission with the IRS.

(v) Except as provided in paragraph (d)(1)(vi) of this section, the IRS will not provide or revise a deduction amount applicable to a taxable year in response to a request for a schedule of deduction amounts that is filed after the deemed payment deadline date (as defined in paragraph (a)(4) of this section) for such taxable year.

(vi) For special transfers relating to taxable years beginning after December 31, 2005, and before January 1, 2010, the IRS will not provide a deduction amount in response to a request for a schedule of deduction amounts that is filed after February 22, 2011.

(vii) Except as provided in paragraph (d)(1)(viii) of this section, a request for a schedule of deduction amounts shall be considered filed only if such request complies substantially with the requirements of this paragraph (d). In determining the date when a request is filed, the principles of sections 7502 and 7503 shall apply.

(viii) If a request does not comply substantially with the requirements of this paragraph (d), the IRS will notify the taxpayer of that fact. If the information or materials necessary to comply substantially with the requirements of this paragraph (d) are provided to the IRS within 30 days after this notification, the request will be considered filed on the date of the original submission. In addition, the request will be considered filed on the date of the original submission in a case in which the information and materials are provided more than 30 days after the notification if the IRS determines that the electing taxpayer made a good faith effort to provide the applicable information or materials within 30 days after notification and also determines that treating the request as filed on the date of the original submission is consistent with the purposes of section 468A. In any other case in which the information or materials necessary to comply substantially with the requirements of this paragraph (d) are not provided within 30 days after the notification, the request will be considered filed on the date that all information or materials necessary to comply with the requirements of this paragraph (d) are provided.

(2) *Information required.* A request for a schedule of deduction amounts must contain the following information:

(i) The taxpayer's name, address and taxpayer identification number.

(ii) Whether the request is for an initial schedule of deduction amounts or a schedule of deduction amounts for a subsequent special transfer.

(iii) The name and location of the nuclear power plant with respect to which a schedule of deduction amounts is requested.

(iv) A description of the taxpayer's qualifying interest in the nuclear power plant and the percentage of such nuclear power plant that the qualifying interest of the taxpayer represents.

(v) The present value of the estimated future decommissioning costs (as defined in § 1.468A–1(b)(6)) with respect to the taxpayer's qualifying interest in the nuclear power plant as of the first day of the taxable year of the taxpayer in which a transfer is made under this section.

(vi) A description of the assumptions, estimates and other factors that were used by the taxpayer to determine the amount of decommissioning costs, including each of the following if applicable:

(A) A description of the proposed method of decommissioning the nuclear power plant (for example, prompt removal/dismantlement, safe storage entombment with delayed dismantlement, or safe storage mothballing with delayed dismantlement).

(B) The estimated year in which substantial decommissioning costs will first be incurred.

(C) The estimated year in which the decommissioning of the nuclear power plant will be substantially complete (*see* § 1.468A–5(d)(3) for a definition of substantial completion of decommissioning).

(D) The total estimated cost of decommissioning expressed in current dollars (that is, based on price levels in

effect at the time of the current determination).

(E) The total estimated cost of decommissioning expressed in future dollars (that is, based on anticipated price levels when expenses are expected to be paid).

(F) For each taxable year in the period that begins with the year specified in paragraph (d)(2)(vi)(B) of this section (the estimated year in which substantial decommissioning costs will first be incurred) and ends with the year specified in paragraph (d)(2)(vi)(C) of this section (the estimated year in which the decommissioning of the nuclear power plant will be substantially complete), the estimated cost of decommissioning expressed in future dollars.

(G) A description of the methodology used in converting the estimated cost of decommissioning expressed in current dollars to the estimated cost of decommissioning expressed in future dollars.

(H) The assumed after-tax rate of return to be earned by the amounts collected for decommissioning.

(I) A copy of each engineering or cost study that was relied on or used by the taxpayer in determining the amount of decommissioning costs.

(vii) The taxpayer's pre-2005 nonqualifying percentage (as defined in paragraph (a)(2) of this section).

(viii) The estimated useful life of the nuclear power plant (as such term is defined in paragraph (b)(1)(ii) or (iii) of this section).

(ix) If the request is for a subsequent schedule of deduction amounts, the amount of the previous special transfer and the present value of the estimated future decommissioning costs (as defined in § 1.468A–1(b)(6)) with respect to the taxpayer's qualifying interest in the nuclear power plant as of the first day of the taxable year of the taxpayer in which the previous special transfer was made.

(x) If the request is for a subsequent schedule of deduction amounts, a copy of all schedules of deduction amounts that relate to the nuclear power plant to which the request relates and that were previously issued to the taxpayer making the request.

(xi) If the request for a schedule of deduction amounts contains a request, pursuant to § 1.468A–5(a)(1)(iv), that the IRS rule whether an unincorporated organization through which the assets of the fund are invested is an association taxable as a corporation for Federal tax purposes, a copy of the legal documents establishing or otherwise governing the organization.

(xii) Any other information required by the IRS that may be necessary or useful in determining the schedule of deduction amounts.

(3) *Statement required.* A taxpayer requesting a schedule of deduction amounts under this paragraph (d) must submit a statement that any nonconforming deductions and nonconforming exclusions have reduced the deduction allowed for the special transfer in accordance with paragraph (b)(2) of this section.

(4) *Administrative procedures.* The IRS may prescribe administrative procedures that supplement the provisions of paragraphs (d)(1) and (2) of this section. In addition, the IRS may, in its discretion, waive the requirements of paragraphs (d)(1) and (2) of this section under appropriate circumstances.

§ 1.468A–9 Effective/applicability date.

Sections 1.468A–1 through 1.468A–8 are effective on December 23, 2010 and apply with respect to taxable years ending after such date. Special rules that are provided for taxable years ending on or before such date, such as the special rule for certain special transfers contained in § 1.468A–8(a)(4)(ii), apply with respect to such taxable years. In addition, a taxpayer may apply the provisions of §§ 1.468A–1 through 1.468A–8 with respect to a taxable year ending on or before December 23, 2010 if all such provisions are consistently applied.

PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

■ **Par. 4.** The authority citation for part 602 continues to read as follows:

Authority: 26 U.S.C. 7805.

■ **Par. 5.** In § 602.101, paragraph (b) is amended as follows:

■ 1. The following entries to the table are removed:

§ 602.101 OMB Control numbers.

* * * * *

(b) * * *

CFR part or section where identified and described	Current OMB control No.
* * * * *	
1.468A–3T	1545–1269 1545–1378 1545–1511
* * * * *	
1.468A–4T	1545–0954
* * * * *	
1.468A–7T	1545–0954
	1545–1511
* * * * *	
1.468A–3T(h), 1.468A–7T, and 1.468A–8T(d)	1545–2091
* * * * *	

■ 2. The following entries are revised in the table:

§ 602.101 OMB Control numbers.

* * * * *

(b) * * *

CFR part or section where identified and described	Current OMB control No.
* * * * *	
1.468A–7	1545–0954 1545–1511
* * * * *	

■ 3. The following entry is added in numerical order to the table:

§ 602.101 OMB Control numbers.

* * * * *

(b) * * *

CFR part or section where identified and described	Current OMB control No.
* * * * *	
1.468A–3(h), 1.468A–7, and 1.468A–8(d)	1545–2091
* * * * *	

Steven T. Miller,

Deputy Commissioner for Services and Enforcement.

Approved: November 1, 2010.

Michael Mundaca,

Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2010–32049 Filed 12–22–10; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE INTERIOR

Bureau of Ocean Energy Management, Regulation and Enforcement

30 CFR Part 250

[Docket ID: BOEM–2010–0034]

RIN 1010–AD68

Increased Safety Measures for Energy Development on the Outer Continental Shelf; Availability, Initial Regulatory Flexibility Analysis

AGENCY: Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE), Interior.

ACTION: Availability of an Initial Regulatory Flexibility Analysis.

SUMMARY: In the **Federal Register** of October 14, 2010, BOEM published an interim final rule implementing certain safety measures recommended in the report entitled, "Increased Safety Measures for Energy Development on the Outer Continental Shelf" (Safety Measures Report). The President directed the Department of the Interior to develop the Safety Measures Report to identify measures necessary to improve the safety of oil and gas exploration and development on the Outer Continental Shelf in light of the Deepwater Horizon event on April 20, 2010, and resulting oil spill. To implement the practices recommended in the Safety Measures Report, the Bureau of Ocean Energy Management, Regulation and Enforcement is amending drilling regulations related to well control, including: subsea and surface blowout preventers, well casing and cementing, secondary intervention, unplanned disconnects, recordkeeping, well completion, and well plugging.

This document provides the official BOEMRE notice of availability for the Initial Regulatory Flexibility Analysis (IRFA) for that interim rule and provides opportunity for comment.

DATES: Submit comments by January 24, 2011. BOEMRE may not fully consider comments received after this date.

ADDRESSES: You may submit comments on the IRFA by any of the following methods. Please use the Regulation Identifier Number (RIN) "1010–AD68 IRFA" as an identifier in your message.

• *Federal eRulemaking Portal: http://www.regulations.gov.* In the entry titled "Enter Keyword or ID," enter BOEM–2010–0034 then click search. Follow the instructions to submit public comments and view other supporting and related materials available for this Notice. BOEMRE will post all comments for this IRFA.

• Mail or hand-carry comments to the Department of the Interior; Bureau of Ocean Energy Management, Regulation and Enforcement; Attention: Regulations and Standards Branch (RSB); 381 Elden Street, MS–4024, Herndon, Virginia 20170–4817. Please reference "Increased Safety Measures for Energy Development on the Outer Continental Shelf, 1010–AD68, IRFA" in your comments and include your name and return address.

FOR FURTHER INFORMATION CONTACT: Amy C. White, Bureau of Ocean Energy Management, Regulation and Enforcement, Office of Offshore Regulatory Programs, Regulations and Standards Branch, 703–787–1665, *amy.white@boemre.gov.*

SUPPLEMENTARY INFORMATION: This Notice is published pursuant to Regulatory Flexibility Act (5 U.S.C. 603) as a matter of information to the public and to solicit comments on the analysis for the Interim Final Rule, Increased Safety Measures for Energy Development on the Outer Continental Shelf (OCS). The preparation of this IRFA is an important step in the process for compliance with the Regulatory Flexibility Act (RFA). The RFA requires agencies to consider the impact of their regulatory proposals on small entities, analyze alternatives, and make the analysis available for public comment.

BOEMRE has updated the estimated compliance costs and small business impacts from the projections reported in the Regulatory Flexibility Analysis of the Safety Measures Rule. These changes are minor and mostly result from updated categorization of companies operating on the OCS and analysis of the number of wells drilled by small and large companies rather than only by lease ownership.

Our updated analysis shows there are currently about 140 Operators of Federal oil and gas OCS leases. Small entities that operate under the requirements of the Safety Measures Rule are coded under the Small Business NAICS codes 211111, Crude Petroleum and Natural Gas Extraction and 213111, Drilling Oil and Gas Wells. For these NAICS code classifications, a small company is one with fewer than 500 employees. Based on this criterion applied to the NAICS codes, approximately 90 (64 percent) of the companies operating on the OCS are considered small companies and 50 (36 percent) are considered large companies.

We estimate that about 90 percent of the regulatory costs will be imposed on deepwater lessees where small businesses only hold 8 percent of the leases and drill 12 percent of the wells. About 10 percent of the total costs will apply to shallow water leases where small companies hold 45 percent of OCS leases and also drill 45 percent of the wells. As a share of fiscal year 2009 revenues, this interim final rule is estimated to cost approximately 0.57 ($0.156/$27.2) percent of OCS revenue for large companies and 0.66 ($0.027/$4.1) percent for small companies.

The analysis can be obtained through the Federal eRulemaking Portal: *http://www.regulations.gov.* In the entry titled "Enter Keyword or ID," enter BOEM–2010–0034 then click search. You may also request a copy through Amy C. White, Bureau of Ocean Energy Management, Regulation and Enforcement, Office of Offshore Regulatory Programs, Regulations and Standards Branch, 703–787–1665, *amy.white@boemre.gov.*

Comments on this IRFA will be considered and any changes to the regulation as a result of these comments will be included in the RIN 1010–AD68, Increased Safety Measures for Energy Development on the Outer Continental Shelf when the final regulation is published. The Safety Measures Rule was published in the **Federal Register** on October 14, 2010 (75 FR 63346) and comments are being accepted on the rule until December 13, 2010.

Dated: December 6, 2010.

Robert P. LaBelle,

Acting Associate Director for Offshore Energy and Minerals Management.

[FR Doc. 2010–32173 Filed 12–22–10; 8:45 am]

BILLING CODE 4310–MR–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2010–1079]

RIN 1625–AA00

Safety Zone; Sacramento New Year's Eve, Fireworks Display, Sacramento, CA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone in support of the Sacramento New Year's Eve Fireworks Display. From 8:45 p.m. on December 31, 2010 until 12:25 a.m. on January 1, 2011, pyrotechnics will be launched from shore over the Sacramento River and from the center of the Tower Lift Bridge on the Sacramento River. The fireworks displays will occur

from 8:45 p.m. to 9:25 p.m. on December 31, 2010 and from 11:45 p.m. on December 31, 2010 until 12:25 a.m. on January 1, 2011. This safety zone is established to ensure the safety of participants and spectators from the dangers associated with the pyrotechnics. Unauthorized persons or vessels are prohibited from entering into, transiting through, or remaining in the safety zone without permission of the Captain of the Port or her designated representative.

DATES: This rule is effective from 6 p.m. on December 31, 2010 until 12:25 a.m. on January 1, 2011.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2010–1079 and are available online by going to *http://www.regulations.gov,* inserting USCG–2010–1079 in the "Keyword" box, and then clicking "Search." They are also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary rule, call Lieutenant Junior Grade Allison Natcher at 415–399–7442, or e-mail *D11-PF-MarineEvents@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because the event would occur before the rulemaking process would be completed. Because of the dangers posed by the pyrotechnics used in these fireworks displays, the safety zones are necessary to provide for the safety of event participants, spectators, spectator craft, and other vessels transiting the event area. For the safety concerns noted, it is in the public interest to have these regulations in effect during the event.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Any delay in the effective date of this rule would expose mariners to the dangers posed by the pyrotechnics used in the fireworks display.

Background and Purpose

The Sacramento Convention and Visitors Bureau will sponsor the Sacramento New Year's Eve Fireworks Displays from 8:45 p.m. until 9:25 p.m. on December 31, 2010 and 11:45 p.m. on December 31, 2010 through 12:25 a.m. on January 1, 2011. The fireworks displays are for entertainment purposes. A safety zone is necessary to protect spectators, vessels, and other property from the hazards associated with pyrotechnics. The Coast Guard has granted the event sponsor a marine event permit for the fireworks displays.

Discussion of Rule

The Coast Guard is establishing a temporary safety zone in order to protect spectators, vessels, and other property from the hazards associated with the planned pyrotechnics. From 6 p.m. until 8:45 p.m. on December 31, 2010, the temporary safety zone will extend 100 feet from the center of the Tower Lift Bridge at position 38°34′48.26″ N, 121°30′38.52″ W over the Sacramento River. During the fireworks displays from 8:45 p.m. until 9:25 p.m. on December 31, 2010 and from 11:45 on December 31, 2010 until 12:25 a.m. on January 1, 2011, the area to which the temporary safety zone applies will increase in size to encompass the navigable waters around the fireworks launch sites located 600 feet from the launch sites at positions 38°34′48.26″ N, 121°30′38.52″ W and 38°34′49.84″ N, 121°30′29.59″ W. At 12:25 a.m., January 1, 2011, the safety zone shall terminate.

The effect of the temporary safety zones will be to restrict navigation in the vicinity of the fireworks sites while the fireworks are set up, and until the conclusion of the scheduled displays. Except for persons or vessels authorized by the Coast Guard Patrol Commander, no person or vessel may enter or remain in the restricted area. These regulations are needed to keep spectators and vessels a safe distance away from the fireworks barges to ensure the safety of participants, spectators, and transiting vessels.

Regulatory Analyses

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

Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order.

Although this rule restricts access to the waters encompassed by the safety zones, the effect of this rule will not be significant. The entities most likely to be affected are pleasure craft engaged in recreational activities. In addition, the rule will only restrict access for a limited time. Finally, the Public Broadcast Notice to Mariners will notify the users of local waterway to ensure that the safety zone will result in minimum impact.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this rule would have a significant economic impact on a substantial number of small entities. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

Although this rule may affect owners and operators of pleasure craft engaged in recreational activities and sightseeing, it will not have a significant economic impact on a substantial number of small entities for several reasons: (i) This rule will encompass only a small portion of the waterway for a limited period of time; (ii) vessel traffic can pass safely around the area; (iii) vessels engaged in recreational activities and sightseeing have ample space outside of the affected areas of Sacramento, CA to engage in these activities; and (iv) the maritime public will be advised in advance of this safety zone via Broadcast Notice to Mariners.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement

Fairness Act of 1996 (Pub. L. 104–121), we offer to assist small entities in understanding the rule so that they can better evaluate its effects on them and participate in the rulemaking process.

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

Collection of Information

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under that Order and have determined that it does not have implications for federalism.

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a "significant energy action" under that order because it is not a "significant regulatory action" under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

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

Environment

We have analyzed this rule under Department of Homeland Security Management Directive 0023.1 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction. This rule involves establishing, disestablishing, or changing Regulated Navigation Areas and security or safety zones. An environmental analysis checklist and a categorical exclusion determination are available in the docket where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, and Waterways.

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 165.T11–379 to read as follows:

§ 165.T11–379 Safety Zone; Sacramento New Year's Eve, Fireworks Display, Sacramento, CA.

(a) *Location.* During the loading of the fireworks onto the Tower Lift Bridge in Sacramento, CA, on December 31, 2010 at 6 p.m. and until the start of the fireworks displays at 8:45 p.m., the temporary safety zone is established for 100 feet from the center of the Tower Lift Bridge at position 38°34′48.26″ N, 121°30′38.52″ W over the Sacramento River. During the fireworks displays from 8:45 p.m. to 9:25 p.m. on December 31, 2010 and from 11:45 p.m. on December 31, 2010 until 12:25 a.m. on January 1, 2011, the safety zone will extend 600 feet from fireworks launch site positions 38°34′48.26″ N, 121°30′38.52″ W (NAD 83) and 38°34′49.84″ N, 121°30′29.59″ W (NAD 83). At 12:25 a.m. on January 1, 2011, this safety zone shall terminate.

(b) *Definitions.* As used in this section, "designated representative" means a Coast Guard Patrol Commander, including a Coast Guard coxswain, petty officer, or other officer operating a Coast Guard vessel and a Federal, State, and local officer designated by or assisting the Captain of the Port San Francisco (COTP) in the enforcement of the safety zone.

(c) *Regulations.*

(1) Under the general regulations in § 165.23, entry into, transiting, or anchoring within this safety zone is prohibited unless authorized by the COTP or the COTP's designated representative.

(2) The safety zone is closed to all vessel traffic, except as may be permitted by the COTP or a designated representative.

(3) Vessel operators desiring to enter or operate within the safety zone must contact the COTP or a designated representative to obtain permission to do so. Vessel operators given permission to enter or operate in the safety zone must comply with all directions given to them by the COTP or the designated representative. Persons and vessels may request permission to enter the safety zones on VHF–16 or through the 24-hour Command Center at telephone 415–399–3547.

(d) *Enforcement period.* This section will be enforced from 6 p.m. to 9:25 p.m. on December 31, 2010 and from 11:45 p.m. on December 31, 2010 until 12:25 a.m. on January 1, 2011.

Dated: December 10, 2010.

C.L. Stowe,

Captain, U.S. Coast Guard, Captain of the Port San Francisco.

[FR Doc. 2010–32192 Filed 12–22–10; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 74

RIN 2900–AM78

VA Veteran-Owned Small Business Verification Guidelines; Correction

AGENCY: Department of Veterans Affairs.

ACTION: Correcting amendment.

SUMMARY: VA published two documents in the **Federal Register**, an interim final rule on May 19, 2008 (73 FR 29024) and a final rule on February 8, 2010 (75 FR 6098), which implement portions of the Veterans Benefits, Health Care, and Information Technology Act of 2006. Both documents contain a typographical error in a cross reference citation. This document corrects that error.

DATES: *Effective Date:* This correction is effective December 23, 2010.

FOR FURTHER INFORMATION CONTACT: Dennis Foley, Deputy Assistant General Counsel (025), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–4998. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: VA published two documents in the **Federal Register**, an interim final rule on May 19, 2008 (73 FR 29024) and a final rule on February 8, 2010 (75 FR 6098), which implement portions of the Veterans Benefits, Health Care, and Information Technology Act of 2006. The regulatory text of § 74.4(c)(4) and (f)(2) contains a typographical error. This document corrects the typographical error by removing "(d)(1)" and adding, in each place, "(f)(1)".

List of Subjects in 38 CFR Part 74

Administrative practice and procedures, Privacy, Reporting and recordkeeping requirements, Small business, Veteran, Veteran-owned small business, Verification.

William F. Russo,

Director of Regulations Management, Office of the General Counsel, Department of Veterans Affairs.

■ For the reason set out in the preamble, VA is correcting 38 CFR part 74 as follows.

PART 74—VETERANS SMALL BUSINESS REGULATIONS

■ 1. The authority citation for part 74 continues to read as follows:

Authority: 38 U.S.C. 501, 513, and as noted in specific sections.

§ 74.4 [Corrected]

■ 2. Amend § 74.4 as follows:

■ a. In paragraph (c)(4), remove "(d)(1)" and add, in its place, "(f)(1)".

■ b. In paragraph (f)(2) introductory text, remove "(d)(1)" and add, in its place, "(f)(1)".

[FR Doc. 2010–32226 Filed 12–22–10; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 100818375–0600–02]

RIN 0648–XX84

Magnuson-Stevens Act Provisions; Fisheries of the Northeastern United States; Northeast Multispecies Fishery; Final Rule to Implement Addenda to 17 Fishing Year (FY) 2010 Sector Operations Plans and Contracts

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

ACTION: Final rule.

SUMMARY: This final rule implements addenda to add exemptions from certain Federal fishing regulations to some or all Northeast (NE) multispecies sector operations plans that were previously approved by the final sector rule published April 9, 2010. That rule approved FY 2010 sector operations plans and contracts for, and made allocations of Annual Catch Entitlements (ACE) to, 17 sectors in the NE multispecies fishery. In addition, this action approves an exemption functionally equivalent to the Gulf of Maine (GOM) Haddock Sink Gillnet Pilot Program for FY 2010 sectors (proposed in Amendment 16 to the NE Multispecies Fishery Management Plan (FMP) for both common pool and sector vessels, but disapproved by NMFS), since this program would be more controlled for sectors and unlikely to compromise efforts to eliminate overfishing and rebuild overfished stocks. The exemptions are intended to provide additional flexibility and improve profitability for sector vessels.

DATES: Effective December 23, 2010, through April 30, 2011.

ADDRESSES: Copies of addenda to the FY 2010 sector operations plans and contracts, and the supplemental environmental assessment (EA), are available from the NMFS NE Regional Office: Patricia A. Kurkul, Regional Administrator, National Marine Fisheries Service, 55 Great Republic Drive, Gloucester, MA 01930. These documents are also accessible via the Federal eRulemaking Portal: *http://www.regulations.gov*. A Final Regulatory Flexibility Analysis (FRFA) was prepared for this final rule and is comprised of the EA, the preamble, and the Classification sections of the final rule.

FOR FURTHER INFORMATION CONTACT: Melissa Vasquez, Fishery Policy Analyst, phone (978) 281–9166, fax (978) 281–9135.

SUPPLEMENTARY INFORMATION: A proposed rule (75 FR 53939) to implement addenda to the 17 approved FY 2010 NE multispecies sector operations plans was published in the **Federal Register** on September 2, 2010, soliciting public comment through September 17, 2010. A second rule (75 FR 59204; September 27, 2010) reopened and extended the comment period to October 1, 2010, to provide additional opportunity for public comment on the proposed addenda. After review of all public comments, NMFS has partially approved the 17 sector operations plan addenda, with the exception of one exemption requested by several sectors, determining that the addenda are consistent with the goals of the FMP as described in Amendment 16, and other applicable laws, and are in compliance with the regulations that govern NE multispecies sector allocation management as specified in 50 CFR 648.87.

Background

A final rule, published April 9, 2010 (75 FR 18113), approved FY 2010 sector operations plans and contracts for, and made allocations of ACE to, 17 NE multispecies sectors. The Amendment 16 regulations governing the sector operations plans and contracts allow for a sector to request exemptions from Federal fishing regulations through the sector operations plan and contract submitted to NMFS for approval on an annual or bi-annual basis (§ 648.87(b)(2)(xv)). Pursuant to § 648.87(c)(2), the Regional Administrator may exempt vessels participating in a sector from certain Federal fishing regulations, in addition to the Amendment 16 universal exemptions already approved for all sectors. Regulations prohibit sectors from requesting exemptions that involve: NE multispecies year-round closure areas, permitting restrictions (e.g., vessel upgrades, etc.); gear restrictions designed to minimize habitat impacts (e.g., roller gear restrictions, etc.); and reporting requirements (not including days-at-sea (DAS) reporting requirements or Special Access Program (SAP)-specific reporting requirements). For FY 2010, the final rule implementing sectors approved several new exemptions from NE multispecies regulations for those sectors that requested the exemptions through their FY 2010 sector operations plans. Specifically, certain sectors received exemptions from the following measures: (1) 120-day block out of the fishery required for Day gillnet vessels; (2) 20-day spawning block out of the fishery required for all vessels; (3) limitation on the number of gillnets imposed on Day gillnet vessels; (4) prohibition on a vessel hauling another vessel's gillnet gear; (5) limitation on the number of gillnets that may be hauled on Georges Bank (GB) when fishing under a groundfish/monkfish DAS; (6) limits on the number of hooks that may be fished; and (7) DAS Leasing Program length and horsepower restrictions.

The sectors also requested several exemptions in the FY 2010 operations plans that NMFS subsequently disapproved, because they are prohibited from being requested or because similar exemption requests were being addressed in the Amendment 16 proposed rule. Among these was a request by the Sustainable Harvest Sector to participate in the GOM Haddock Sink Gillnet Pilot Program, a program proposed in Amendment 16 that would have allowed the seasonal use of 6-inch (15.24-cm) mesh gillnets in the GOM Regulated Mesh Area (RMA) (as opposed to the current 6.5-inch (16.51-cm) mesh requirement) for the purposes of targeting GOM haddock.

Upon initial review of the FY 2010 sector operations plans and contracts, NMFS requested that sectors remove exemption requests that repeated measures already proposed under Amendment 16, including the GOM Haddock Sink Gillnet Pilot Program, to avoid duplication in the rulemaking process. The Pilot Program was subsequently disapproved for all groundfish vessels by NMFS in Amendment 16 because of concern that it could increase catch of overfished stocks, such as GOM cod, and therefore undermine the rebuilding programs for these stocks.

In comments on the proposed FY 2010 sector operations plan rule, the Sustainable Harvest Sector, the New England Fishery Management Council (Council), and 14 others asked what actions NMFS was considering for exemption requests such as the pilot program that were removed from sector operations plans to reduce duplication with Amendment 16, but which were subsequently disapproved in Amendment 16. NMFS responded in a March 23, 2010, letter to the Council that it would work with sector managers regarding reconsideration of the pilot program for sectors in a separate rulemaking given that, for a sector, this program would be more controlled and unlikely to compromise efforts to eliminate overfishing and rebuild overfished stocks. At that time, NMFS noted it would also consider granting approved sector exemption requests to all FY 2010 sectors, if appropriate, through additional rulemaking. As a result, in April 2010, NMFS solicited requests from the approved FY 2010 sectors to determine if they would be interested in an exemption that would be functionally equivalent to the GOM Haddock Sink Gillnet Pilot Program (*i.e.,* the "GOM sink gillnet mesh exemption"), as well as any additional exemptions approved in the final sector rule which their sector had not previously requested. In response, all 17 sectors submitted requests for addenda to their operations plans and contracts to incorporate additional exemptions. Therefore, 17 addenda to the approved FY 2010 sector operations plans and contracts, and the additional exemptions requested therein, were proposed in the proposed rule published September 2, 2010.

Among the exemptions under consideration in the proposed rule was a partial exemption from the requirement to retain and land all legal-sized fish of the 14 stocks allocated to sectors. Regulations at §§ 648.14(k)(14)(viii) and 648.87 (b)(1)(v)(A) specifically prohibit sector vessels from discarding legal-sized regulated species allocated to sectors. This requirement applies to all fish or pieces of fish above the minimum size, including fish that may be considered unmarketable, such as depredated fish. Sector members and managers raised concerns with this requirement, specifically the retention of unmarketable fish, stating that the need to separate the unmarketable fish from the food-grade product within limited deck and storage space was creating operational difficulties and potential safety hazards at sea. Although this problem was raised to the Council during the development of Amendment 16, no exceptions to this requirement were considered or recommended by the Council.

To address this concern, the proposed rule to implement sector operations plan addenda proposed a partial exemption in each sector operations plan from the prohibition on discarding of legal-sized unmarketable fish of allocated stocks, provided that the legal-sized unmarketable fish are accounted for in the sector's discard rate, as determined through observer coverage, similar to how other allowable discards are accounted for. For the purposes of this exemption, unmarketable fish is defined as any legal-sized fish the vessel

owner/captain elects not to retain because of condition or marketability problems.

Since proposing this measure in the proposed rule, new concerns have come to light regarding implementation of this measure mid-year, rather than at the start of the fishing year, given that it would require the adjustment of sector discard rates mid-season. NMFS had intended to revise the sector-specific discard rates for sectors that opt for the discarding exemption, to adjust for the change in possession restrictions and the handling of legal-sized unmarketable fish. However, it was determined that adjusting sector discard rates mid-season would disrupt the cumulative year-long dataset used to monitor sector ACEs. In addition, implementing this exemption mid-season would disrupt some sector's discard rates more than others, potentially raising equity issues. Therefore, because granting this exemption without accounting for revised discard rates would not adequately track catch of multispecies stocks, this exemption has been removed as an option in this final rule. NMFS will instead consider this exemption for FY 2011 sector operations plans, which would be effective at the start of the new fishing year (May 1, 2011) and, thus, would be less disruptive to sector discard rates.

Approved Sector Exemption Requests

After thorough review and consideration of public comments on the exemption requests, NMFS authorizes exemptions from the following regulations for all individual sectors that requested them: (1) Minimum mesh size for sink gillnets in the GOM (GOM sink gillnet mesh exemption); (2) 120-day block out of the fishery required for Day gillnet vessels; (3) 20-day spawning block out of the fishery required for all vessels; (4) limitation on the number of gillnets imposed on Day gillnet vessels; (5) prohibition on a vessel hauling another vessel's gillnet gear; (6) limitation on the number of gillnets that may be hauled on GB when fishing under a groundfish/monkfish DAS; (7) limits on the number of hooks that may be fished; and (8) DAS Leasing Program length and horsepower restrictions. A summary of exemptions authorized for individual sectors is available in Table 1, and further details of each exemption are discussed below.

The supplemental EA prepared for this action analyzed the impacts of expanding these exemptions to all FY 2010 sectors, not just those sectors that requested them. Therefore, although the addenda implemented through this final rule add only those exemptions currently requested by each sector, NMFS authorizes these exemptions for all FY 2010 sectors such that a sector may submit a request for an addendum to their FY 2010 sector operations plan to add any of these approved exemptions at a later date, and NMFS may review and could approve the request without additional rulemaking. Approved addenda would be made available on the Northeast Regional Office Web site, or by mail upon request [see **ADDRESSES**].

BILLING CODE 3510–22–P

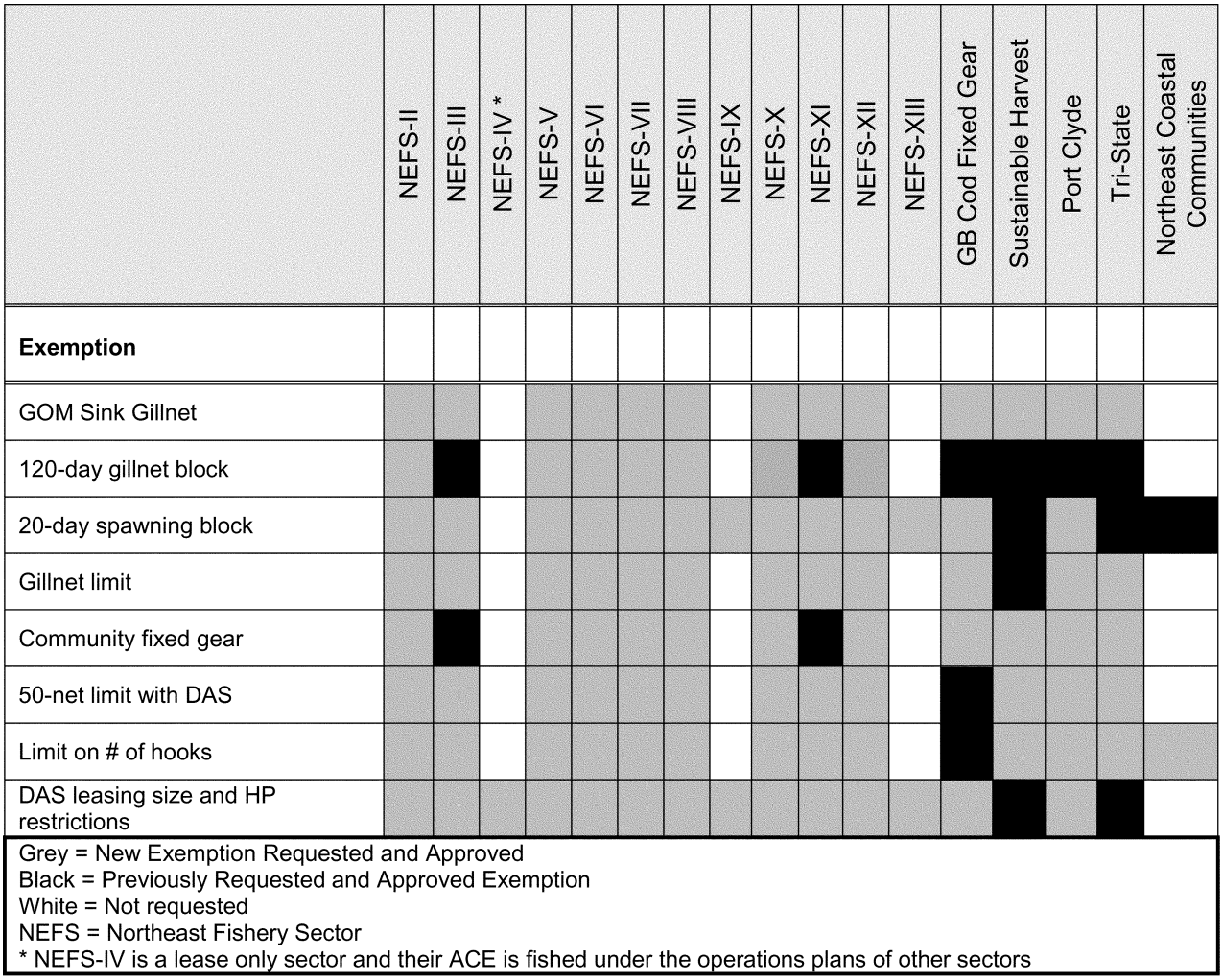


Table 1. Exemptions Granted to FY 2010 Sectors

BILLING CODE 3510–22–C

1. GOM Sink Gillnet Mesh Exemption

Regulations require a minimum mesh size of 6.5-inch (16.51-cm) for gillnets in the GOM RMA (§ 648.80(a)(3)(iv)). Minimum mesh size requirements have been used, along with other management measures, to reduce overall mortality on groundfish stocks, as well as to reduce discarding and improve survival of sub-legal groundfish. This exemption allows FY 2010 sector vessels to use 6-inch (15.24-cm) mesh stand-up gillnets in the GOM RMA from January 1, 2011 to April 30, 2011, to fish for haddock. Sector vessels utilizing this exemption are prohibited from using tie-down gillnets in the GOM RMA during this period. Sector vessels may transit the GOM RMA with tie-down gillnets, provided they are properly stowed and not available for immediate use in accordance with one of the methods specified at § 648.23(b). In the proposed rule, NMFS proposed that Day gillnet vessels would not be able to fish with, possess, haul, or deploy more than 30 nets per trip during this period. However, Day gillnet vessels participating in sectors granted the exemption from Day gillnet net limits are exempt from the general net limit in the GOM RMA, and would be able to fish up to 150 nets in the GOM RMA at other times of year. Therefore, to maximize the flexibility for sector vessels fishing under this exemption, NMFS is allowing Day gillnet vessels participating in a sector granted both the GOM sink gillnet mesh exemption and the general net limit exemption to fish up to 150 stand-up nets in the GOM RMA during this period (up to 150 nets total in all RMAs). Day gillnet vessels participating in a sector that has not also been approved for the general net limit exemption will be restricted to the limit of 50 stand-up sink gillnets during this period, consistent with existing net limits in the GOM RMA specified at § 648.80(a)(3)(iv)(B)(*2*). The Letter of Authorization (LOA) issued to the sector vessels that qualify for this exemption will specify the net restrictions to help ensure the provision is enforceable. There is no limit on the number of nets that participating Trip gillnet vessels are able to fish with, possess, haul, or deploy, during this period, because Trip gillnet vessels are required to remove all gillnet gear from the water before returning to port at the end of a fishing trip.

Recent selectivity studies have indicated that 6.5-inch (16.51-cm) sink gillnets may not be effective at retaining haddock at the current legal minimum fish size. This exemption would provide sector vessels the opportunity to utilize a smaller mesh size gillnet to potentially catch more haddock in the GOM, and, thereby, increase efficiency and revenue in the fishery. NMFS believes that impacts to allocated target stocks resulting from this exemption would be negligible, because fishing mortality by sector vessels is restricted by an ACE for

allocated stocks, which caps overall mortality. It is possible that a higher net limit for Day gillnet vessels participating in this program could result in an increase in the number of gillnets in the water at one time and, therefore, potentially increase interactions with protected species. However, potential negative impacts to protected species from this exemption are expected to be low because additional nets may result in greater efficiency that could decrease the overall number of soak hours throughout the year as a sector's ACE is caught faster, thus potentially reducing interactions with protected species. In addition, sector vessels utilizing this exemption are still required to comply with all requirements of the Harbor Porpoise Take Reduction Plan (75 FR 12698; March 17, 2010) and Atlantic Large Whale Take Reduction Plan (73 FR 58942; October 8, 2008). The GOM sink gillnet mesh exemption is approved for Northeast Fishery Sectors II and III, V–VIII, and X–XII, the Sustainable Harvest Sector, the Port Clyde Community Groundfish Sector, the GB Cod Fixed Gear Sector and the Tri-State Sector.

2. 120-Day Block Requirement Out of the Fishery for Day Gillnet Vessels

The 120-day block requirement out of the fishery for Day gillnet vessels was implemented to help ensure that management measures for Day gillnet vessels were comparable to effort controls placed on other fishing gear types, given that gillnets continue to fish as long as they are in the water. Regulations at § 648.82(j)(1)(ii) require that each NE multispecies gillnet vessel declared into the Day gillnet category declare out and be out of the non-exempt gillnet fishery for 120 days each fishing year. Each period of time taken must be a minimum of 7 consecutive days, and at least 21 of the 120 days must be taken between June 1 and September 30. This exemption was previously approved for the GB Cod Fixed Gear Sector, Sustainable Harvest Sector, Port Clyde Community Groundfish Sector, Tri-State Sector, and Northeast Fishery Sectors III and XI, based upon the rationale that this measure was designed to control fishing effort and, therefore, is no longer necessary for sectors because sectors are restricted to an ACE for each groundfish stock, which limits overall fishing mortality resulting from sector operations. Approval of this exemption for additional sectors would increase the operational flexibility of sector vessels and is expected to increase profit margins of sector fishermen. For additional information on this exemption, please refer to the description of this exemption in the proposed and final rules approving FY 2010 sector operations plans (74 FR 68015 and 75 FR 18113, respectively). This exemption is approved for seven additional sectors: Northeast Fishery Sectors II, V–VIII, X, and XII.

3. 20-Day Spawning Block

Regulations at § 648.82(g) require vessels to declare out and be out of the NE multispecies DAS program for a 20-day period each calendar year between March 1 and May 31, when spawning is most prevalent in the GOM. This regulation was developed to reduce fishing effort on spawning groundfish stocks and an exemption from this requirement was previously approved for FY 2010 sectors based upon the rationale that the sector's ACE will restrict fishing mortality, making the requirement no longer necessary as an effort control. Exemption from this requirement is being approved for additional sectors, because it would provide vessel owners with greater flexibility to plan operations according to fishing and market conditions. For additional information on this exemption, please refer to the description of this exemption in the FY 2010 sector operations plan rules. This exemption was previously approved for the Sustainable Harvest Sector, the Tri-State Sector, and the Northeast Coastal Communities Sector. This final rule approves this exemption for an additional 13 sectors: Northeast Fishery Sectors II, III, and V–XIII; the GB Cod Fixed Gear Sector; and the Port Clyde Community Groundfish Sector.

4. Limitation on the Number of Gillnets for Day Gillnet Vessels

Current gear restrictions in the groundfish RMAs restrict Day gillnet vessels from fishing more than: 100 gillnets (of which no more than 50 can be roundfish gillnets) in the GOM RMA (§ 648.80(a)(3)(iv)(B)(*2*)); 50 gillnets in the GB RMA (§ 648.80(a)(4)(iv)(B)(*1*); and 75 gillnets in the Southern New England (SNE) and Mid-Atlantic (MA) RMAs (§§ 648.80(b)(2)(iv)(B)(*1*) and 648.80(c)(2)(v)(B)(*1*), respectively). This exemption, as previously approved for the Sustainable Harvest Sector in the final sector rule for FY 2010, allows sector vessels to fish up to 150 nets (any combination of flatfish or roundfish nets) in each of the RMAs (up to 150 total), and would provide greater operational flexibility to sector vessels in deploying gillnet gear. This exemption was originally approved, and is being approved for additional sectors, based upon the rationale that it is designed to control fishing effort and is no longer necessary for sector vessels, since each sector is restricted by an ACE for each stock, which caps overall fishing mortality. For additional information on this exemption, please refer to the description of this exemption in the FY 2010 sector operations plan rules. This final rule approves this exemption for 12 additional sectors: Northeast Fishery Sectors II, III, V–VIII, and X–XII; the GB Cod Fixed Gear Sector; the Port Clyde Community Groundfish Sector; and the Tri-State Sector.

5. Prohibition on a Vessel Hauling Another Vessel's Gillnet Gear

Northeast Fishery Sectors III and XI received an exemption for FY 2010 from current regulations that prohibit one vessel from hauling another vessel's gillnet gear (§§ 648.14(k)(6)(ii)(A) and 648.84(a)) in order to share fixed gear among sector vessels. This exemption was originally approved for FY 2010 sectors and is being expanded to allow sector vessels to reduce costs by pooling gillnet gear, and because it was determined that the regulations pertaining to hauling and setting responsibilities are no longer necessary when sectors are confined to an ACE for each stock. Consistent with the exemption as originally approved, the sectors that requested this exemption proposed that all vessels utilizing community fixed gear be jointly liable for any violations associated with that gear. For additional information on this exemption, please refer to the description of this exemption in the FY 2010 sector operations plan rules. Note that the description of this exemption in the FY 2010 sector operations plan rules and the proposed rule to implement FY 2010 sector operations plan addenda incorrectly referred to the entirety of § 648.84. This exemption was intended to exempt sector vessels only partially from § 648.84(a), to allow a sector vessel to haul gillnet gear marked by another vessel participating in this exemption. The regulation citation has been corrected in this final rule and will be reflected in the LOA issued to each sector vessel. This exemption is approved for an 11 additional sectors: Northeast Fishery Sectors II, V–VIII, X, and XII; the GB Cod Fixed Gear Sector; the Sustainable Harvest Sector; the Port Clyde Community Groundfish Sector; and the Tri-State Sector.

6. Limitation on the Number of Gillnets That May Be Hauled on GB When Fishing Under a Groundfish/Monkfish DAS

The GB Cod Fixed Gear Sector received an exemption for FY 2010 from the limit on the number of gillnets that may be hauled on GB when fishing under a groundfish/monkfish DAS. Current regulations at § 648.80(a)(4)(iv) prohibit Day gillnet vessels fishing on a groundfish DAS from possessing, deploying, fishing, or hauling more than 50 nets on GB, and were implemented as a groundfish mortality control under Amendment 13. This exemption was previously approved, and is being expanded to additional sectors, because it would allow nets deployed under existing net limits of the Monkfish FMP to be hauled more efficiently by vessels dually permitted under both FMPs. For additional information on this exemption, please refer to the description of this exemption in the FY 2010 sector operations plan rules. This exemption is approved for an additional 12 sectors for FY 2010: Northeast Fishery Sectors II, III, V–VIII, and X–XII; the Sustainable Harvest Sector; the Port Clyde Community Groundfish Sector; and the Tri-State Sector.

7. Limitation on the Number of Hooks That May Be Fished

The GB Cod Fixed Gear Sector was granted an exemption for FY 2010 from the number of hooks that a vessel may fish on a given fishing trip. Current regulations at § 648.80 prohibit vessels from fishing or possessing more than 2,000 rigged hooks in the GOM RMA, more than 3,600 rigged hooks in the GB RMA, more than 2,000 rigged hooks in the Southern New England (SNE) RMA, or 4,500 rigged hooks in the MA RMA. This exemption was approved in the final rule approving sector operations plans for FY 2010 and is being approved here for additional sectors because it would allow sector vessels to more efficiently harvest ACE and is no longer a necessary control on effort by sector vessels. For additional information on this exemption, please refer to the description of this exemption in the FY 2010 sector operations plan rules. This action exempts 13 additional sectors from this requirement: Northeast Fishery Sectors II, III, V–VIII, and X–XII; the Sustainable Harvest Sector; the Port Clyde Community Groundfish Sector; the Tri-State Sector; and the Northeast Coastal Communities Sector.

8. Length and Horsepower Restrictions on DAS Leasing

While sector vessels are exempt from the requirement to use NE multispecies DAS to harvest groundfish, sector vessels have been allocated and still need to use NE multispecies DAS for specific circumstances. For example, the Monkfish FMP includes a requirement that limited access monkfish Category C and D vessels harvesting more than the incidental monkfish catch must fish under both a monkfish and a NE multispecies DAS. Therefore, sector vessels may still use, and lease, NE multispecies DAS.

The Sustainable Harvest Sector and Tri-State Sector received a FY 2010 exemption from the DAS Leasing Program length and horsepower baseline restrictions on DAS leases between vessels within their individual sectors as well as with vessels in other sectors with this exemption. Restricting sectors to their ACEs eliminates the need to use vessel characteristics to control fishing effort. Further, exemption from this restriction allows sector vessels greater flexibility in the utilization of ACE and DAS. Approving this exemption for additional sectors could increase the profitability of sector participants by expanding the pool of eligible lessors and lessees for any given vessel. Providing greater flexibility in the distribution of DAS could result in increased effort on non-allocated target stocks, such as monkfish and skates. However, sectors predicted little consolidation and redirection of effort in their FY 2010 operations plans. In addition, any potential redirection in effort would be restricted by the sector's ACE for each stock, as well as effort controls in other fisheries (*e.g.,* trip limits and DAS). For additional information on this exemption, please refer to the description of this exemption in the FY 2010 sector operations plan rules. This final rule approves this exemption for 14 additional sectors: Northeast Fishery Sectors II–XIII; the GB Cod Fixed Gear Sector; and the Port Clyde Community Groundfish Sector.

Supplemental Environmental Assessment

In accordance with the National Environmental Policy Act, a supplemental EA was prepared analyzing these 17 operations plan addenda. The supplemental EA is tiered from the Environmental Impact Statement (EIS) for Amendment 16 and the 17 sector EAs prepared for the 17 sector operations plans and contracts previously approved for FY 2010. The supplemental EA for this action examines the biological, economic, and social impacts associated with the new GOM sink gillnet mesh exemption and expanding the other exemptions previously approved for some FY 2010 sectors. It also provides a cumulative effects analysis (CEA) that addresses the combined impact of the direct and indirect effects of all proposed exemptions if approved for all the FY 2010 sectors. For the purpose of this analysis, the supplemental EA assumes that all 17 sectors requested and were granted all additional exemptions, because any individual sector approved for a given exemption could fish all the allocation through ACE trading. The summary finding of the supplemental EA concludes that, operating under the proposed exemptions, the sectors would produce similar effects that have non-significant impacts. An analysis of aggregate sector impacts was also conducted. A copy of the supplemental EA prepared for the 17 sector operations plan addenda that this rule implements is available from the Regional Office and online (see **ADDRESSES**).

Comments

Comments were submitted by one individual, one fishing industry organization, and one environmental organization. One comment, received from an individual, was not applicable to this action, and therefore is not addressed in this rule.

Comment 1: The Associated Fisheries of Maine supported the approval of the addenda to FY 2010 sector operations plans and all exemption requests therein.

Response 1: NMFS has approved the 17 addenda and associated exemption requests, with the exception of the discarding exemption. The discarding exemption was removed as an option from this final rule due to concerns that implementing this exemption mid-season would disrupt sector discard rates. The discarding exemption will instead be considered for FY 2011 sectors in the proposed rule that proposes FY 2011 sector operations plans and associated exemption requests.

Comment 2: Oceana opposed the discarding exemption, asserting that the prohibition on discarding is clearly articulated in Amendment 16 and is a provision of the NE Multispecies FMP that cannot be changed without a full amendment to the FMP.

Response 2: Although NMFS is not approving this exemption request for FY 2010, NMFS disagrees with Oceana's assertions about this exemption. Amendment 16 does not explicitly

address the handling of unmarketable fish by sector vessels at sea, as was determined when NMFS staff raised this issue with the Council's Groundfish Oversight Committee at their June 16, 2010, meeting. At that time, the Committee requested that NMFS consider methods to rectify this issue in the near-term. Thus, NMFS proposed a partial exemption from the prohibition on discarding legal-size fish, pursuant to the regulations at § 648.87(c)(2), which specify that sectors may request and be approved for exemptions from any NE multispecies regulation (with specific exceptions). This exemption was proposed in the proposed rule to implement addenda to FY 2010 sector operations plans, but removed as an option in the final rule for the reasons stated above. This exemption will instead be considered for FY 2011 sectors in the proposed rule to implement FY 2011 sector operations plans. Neither of these actions proposes to modify the no-discard provision, but rather proposes sector operations plan exemptions under the authority provided to the RA through Amendment 16.

Comment 3: Oceana commented that the RA may not approve the discarding exemption for sectors, because the prohibition on discarding of legal-sized fish of allocated stocks is part of the sector reporting requirements, one of the four provisions from which the RA does not have authority to grant sectors an exemption. Oceana stated that approval of the discarding exemption would compromise the sector monitoring program, thus undermining the FMP goals, and National Standards 2 and 9 of the Magnuson-Stevens Act.

Response 3: Although NMFS is not approving this exemption request, NMFS disagrees that the prohibition on discarding is a sector reporting requirement. While the purpose of the no-discard provision is to facilitate the accurate monitoring of sector ACEs and is described among sector monitoring requirements in Amendment 16 and the NE multispecies regulations, this provision is not a reporting or monitoring requirement in itself. This provision is a possession restriction, prescribing the handling of legal-sized fish of allocated stocks, and not the reporting or monitoring of these fish. It is NMFS' intent that the partial exemption from this possession restriction, if approved at a later date, would allow the discarding of unmarketable fish of allocated stocks rather than require the retention and landing of these fish. The discarding exemption would not exempt sector vessels from any reporting requirements, and all discards would still be reported consistent with NE multispecies and sector reporting requirements.

NMFS disagrees that the discarding exemption, if later approved, would compromise the sector monitoring program. Actual discards by sector vessels observed by NMFS observers and at-sea monitors on sector trips are applied to the sector's ACEs in live weights, and incorporated into sector-specific discard rates that are used to account for discards by sector vessels on unobserved trips. If implemented in FY 2011, the discarding exemption would not modify this monitoring process in any way. Discards of unmarketable fish under this exemption would be applied to sector ACEs through observer data and sector-specific discard rates, in the same way that allowable discards are accounted for currently. Furthermore, NMFS has delayed consideration of this exemption for sectors to FY 2011 to ensure that the exemption does not disrupt the year-long cumulative dataset used to monitor sector ACEs. If the discarding exemption is approved for FY 2011 sectors, through the final rule implementing FY 2011 sector operations plans and contracts, it would be implemented with the start of the fishing year on May 1, 2011, so that unmarketable fish would be consistently handled and applied to sector ACEs throughout the 2011 FY. Thus, if later approved, the discarding exemption would not compromise the sector ACE monitoring program implemented by Amendment 16, nor undermine the objectives of the FMP or the National Standards.

Comment 4: Oceana commented that the proposed rule did not contain sufficient analysis of the discarding exemption, including an analysis of its projected effect on sector discard rates, and that further analysis should be completed before any action is taken to revise this requirement.

Response 4: The analysis of the discarding exemption in the supplemental EA and preamble of the proposed rule was based on the most reliable information available on unmarketable fish at the time of the analysis, which consisted of observer data from sector trips during the first 3 months of FY 2010. Analysis of the discarding exemption has been updated in the final supplemental EA using observer data from sector trips during the first half of FY 2010, up to November 3, 2010, which confirmed that the occurrence of legal-sized unmarketable fish limited, and does not appear to be a significant portion of sector catch. The analysis of this exemption in the FY 2011 sector operations plan proposed rule, which will consider the discarding exemption for FY 2011 sectors, will also be updated with available FY 2010 observer data.

As explained previously, NMFS has delayed consideration of this exemption for sectors to FY 2011 to ensure that sector discard rates and the year-long dataset used to monitor sector ACEs is not disrupted. If this exemption is approved for FY 2011 sectors, unmarketable fish will be applied to sector ACEs through observer data and sector-specific discard rates, as described above, beginning with the start of FY 2011, May 1, 2011.

Classification

Pursuant to § 304(b)(1)(A) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), the Assistant Administrator for Fisheries, NOAA, has determined that this final rule is consistent with the FMP, other provisions of the Magnuson-Stevens Act, and other applicable law.

Pursuant to 5 U.S.C. 553(d)(1), the Assistant Administrator for Fisheries has determined that this rule is not subject to the 30-day delayed effectiveness provision of the Administrative Procedure Act (APA) because it relieves a restriction by granting FY 2010 sector members exemptions from the following regulations of the NE Multispecies FMP:

1. Minimum mesh size for sink gillnets in GOM (GOM sink gillnet mesh exemption);

2. Day gillnet 120-day block requirement out of the fishery;

3. Prohibition on a vessel hauling another vessel's gillnet gear;

4. Limitation on the number of gillnets that may be hauled on GB when fishing under a groundfish/monkfish DAS;

5. Limitation on the number of gillnets imposed on Day gillnet vessels;

6. 20-day spawning block requirement out of the fishery required for all vessels;

7. Limits on the number of hooks that may be fished; and

8. Length and horsepower restrictions on DAS leasing.

These regulations from which sector vessels are exempt remain in place for vessels in the common pool. Pursuant to the regulations at §§ 648.87(b)(2)(xv) and 648.87(c)(2), a sector may request and be exempt from regulations of the NE Multispecies FMP, with few exceptions, through its annual or bi-annual operations plan. On May 1, 2010, operations plans were

implemented for 17 sectors for the 2010 fishing year, including exemptions from certain NE multispecies regulations. The final rule implementing FY 2010 sector operations plans only approved exemptions for those sectors that had originally requested them through their FY 2010 sector operations plans. The sectors that had not requested certain exemptions in their operations plans were required to continue to comply with the regulations otherwise exempted for other sectors, which include effort controls such as required time out of the fishery and gear restrictions.

This action expands the previously approved exemptions for FY 2010 to all sectors that wish to add them, in addition to approving a new exemption for sectors (*i.e.,* the GOM Sink Gillnet Mesh exemption), via an amendment to their current operations plan. This rule relieves several restrictions for the NE multispecies fishery in order to help mitigate the adverse economic impacts resulting from continued efforts to end overfishing and rebuild overfished stocks, and increases the flexibility and economic efficiency of vessel operations through the approval of exemptions for vessels participating in NE multispecies sectors for FY 2010. In general, this rule implements exemptions from several effort control measures that are no longer necessary and, thus, are redundant for sectors because sectors are restricted to an ACE for each groundfish stock, which limits overall fishing mortality. The exemptions allow sector members more operational flexibility, but there is no requirement to use them on any given fishing trip. Therefore, a delayed effectiveness is not required to provide time for sector members to prepare to use their requested exemptions.

NE multispecies sector operations, including exemptions from certain NE multispecies regulations, are approved annually. Thus, the exemptions approved in this rule are only effective for FY 2010 (through April 30, 2011). To date, only 5 months remain in FY 2010. In order to achieve the most economic benefits, this action must be effective as soon as possible to maximize the amount of time sector vessels have to utilize these exemptions. The GOM sink gillnet mesh exemption, which is intended to enhance the ability of sector vessels to target a rebuilt stock, has a season associated with it (January 1, 2011, through April 30, 2011). Delayed implementation of these measures would shorten the participation period for this exemption and reduce the economic benefits sector vessels may derive from this and other exemptions in FY 2010.

Delaying implementation would result in short-term adverse economic impacts to NE multispecies vessels and associated fishing communities since vessels that are participating in a sector in FY 2010 (762 permits, 52 percent of the groundfish fleet) would not be able to take immediate advantage of the flexibility in vessel operations this rule provides. Sector vessels would continue to operate under redundant effort controls for an additional month, and revenues would be expected to be lower. For example, sector vessels would not be able to participate in the GOM sink gillnet mesh exemption that this rule allows until the last three months of FY 2010, reducing opportunity for gillnet vessels to target haddock and benefit from potentially increased haddock revenues. Delaying implementation of these exemptions could incentivize sector vessels to delay fishing trips until the period of greater flexibility, potentially creating safety issues because sector vessels would have less flexibility to time fishing trips to optimal weather conditions. Furthermore, delaying implementation would limit flexibility for sector vessels to time fishing trips to market conditions, and revenues would be expected to be lower.

This final rule is exempt from review under Executive Order (E.O) 12866.

A Final Regulatory Flexibility Analysis (FRFA) has been prepared for this rule as required by § 603 of the Regulatory Flexibility Act (RFA). The FRFA is comprised of the economic impacts identified in the Initial Regulatory Flexibility Analysis (IRFA), the preamble of the proposed rule and this rule, the supplemental EA prepared for this action, and the discussions, including responses to public comments, included in this rule. This FRFA describes the economic impact that the proposed rule, if adopted, would have on small entities. A description of the action, why it is being considered, and the legal basis for this action are contained in the preamble to this final rule and in sections 1.0, 2.0, and 3.0 of the supplemental EA prepared for this action and, thus, are not repeated here.

No issues were raised by public comments in response to the IRFA or with respect to the economic impacts of this action. Accordingly, no changes were made from the proposed rule as the result of any such comments.

Description and Estimate of the Number of Small Entities To Which the Final Rule Would Apply

This action would affect regulated entities engaged in commercial fishing for groundfish that are enrolled in any one of the 17 sectors that are operating in FY 2010. Anyone with a valid limited access Federal permit under the NE Multispecies FMP is eligible to join a sector. The Small Business Administration (SBA) size standard for commercial fishing (NAICS code 114111) is $4 million in sales. Available data indicate that, based on 2005–2007 average conditions, median gross annual sales by commercial fishing vessels were just over $200,000, and no single fishing entity earned more than $2 million annually. Since available data are not adequate to identify affiliated vessels, each operating unit is considered a small entity for purposes of the RFA.

Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Final Rule

This final rule contains no collection-of-information requirement subject to the Paperwork Reduction Act.

Description of Steps the Agency Has Taken To Minimize the Economic Impact on Small Entities Consistent With the Stated Objectives of Applicable Statutes

The EIS for Amendment 16 compares economic impacts of sector measures with non-sector measures, and analyzes costs and benefits of the universal exemptions. The proposed rule proposing approval of the FY 2010 sector operations plans and contracts discussed the economic impacts of the additional exemptions requested by sectors. This final rule and the accompanying supplemental EA discuss the economic impacts of approving the GOM sink gillnet mesh exemption, as well as expanding the exemptions approved for FY 2010 sectors. The exemptions implemented by this final rule would provide additional economic flexibility to vessels already participating in NE multispecies sectors during FY 2010. All exemptions requested by the sectors are intended to provide positive social and economic benefits to sector members and ports.

The GOM sink gillnet mesh exemption is being requested by Northeast Fishery Sectors II and III, V–VIII, and X–XII, the GB Cod Fixed Gear Sector, the Sustainable Harvest Sector, the Port Clyde Community Groundfish Sector, and the Tri-State Sector, which represent 616 permits. The exemption

will allow the use of 6-inch (15.24-cm) mesh gillnets in the GOM RMA from January 1, 2011–April 30, 2011. This exemption would provide participating sector vessels an opportunity to retain more GOM haddock, a healthy stock, and share in the benefits from the stock recovery. To utilize this exemption, it would be necessary for participating sector vessels to purchase 6-inch (15.24-cm) mesh gillnets. However, it would allow a greater catch of haddock, which may increase revenues for gillnet fishermen and the ports where they land their fish, particularly if participating vessels are able to change fishing behavior to selectively target this stock and minimize catch of other allocated target stocks.

Exemption from the Day gillnet 120-day block requirement out of the fishery is being approved for the Northeast Fishery Sectors II, V–VIII, X and XII. Existing regulations require that vessels using gillnet gear remove all gear from the water for 120 days per year. Since the time out from fishing is up to the vessel owner to decide (with some restrictions), many affected vessel owners have purchased more than one vessel such that one may be used while the other is taking its 120-day block out of the groundfish fishery, to provide for sustained fishing income. Acquiring a second vessel adds the expense of outfitting another vessel with gear and maintaining that vessel. The exemption from the 120-day block could allow sector members to realize the cost savings associated with retiring the redundant vessel. Furthermore, this exemption could provide additional flexibility to sector vessels to maximize the utility of other sector-specific and universal exemptions, such as the exemption from the GB Seasonal Closure in May and portions of the GOM Rolling Closure Areas. Several of the FY 2010 sectors, representing 390 permits, are already utilizing this exemption. This final rule extends this flexibility and potential economic benefits to an additional 226 permits.

Northeast Fishery Sectors II and III, and V–XIII, the GB Cod Fixed Gear Sector, and the Port Clyde Community Groundfish Sector, are granted an exemption from the required 20-day spawning block out of the fishery. Exemption from the 20-day spawning block would improve flexibility to match trip planning decisions to existing fishing and market conditions. Although vessel owners currently have the flexibility to schedule their 20-day block according to business needs and may use that opportunity to perform routine or scheduled maintenance, vessel owners may prefer to schedule these activities at other times of the year, or may have unexpected repairs. Removing this requirement may not have a significant impact, but could still provide vessel owners with greater opportunity to make more efficient use of their vessel. This exemption was previously approved for three sectors representing 153 permits. Approval of this exemption for these additional sectors extends the exemption to an additional 563 permits.

Northeast Fishery Sectors II and III, V–VIII, and X–XII, the GB Cod Fixed Gear Sector, the Port Clyde Community Groundfish Sector, and the Tri-State Sector, are granted an exemption from the limit on the number of nets (not to exceed 150 in all RMAs) that may be deployed by Day gillnet vessels. This exemption would provide greater flexibility to deploy fishing gear by participating sector members according to operational and market needs. In addition, approval of this exemption could also maximize the utility of the GOM Sink Gillnet exemption for those sectors approved for both because it would allow them to deploy more nets under the GOM Sink Gillnet exemption. A total of 116 permits participating in FY 2010 sectors are already exempt from this requirement. This action extends this flexibility and potential economic benefits to an additional 500 permits.

The Northeast Fishery Sectors II, V–VIII, X and XII, the GB Cod Fixed Gear Sector, the Sustainable Harvest Sector, the Port Clyde Community Groundfish Sector, and the Tri-State Sector are being granted an exemption from the prohibition on a vessel hauling gear that was set by another vessel. The community fixed gear exemption allows sector vessels in the Day gillnet category to effectively pool gillnet gear that may be hauled or set by sector members. This provision could reduce the total amount of gear that would have to be purchased and maintained by participating sector members resulting in some uncertain level of cost savings, along with a possible reduction in total gear fished. This exemption has already been approved for 120 permits in FY 2010 sectors and is being approved for additional sectors through this action, representing an additional 496 permits.

Northeast Fishery Sectors II and III, V–VIII, and X–XII, the Sustainable Harvest Sector, the Port Clyde Community Groundfish Sector, and the Tri-State Sector are granted an exemption from the limitation on the number of gillnets that may be hauled on GB when fishing under a groundfish/monkfish DAS. Approving this exemption would increase operational flexibility for an additional 522 permits, providing an opportunity for a substantial portion of the fleet to improve vessel profitability.

The Northeast Fishery Sectors II and III, V–VIII, and X–XII, the Sustainable Harvest Sector, the Port Clyde Community Groundfish Sector, the Tri-State Sector, and the Northeast Coastal Communities Sector, representing an additional 540 permits, are granted an exemption from the number of hooks that may be fished. These exemptions would provide vessel owners in these additional sectors with the flexibility to adapt the number of hooks fished to existing fishing and market conditions and, thereby, improve vessel profitability. The exemption from the number of hooks that may be fished has been granted to the GB Cod Hook Sector each year since 2004 and was granted to the GB Cod Fixed Gear Sector for FY 2010. Approval of this exemption for these additional sectors extends the potential economic benefits to more vessels in other sectors.

Northeast Fishery Sectors II–XIII, the GB Cod Fixed Gear Sector, and the Port Clyde Community Groundfish Sector, are granted an exemption from regulations that currently limit leasing of DAS to vessels within specified length and horsepower restrictions. Current restrictions create a system in which a small vessel may lease DAS from virtually any other vessel, but is limited in the number of vessels that it may lease to. The opposite is true for larger vessels. Exemption from these restrictions allows greater flexibility to lease DAS between vessels of different sizes and could expand the market of potential lessees for some vessels. The efficiency gains of this exemption as approved for the Tri-State Sector and the Sustainable Harvest Sector were limited because the exemption would only apply to leases between Tri-State Sector and Sustainable Harvest Sector members, representing 135 permits. This action extends this exemption to an additional 609 permits, which could not only potentially increase efficiency for the additional sectors for which this exemption is approved, but also for members of the Tri-State and Sustainable Harvest Sectors by expanding the pool of potential lessees with this exemption. Since DAS are not required while fishing for groundfish, the economic importance of this exemption would be associated with the need to use NE multispecies DAS when fishing in other fisheries, for example, monkfish.

Economic Impacts of the Alternative to the Proposed Action

Under the No Action alternative, one or more of the sectors' requests for operations plan addenda would be disapproved, which would result in sector vessels operating under the operations plans and exemptions as approved for the start of the 2010 FY in the sector operations plan final rule published April 9, 2010. Under this scenario, sector vessels may experience the efficiency gains and economic benefits of sector participation and the exemptions for which they have already been approved, as described in the IRFA for the proposed rule proposing approval of FY 2010 sector operations and exemptions. However, sector vessels would not be provided the opportunity to benefit from the increase in the operational flexibility that may be gained from all the exemptions available to FY 2010 sectors and revenues would be expected to be lower than under the proposed action. Relative to the proposed action, it is more likely under the No Action alternative that the ports and fishing communities where sectors plan to land their fish would be negatively impacted.

Allowing sectors to propose either entirely new exemptions or variations of previously approved exemptions was considered. However, this alternative was considered unreasonable because these exemptions are discrete measures which, by their nature, do not lend themselves to alternate configurations, and allowing sectors to propose entirely new exemptions or changing already approved exemptions could result in implementation delays that would reduce the utility of this action for sectors in this fishing year (FY 2010). In addition, this action is intended to be a continuing part of a longer action implementing Amendment 16, Framework Adjustment 44 to the NE Multispecies FMP, and the final rule approving FY 2010 sector operations plans, in which other alternative measures have already been considered. The FY 2010 sectors will have an opportunity to propose any new or revised exemptions in their operations plans for FY 2011.

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1966 states that, for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as "small entity compliance guides." The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. As part of this rulemaking process, a letter to sector members that also serves as a small entity compliance guide (the guide) was prepared. Copies of this final rule are available from the Regional Administrator. The guide and this final rule will be available upon request.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: December 20, 2010.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 2010–32340 Filed 12–22–10; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 75, No. 246
Thursday, December 23, 2010

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

NUCLEAR REGULATORY COMMISSION

10 CFR Part 70

[Docket No. PRM–70–9; NRC–2010–0372]

Francis Slakey on Behalf of the American Physical Society; Receipt of Petition for Rulemaking

AGENCY: Nuclear Regulatory Commission.

ACTION: Petition for rulemaking; notice of receipt.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC or Commission) is publishing for public comment a notice of receipt of a petition for rulemaking, dated November 10, 2010, which was filed with the NRC by Francis Slakey on behalf of the American Physical Society (APS). The petition was docketed by the NRC on November 18, 2010, and has been assigned Docket No. PRM–70–9. The petitioner requests that the NRC amend its regulations regarding the domestic licensing of special nuclear material to include proliferation assessments as part of the licensing process.

DATES: Submit comments by March 8, 2011. Comments received after this date will be considered if it is practical to do so, but the NRC is able to assure consideration only for comments received on or before this date.

ADDRESSES: Please include Docket ID NRC–2010–0372 in the subject line of your comments. For instructions on submitting comments and accessing documents related to this action, see "Submitting Comments and Accessing Information" in the **SUPPLEMENTARY INFORMATION** section of this document. You may submit comments by any one of the following methods.

Federal rulemaking Web site: Go to *http://www.regulations.gov* and search for documents filed under Docket ID NRC–2010–0372. Address questions about NRC dockets to Carol Gallagher, telephone: 301–492–3668, e-mail: *Carol.Gallagher@nrc.gov.*

Mail comments to: Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Rulemakings and Adjudications Staff.

E-mail comments to: Rulemaking.Comments@nrc.gov. If you do not receive a reply e-mail confirming that we have received your comments, contact us directly at 301–415–1966.

Hand deliver comments to: 11555 Rockville Pike, Rockville, Maryland 20852 between 7:30 a.m. and 4:15 p.m. during Federal workdays (telephone: 301–415–1966).

Fax comments to: Secretary, U.S. Nuclear Regulatory Commission at 301–415–1101.

FOR FURTHER INFORMATION CONTACT: Cindy Bladey, Chief, Rules, Announcements, and Directives Branch, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: 301–492–3667.

SUPPLEMENTARY INFORMATION:

Submitting Comments and Accessing Information

Comments submitted in writing or in electronic form will be posted on the NRC Web site and on the Federal rulemaking Web site, *http://www.regulations.gov.* Because your comments will not be edited to remove any identifying or contact information, the NRC cautions you against including any information in your submission that you do not want to be publicly disclosed. The NRC requests that any party soliciting or aggregating comments received from other persons for submission to the NRC inform those persons that the NRC will not edit their comments to remove any identifying or contact information, and therefore, they should not include any information in their comments that they do not want publicly disclosed.

You can access publicly available documents related to this document, including the petition for rulemaking, using the following methods:

NRC's Public Document Room (PDR): The public may examine and have copied for a fee publicly available documents at the NRC's PDR, Room O–1F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

NRC's Agencywide Documents Access and Management System (ADAMS): Publicly available documents created or received at the NRC are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html.* From this page, the public can gain entry into ADAMS, which provides text and image files of NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC's PDR reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *PDR.Resource@nrc.gov.*

Federal rulemaking Web site: Public comments and supporting materials related to this action can be found at *http://www.regulations.gov* by searching on Docket ID NRC–2010–0372.

Background

Francis Slakey, on behalf of APS (petitioner), submitted a petition for rulemaking dated November 10, 2010. The APS is an organization of research physicists with members in academia, national laboratories, and industry. The petitioner requests that the NRC revise its regulations regarding the domestic licensing of special nuclear material to include proliferation assessments as part of the licensing process. The NRC has determined that the petition meets the threshold sufficiency requirements for a petition for rulemaking under title 10 of the Code of Federal Regulations (10 CFR), section 2.802, and the petition has been docketed as PRM–70–9. The NRC is requesting public comment on the petition for rulemaking.

Discussion of the Petition

The petitioner stated that on February 18, 2010, the APS Panel on Public Affairs (POPA) released a report entitled "Technical Steps to Support Nuclear Arsenal Downsizing." In the report, APS/POPA noted that over the next few years, the NRC would be reviewing license applications for new technologies, and that these new technologies could pose proliferation risks. Specifically, the report concluded that some of the enrichment and reprocessing (ENR) technologies could pose unique proliferation risks, and that these risks can best be addressed by including a Nuclear Proliferation Assessment (NPA) in the ENR licensing process. The petitioner believes that the current licensing process may be insufficient to cover all of the issues that would arise in an NPA for two reasons:

(1) By having an NPA emerge as a "net effect" of the current licensing process rather than as an explicit request, non-proliferation is not given an adequate level of attention. The petitioner states that, under the current process, proliferation issues are spread across the entire license application process. As a result, the current process may overlook some properties of the new technology which may merit attention in a proliferation context.

(2) Key questions that indicate the degree of proliferation risk of an ENR technology may not be addressed under the NRC's "net effect" approach. The petitioner believes that a proliferation assessment would be incomplete without a consideration of these key questions, including, but not limited to:

- Could the design of the technology be altered easily to allow for diversion of nuclear material?
- Could the facility be constructed and operated in a manner that is undetectable?
- Are there unique components of the technology whose acquisition would indicate the construction of such a facility and could be easily tracked?

The petitioner proposes that the NRC amend its regulations at subpart D of 10 CFR part 70, "Domestic Licensing of Special Nuclear Material," to include a requirement for an NPA as follows:

§ 70.22 Contents of applications.

(o) Nuclear Proliferation Assessment. Each applicant for the license of an enrichment or reprocessing facility shall include an assessment of the proliferation risks that construction and operation of the proposed facility might pose.

The petitioner believes that including a specific requirement for an NPA in the NRC regulations is consistent with the NRC requirement to evaluate whether the issuance of a license "would be inimical to the common defense and security or to the health and safety of the public."

Dated at Rockville, Maryland, this 16th day of December, 2010.

For the Nuclear Regulatory Commission,

Annette Vietti-Cook,

Secretary of the Commission.

[FR Doc. 2010–32242 Filed 12–22–10; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF ENERGY

10 CFR Part 430

Request for Exclusion of 120 Volt, 100 Watt R20 Short Incandescent Reflector Lamps

AGENCY: Office of the General Counsel, Department of Energy (DOE).

ACTION: Petition for rulemaking; request for comment.

SUMMARY: On November 29, 2010, the Department of Energy received a petition for rulemaking from the National Electrical Manufacturers Association (NEMA). The petition, requests the initiation of a rulemaking regarding a certain incandescent reflector lamp. The petition seeks to exclude from the coverage of energy conservation standards for incandescent reflector lamps a 120 volt, 100 watt R20 short lamp, which is marketed for use in hot tub spas. Public comment is requested on whether DOE should grant the petition and proceed with a rulemaking procedure on this matter.

DATES: Comments must be postmarked no later than January 24, 2011.

ADDRESSES: Any comments submitted must reference "Petition for Rulemaking: Exclusion of 120 Volt, 100 Watt R20 Short Incandescent Reflector Lamps." Comments may be submitted using any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail: ShortLampsPetition-2010-PET-0047@ee.doe.gov.* Include "Petition for Rulemaking" in the subject line of the message.
- *Postal Mail:* John Cymbalsky, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Program, EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121. Please submit one signed original paper copy.
- *Hand Delivery/Courier:* John Cymbalsky, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Program, EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121. Please submit one signed original paper copy.

FOR FURTHER INFORMATION CONTACT: John Cymbalsky U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Program, EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121, (202) 287–1692, e-mail: *john.cymbalsky@ee.doe.gov.*

SUPPLEMENTARY INFORMATION: The Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.,* provides among other things, that "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." (5 U.S.C. 553(e)). Pursuant to this provision of the APA, NEMA petitioned the Department of Energy for the issuance of a new rule, as set forth below. In publishing this petition for public comment, the Department of Energy is seeking views on whether it should grant the petition and undertake a rulemaking to consider the proposal contained in this petition. By seeking comment on whether to grant this petition, the Department of Energy takes no position at this time regarding the merits of the suggested rulemaking.

The proposed rulemaking sought by NEMA would exclude 120 volt, 100 watt R20 short lamps from coverage of energy conservation standards for incandescent reflector lamps. The petition requests the Department of Energy stay enforcement of its energy conservation standard as applied to this type of lamp pending the outcome of this petition. The Department of Energy seeks public comment on whether DOE should grant the petition and proceed with a rulemaking procedure on this issue.

Issued in Washington, DC, on December 17, 2010.

Scott Blake Harris,

General Counsel.

Set forth below is the full text of the National Electrical Manufacturers Association petition:

BEFORE THE U.S. DEPARTMENT OF ENERGY

November 29, 2010

Petition for Rulemaking

U.S. Department of Energy Attention: Hon. Catherine R. Zoi Acting Under Secretary of Energy 1000 Independence Avenue, SW Washington, D.C. 20585

RE: Petition of the National Electrical Manufacturers Association To Undertake Rulemaking To Exclude 120 Volt, 100 Watt R20 Short Lamps from Coverage of Energy Conservation Standards for Incandescent *Reflector Lamps. Request for Stay of Enforcement Pending Rulemaking*

Dear Under Secretary Zoi:

The National Electrical Manufacturers Association (NEMA), on behalf of its members who distribute in commerce certain incandescent reflector lamps, petitions the Department to commence a rulemaking pursuant to the Administrative Procedure Act to (1) determine that a certain type of incandescent reflector lamp—a 120 volt, 100 watt R20 short, which is marketed exclusively for use in hot tub spas sold into specific jurisdictions that provide pools and

spas with 120 volt electricity—be excluded from the coverage of energy conservation standards for incandescent reflector lamps prescribed by or promulgated under section 325(i) of the Energy Policy and Conservation Act (EPCA), 42 U.S.C. § 6295(i), as amended, and (2) amend the Department's current energy conservation standard at 10 CFR § 430.32(n)(6)(ii) and 10 CFR § 430.2 (definitions).

As grounds for this petition, NEMA believes that the rulemaking will conclude: (a) that energy conservation standards for this unique type of lamp will not result in significant energy savings, and (b) that this type of lamp is designed for special applications or has special characteristics not available in reasonably substitutable lamp types. 42 U.S.C. § 6291(30)(E). As further grounds for this rulemaking, NEMA believes that the rulemaking will show that the application of energy conservation standards for incandescent reflector lamps to this type of lamp—which has unique size, performance requirements, and capacity for use in certain types of hot tub spas that require smaller dimensions—would lead to their unavailability in the United States. Cf., 42 U.S.C. § 6295(o)(4).

Separately, NEMA requests the Department stay enforcement of its energy conservation standard as applied to this type of lamp pending the outcome of this rulemaking, so that sales of this type of lamp may be resumed. For the reasons explained below, the two manufacturers who previously distributed the 100 watt R20 short lamp in commerce recently realized that they harbored a mistaken belief that this type of underwater service lamp was excluded from coverage under EPCA. Both companies immediately withdrew the product from the market when they realized their mistake. This decision has created significant hardships for hot tub spa manufacturers that used this unique lamp type, as there is no known substitute for it on the market. This also means that owners of hot tub spas that use this unique lamp type will not have replacement lamps available for their spas when their lamps reach end of life.

Definition of the Lamp Type for Which a Rule Is Sought

The lamp type is a 100 watt R20 short incandescent reflector lamp. The term "short" refers to the fact that the maximum overall length (MOL) of the lamp is 3⅝", in contrast to the normal overall length of 4⅛". By this petition, NEMA proposes that 10 CFR § 430.2 be amended as follows to include a new definition of "R20 short"after the definition of "R20 incandescent reflector lamp":

§ 430.2 DEFINITIONS.

For purposes of this part, words shall be defined as provided for in section 321 of the Act and as follows—

* * * * *

R20 incandescent reflector lamp means a reflector lamp that has a face diameter of approximately 2.5 inches, as shown in figure 1(R) on page 7 of ANSI C79.1–1994 (incorporated by reference; see § 430.3).

R20 short means an R20 incandescent reflector lamp that has a maximum overall length of 3⅝ inches.

Nature of the Exclusion for Which a Rule Is Sought

10 CFR § 430.32(n)(6)(ii) currently excludes from the energy conservation standards applicable to the covered product "incandescent reflector lamp" three types of incandescent reflector lamps. By this petition, NEMA proposes that 10 CFR § 430.32(n)(6)(ii) be amended to add a new paragraph (D) to this section as shown below.

§ 430.32 ENERGY AND WATER CONSERVATION STANDARDS AND THEIR EFFECTIVE DATES.

The energy and water (in the case of faucets, showerheads, water closets, and urinals) conservation standards for the covered product classes are:

* * * * *

(n) General service fluorescent lamps and incandescent reflector lamps.

(6)(i)(A) Subject to the exclusions in paragraph (n)(6)(ii) of this section, the standards specified in this section shall apply to ER incandescent reflector lamps, BR incandescent reflector lamps, BPAR incandescent reflector lamps, and similar bulb shapes on and after January 1, 2008.

(B) Subject to the exclusions in paragraph (n)(6)(ii) of this section, the standards specified in this section shall apply to incandescent reflector lamps with a diameter of more than 2.25 inches, but not more than 2.75 inches, on and after June 15, 2008.

(ii) The standards specified in this section shall not apply to the following types of incandescent reflector lamps:

(A) Lamps rated at 50 watts or less that are ER30, BR30, BR40, or ER40 lamps;

(B) Lamps rated at 65 watts that are BR30, BR40, or ER40 lamps;

(C) R20 incandescent reflector lamps rated 45 watts or less*; or*

(D) R20 short incandescent reflector lamps rated at 100 watts that are designated and marketed specifically for pool and spa applications with—

(I) the designation appearing on the lamp packaging; and

(II) *marketing materials that identify the lamp as being for pool and spa applications.*[1]

The lamp at issue comes in two different voltage configurations: 12V and 120V. Some state and local jurisdictions allow pools and spas to be supplied with 120V electricity; the remainder require pools and spas to be supplied with much lower voltage electricity[2] via a distribution transformer that steps down voltage to the pool lights where the 12 volt lamp is used. NEMA has not been able to find a list of which jurisdictions have adopted one requirement over the other, but the so-called "line voltage" (120V) jurisdictions appear to include Florida, and a number of jurisdictions primarily located in the Midwest. The statutory definition of "incandescent reflector lamp" only includes such lamps that are within the range of 115 volts and 130 volts, see 10 CFR § 430.2,[3] which leaves the 12 volt version of the 100 watt R20 short lamp unregulated under EPCA.

Why the Exclusion Is Needed

Hot tub spa manufacturers design the dimensions of some hot tubs so that the underwater lighting can only accommodate a luminaire and lamp with a maximum overall length of 3 and ⅝ inches. They also seek a luminaire/lamp combination that is designed to light the spa with a certain lumen output providing diffuse (not directed) illumination that requires a wide beam spread. The 100 watt R20 short is the only lamp that meets the spa manufacturers' specifications and is used in these particular spas. These 100 watt lamps have a heat shield inside the base to protect against high heat damaging the cement that joins the base to the glass envelope, and the filament has been specially engineered to provide the desired beam spread required by spa manufacturers. Given the underwater application in waters in excess of 100 degrees F, an electronic lamp product is not an alternative.

Current energy conservation standards for a 100 watt incandescent reflector lamp require that the lamp have 14 lumens per watt. 42 U.S.C. § 6295(i)(1)(B). The 100 watt R20 short has lumens of 900 to 1000, which translates to a maximum lumens per watt of 9 or 10. It is not possible to increase the lumens in this lamp without increasing the maximum overall length of the lamp because a higher lumen filament would operate at a higher temperature, which could potentially cause the lamp to burst and/or damage the luminaire and/or hot tub. As this lamp is used in an underwater fixture, the implications surrounding potential safety hazards would prohibit the use of higher lumen lamp in this application. Additionally, a higher lumen filament would result in severely shortened lamp life that would be unacceptable in spa applications.

Until September 2010, there were only two known manufacturers of the 120 volt 100 watt R20 short lamp supplying in the United States to spa manufacturers whose spa designs required this lamp. They had been supplying this lamp on the mistaken belief that EPCA had excluded pool and underwater service lamps from coverage. They relied on the Federal Trade Commission's 1994 lamp labeling rule, which treated an incandescent reflector lamp as a general service incandescent lamp, see 16 CFR § 305.2(16), and applied EPCA's exclusions from the definition of general service incandescent lamp[4] to incandescent

[1] This particular language relating to designation on lamp packaging and marketing materials appears in Section 321 of EPCA with respect to the definitions of "rough service lamp," "shatter resistant lamp," and "vibration service lamp," all of which are currently excluded from energy conservation standards applicable to general service incandescent lamps.

[2] Sometimes this requirement is expressed as less than a maximum voltage (e.g. < 15V).

[3] "Incandescent reflector lamp (commonly referred to as a reflector lamp) means any lamp in which light is produced by a filament heated to incandescence by an electric current, which: Is not colored or designed for rough or vibration service applications that contains an inner reflective coating on the outer bulb to direct the light; has an R, PAR, ER, BR, BPAR, or similar bulb shapes with an E26 medium screw base; has a rated voltage or voltage range that lies at least partially in the range of 115 and 130 volts; has a diameter that exceeds 2.25 inches; and has a rated wattage that is 40 watts or higher."

[4] EPAct 1992, amending EPCA, originally excluded "swimming pool" and "other underwater

reflector lamps. When they discovered that neither EPCA nor the DOE rules treated this lamp similar to the way the FTC treated them, they promptly withdrew the product from the market. This leaves the hot tub manufacturers without a supply of these lamps and leaves spa owners purchasing in the replacement market without a supply of these lamps. The product is sold in the replacement market to spa manufacturers, pool and spa product distributors, maintenance/repair and janitorial distributors.

Grounds for the Petition and Rulemaking

The application of energy conservation standards to the 120V, 100 watt R20 short lamp will not result in significant energy savings.

The two known manufacturers of the 120 volt 100 watt, R20 short have supplied their 2009 shipment data to NEMA to evaluate the percentage of overall incandescent reflector lamps accounted for by this particular lamp. This information is set forth in the confidential Annex to this petition, and it reveals that these lamps are an extremely small portion of incandescent reflector lamp shipments. By NEMA's analysis, sales of this lamp represent significantly *less than 0.10%* of 2009 shipments of covered incandescent reflector lamps. *See attached Confidential Annex.*

Because NEMA's antitrust compliance disclosure rules prohibit the disclosure of any information containing the shipment or sales data of only one or two reporting companies and NEMA is precluded by its policies governing the handling of confidential information from disclosing individual company data to anyone, NEMA can only supply information on shipments of the 120 volt, 100 watt, R20 short lamp to the Department on a confidential basis. NEMA and the two manufacturers claim an exemption from disclosure under the Freedom of Information Act pursuant to 5 U.S.C. § 552(b)(4), and states (1) that this information is held in confidence by NEMA and the two manufacturers, (2) the information is of a type customarily held in confidence by NEMA and the two manufacturers, (3) the information is transmitted to the Department in confidence, (4) the information is not available in public sources, (5) the disclosure of this information is likely to impair the Department's ability to obtain this kind of information in the future, and (6) disclosure is likely to cause competitive harm to the two manufacturers. 10 CFR § 1004.11(f).

In the 2009 rulemaking for incandescent reflector lamps, DOE considered a proposal to extend the upper bound of the covered product to 505 watts (from 205 watts) and stated, "DOE analyzed commercially-available product in manufacturer catalogs to assess the prevalence of products with wattages greater than 205W. Based on this research, DOE believes that IRL with rated wattages greater than 205W comprise a very small portion of the market and, therefore, do not represent substantial potential energy savings." 74 Fed.Reg. at 34092 (July 14, 2009). NEMA believes that the portion of the market represented by the 120V, 100 watt, R20 short is smaller than the portion of the market of incandescent reflector lamps represented by lamps above 205 watts, and, because of their lower wattage, less energy is consumed. Thus, a similar conclusion appears to be warranted in the case of these unique spa lamps.

This type of lamp is designed for special applications or has special characteristics not available in reasonably substitutable lamp types.

There are presently no substitute products on the market for this application. As noted above, the product is used for a unique specification in hot tub spas where space limitations in the design of the spa will not permit a luminaire sized for a lamp with a normal 4⅛″ MOL, and instead requires a "short" lamp with an MOL of 3⅝″. Second, this R20 short lamp was specifically designed to meet the underwater illumination requirements of hot tub spa manufacturers, including beam spread and lumens.

Consumers are not likely to substitute this lamp for other types of residential covered lamps subject to energy conservation standards.

The price of the replacement 120V, 100 watt, R20 short lamp at retail ranges from $10–$20 per lamp. It is relatively expensive compared to other types of incandescent reflector lamps used in residential applications—more than twice the price. Furthermore, since the product is marked on the packaging for pool and spa applications, this deters consumers from considering the lamp for general lighting applications in the home.

These lamps are sold through different retail channels than other residential covered lamps, and generally not found at stores where consumers are shopping for general residential lighting applications. Consumers will have to incur greater search costs to find this type of lamp, and for those who do find it, they will see that it is for pool and spa applications and that it costs substantially more.

If not excluded from coverage under the Energy Policy and Conservation Act, it will result in the unavailability of the lamp in the United States.

To the best of NEMA's knowledge and its manufacturers, the decision of the two manufacturers of this 120 volt lamp to withdraw the product from the market has resulted in its unavailability.

If there is additional information that NEMA can provide in support of this petition, please contact the undersigned at *Cla_Silcox@nema.org* or by telephone at (703) 841–3280.

Very truly yours,

Clark R. Silcox
General Counsel

cc: Scott Blake Harris, Esq.
Daniel Cohen, Esq.
Laura Barhydt, Esq.
Kathleen Hogan
Michael McCabe
Roland Risser
Kyle Pitsor, NEMA

CONFIDENTIAL ANNEX [5]

Total Reported 2009 shipments = _____ units

In the Technical Support Document (TSD) that accompanied the DOE's Final Rule on incandescent reflector lamps, the DOE estimated 2005 shipments of "covered" incandescent reflector lamp shipments for the US market at 181 million units. TSD, Chapter 10 at 10–34. While NEMA does not regularly collect shipment data for incandescent reflector lamps that matches this classification, NEMA shipment data for the year 2009 indicates that annual incandescent reflector lamp shipments have fallen significantly since 2005. Still, the NEMA data leads NEMA to believe that the 2009 shipments of "covered" incandescent reflector lamps remained above 100 million units.

Based on a range from a maximum 181 million units to a minimum of 100 million units of covered incandescent reflector lamp product, the 2009 shipments of the 120 volt, 100 watt R20 short lamp represent __ % to __ % of covered incandescent reflector lamps.

[FR Doc. 2010–32259 Filed 12–22–10; 8:45 am]

BILLING CODE 6450–01–P

service" lamps from coverage for "general service incandescent lamps." The FTC's 1994 lamp labeling rule exclusions mirrored the statutory list.

"(D) The term 'general service incandescent lamp' means any incandescent lamp (other than a miniature or photographic lamp) that has an E26 medium screw base, a rated voltage range at least partially within 115 and 130 volts, and which can be used to satisfy the majority of lighting applications, but does not include any lamps specifically designed for—

* * *

"(xiii) swimming pool or other underwater service; * * *

EISA 2007 eliminated this particular exclusion for general service incandescent lamps.

[5] The underscored information provided in blank on this page is considered confidential commercial information, and exempt from disclosure pursuant to 5 U.S.C. § 552(b)(4). NEMA's antitrust compliance disclosure rules prohibit the disclosure of any information containing the shipment or sales data of only one or two reporting companies and NEMA is precluded by its policies governing the handling of confidential information from disclosing individual company data to anyone. Accordingly, NEMA can only supply aggregated information on shipments of the 120 volt, 100 watt, R20 short lamp to the Department on a confidential basis. NEMA and the two manufacturers claim an exemption from disclosure under the Freedom of Information Act pursuant to 5 U.S.C. § 552(b)(4), and state (1) that this information is held in confidence by NEMA and the two manufacturers, (2) the information is of a type customarily held in confidence by NEMA and the two manufacturers, (3) the information is transmitted to the Department in confidence, (4) the information is not available in public sources, (5) the disclosure of this information is likely to impair the Department's ability to obtain this kind of information in the future, and (6) disclosure is likely to cause competitive harm to the two manufacturers. 10 C.F.R. § 1004.11(f).

DEPARTMENT OF ENERGY

10 CFR Part 850

[Docket No. HS–RM–10–CBDPP]

RIN 1992–AA39

Chronic Beryllium Disease Prevention Program

AGENCY: Office of Health, Safety and Security, Department of Energy.

ACTION: Request for information.

SUMMARY: The Department of Energy (DOE or the Department) requests information and comments on issues related to its current chronic beryllium disease prevention program. The Department solicits comment and information on the permissible exposure level, establishing surface action levels, the use of warning labels to release items that are free of removable surface levels of beryllium to other DOE facilities for non-beryllium use or to general members of the public, medical restrictions for beryllium workers, and other pertinent subjects. The information received in response to this request will assist DOE in determining the appropriate course of action regarding its chronic beryllium disease prevention program.

DATES: All comments on the issues presented in this document must be received by the Department by February 22, 2011.

ADDRESSES: Comments in response to this document may be submitted by hardcopy or electronically through e-mail. Hardcopies (2 copies) sent by regular mailing should be addressed to: Jacqueline D. Rogers, Office of Worker Safety and Health Policy, Office of Health, Safety and Security, U.S. Department of Energy, Docket No. HS–RM–10–CBDPP, 1000 Independence Avenue, SW., Washington, DC 20585.

Electronic submissions may be sent to *jackie.rogers@hq.doe.gov*. If you have additional information, such as studies or journal articles, and cannot attach them to your electronic submission, please send 2 copies to the address above. The additional material must clearly identify your electronic comments by name, date, subject, and Docket No. HS–RM–10–CBDPP.

FOR FURTHER INFORMATION CONTACT: Jacqueline D. Rogers, U.S. Department of Energy, Office of Health, Safety and Security, Office of Worker Safety and Health Policy, 1000 Independence Avenue, SW., Washington, DC 20585, 202–586–4714, or *jackie.rogers@hq.doe.gov*.

Electronic copies of this **Federal Register** notice, as well as other relevant DOE documents concerning this issue, will be available on a Web page at: *http://www.hss.energy.gov/HealthSafety/WSHP/BE/*.

SUPPLEMENTARY INFORMATION:

I. Background

DOE has a long history of beryllium use because of the element's broad application to many nuclear operations and processes. Beryllium metal and ceramics are used in nuclear weapons as nuclear reactor moderators or reflectors and as nuclear reactor fuel element cladding. At DOE, beryllium operations have historically included foundry (melting and molding), grinding, and machine tooling of parts.

Inhalation of beryllium particles may cause chronic beryllium disease (CBD) and beryllium sensitization. CBD is a chronic, often debilitating, and sometimes fatal lung condition. Beryllium sensitization is a condition in which a person's immune system becomes highly responsive (allergic) to the presence of beryllium in the body. There has long been scientific consensus that exposure to airborne beryllium is the only cause of CBD.

On December 3, 1998, DOE published a notice of proposed rulemaking (NOPR) to establish a Chronic Beryllium Disease Prevention Program (CBDPP) (63 FR 66940). After considering the comments received, DOE published its final rule establishing CBDPP on December 8, 1999 (64 FR 68854). At that time, DOE sought to reduce the number of workers exposed to beryllium in the course of their work at DOE facilities managed by DOE or its contractors; to minimize the levels of, and potential for, exposure to beryllium; and to establish medical surveillance requirements to ensure early detection of the disease. DOE now has nearly 10 years of job, exposure, and health data, as well as experience implementing the rule, since CBDPP was fully implemented in January 2002. In addition, new research related to CBD has been published in the years since 1999.

Currently, the Department is considering establishing new requirements in several sections of the CBDPP rule (10 CFR part 850). DOE is gathering data, views, and other relevant information to develop a revised standard for CBDPP at its facilities. The Department urges those individuals interested in this issue to provide responses to the questions provided in this document.

II. Questions for Comment

DOE would like to have more data and information to decide whether its current CBDPP can be improved, and if so, how it can be improved. When answering specific numbered questions below, key your response to the number of the question and, if possible, include the mission and cost impacts implied by the question and by your answer.

1. DOE currently defers to the Occupational Safety and Health Administration (OSHA) for establishing the permissible exposure limits (PEL) and uses an action level as the administrative level to assure that controls are implemented to prevent exposures from exceeding the permissible exposure limits. Should the Department continue to use the OSHA PEL? Please explain your answer and provide evidence to support your answer.

2. Should the Department use the 2010 ACGIH threshold limit value (TLV) of 0.05 $\mu g/m^3$ (8-hour time-weighted average of 0.05 microgram of beryllium, in inhalable particulate matter, per cubic meter of air), for its allowable exposure limit? Please explain your answer and provide evidence to support your answer.

3. Should an airborne action level that is different from the 2010 ACGIH TLV for beryllium (8-hour time-weighted average of 0.05 microgram of beryllium, in inhalable particulate matter, per cubic meter of air) be established? If so, what should be the level? Please explain each of your answers and provide evidence to support your answers.

4. In the past DOE encouraged, but did not require, the use of wet wipes rather than dry wipes for surface monitoring. DOE's experience with wipe testing leads the Department to consider requiring the use of wet wipes, unless the employer demonstrates that using wet wipes may cause an undesirable alteration of the surface, in order to achieve greater comparability of results across the DOE complex and in response to studies demonstrating that wet wipes capture more of the surface contamination than do dry wipes. Should the Department require the use of wet wipes? Please explain your answer and provide evidence to support your answer.

5. Since the use of wipe sampling is not a common occupational safety and health requirement, how do current wipe sampling protocols aid exposure assessments and the protection of beryllium workers? How reliable and accurate are current sampling and analytical methods for beryllium wipe samples? Please explain your answers and provide evidence to support your answers.

6. What is the best method for sampling and analyzing inhalable beryllium? Please explain your answers

and provide evidence to support your answers.

7. How should total fraction exposure data be compared to inhalable fraction exposure measurements? Please explain your answer and provide evidence to support your answer.

8. Should surface area action levels be established, or should DOE consider controlling the health risk of surface levels by establishing a low airborne action level that precludes beryllium settling out on surfaces, and administrative controls that prevent the buildup of beryllium on surfaces? If surface area action levels are established, what should be the DOE surface area action levels? If a low airborne action level should be established in lieu of the surface area action level, what should that airborne action level be? What, if any, additional administrative controls to prevent the buildup on surfaces should be established? Please explain each of your answers and provide evidence to support your answers.

9. Should warning labels be required for the transfer, to either another DOE entity or to an entity to whom this rule does not apply, of items with surface areas that are free of removable surface levels of beryllium but which may contain surface contamination that is inaccessible or has been sealed with hard-to-remove substances, *e.g.,* paint? Please explain your answer and provide evidence to support your answer.

10. Should the Department establish both surface level and aggressive air sampling criteria (modeled after the U.S. Environmental Protection Agency's aggressive air sampling criteria to clear an area after asbestos abatement) for releasing areas in a facility, or should the Department consider establishing only the aggressive air sampling criteria? Please explain your answers and provide evidence to support your answers.

11. Currently, after the site occupational medicine director has determined that a beryllium worker should be medically removed from exposure to beryllium, the worker must consent to the removal. Should the Department continue to require the worker's consent for medical removal, or require mandatory medical removal? Please explain your answers.

Issued in Washington, DC, on December 20, 2010.

Glenn S. Podonsky,

Chief Health, Safety and Security Officer, Office of Health, Safety and Security.

[FR Doc. 2010–32258 Filed 12–22–10; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. NM438 Special Conditions No. 25–10–03–SC]

Special Conditions: Gulfstream Model GVI Airplane; High Incidence Protection

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed special conditions.

SUMMARY: This action proposes special conditions for the Gulfstream GVI airplane. This airplane will have novel or unusual design features when compared to the state of technology envisioned in the airworthiness standards for transport category airplanes associated with the use of high incidence protection. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for these design features. These proposed special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: We must receive your comments by February 7, 2011.

ADDRESSES: You must mail two copies of your comments to: Federal Aviation Administration, Transport Airplane Directorate, *Attn:* Rules Docket (ANM–113), Docket No. NM438, 1601 Lind Avenue, SW., Renton, Washington 98057–3356. You may deliver two copies to the Transport Airplane Directorate at the above address. You must mark your comments: Docket No. NM438. You can inspect comments in the Rules Docket weekdays, except Federal holidays, between 7:30 a.m. and 4 p.m.

FOR FURTHER INFORMATION CONTACT: Joe Jacobsen, FAA, Airplane & Flightcrew Interface Branch, ANM–111, Transport Standards Staff, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue, SW., Renton, Washington, 98057–3356; telephone (425) 227–2011; facsimile (425) 227–1320.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite interested people to take part in this rulemaking by sending written comments, data, or views. The most helpful comments reference a specific portion of the special conditions, explain the reason for any recommended change, and include supporting data. We ask that you send us two copies of written comments.

We will file in the docket all comments we receive, as well as a report summarizing each substantive public contact with FAA personnel concerning these special conditions. You can inspect the docket before and after the comment closing date. If you wish to review the docket in person, go to the address in the **ADDRESSES** section of this preamble between 7:30 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

We will consider all comments we receive on or before the closing date for comments. We will consider comments filed late if it is possible to do so without incurring expense or delay. We may change these special conditions based on the comments we receive. If you want us to acknowledge receipt of your comments on this proposal, include with your comments a self-addressed, stamped postcard on which you have written the docket number. We will stamp the date on the postcard and mail it back to you.

Background

On March 29, 2005, Gulfstream Aerospace Corporation (hereafter referred to as "Gulfstream") applied for an FAA type certificate for its new Gulfstream Model GVI passenger airplane. Gulfstream later applied for, and was granted, an extension of time for the type certificate, which changed the effective application date to September 28, 2006. The Gulfstream Model GVI airplane will be an all-new, two-engine jet transport airplane with an executive cabin interior. The maximum takeoff weight will be 99,600 pounds, with a maximum passenger count of 19 passengers.

Type Certification Basis

Under provisions of Title 14, Code of Federal Regulations (14 CFR) 21.17, Gulfstream must show that the Gulfstream Model GVI airplane (hereafter referred to as "the GVI") meets the applicable provisions of 14 CFR part 25, as amended by Amendments 25–1 through 25–119, 25–122, and 25–124. If the Administrator finds that the applicable airworthiness regulations (*i.e.,* 14 CFR part 25) do not contain adequate or appropriate safety standards for the GVI because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16.

In addition to complying with the applicable airworthiness regulations and special conditions, the GVI must

comply with the fuel vent and exhaust emission requirements of 14 CFR part 34 and the noise certification requirements of 14 CFR part 36. The FAA must also issue a finding of regulatory adequacy pursuant to section 611 of Public Law 92–574, the "Noise Control Act of 1972."

The FAA issues special conditions, as defined in 14 CFR 11.19, in accordance with § 11.38, and they become part of the type certification basis under § 21.17(a)(2).

Special conditions are initially applicable to the model for which they are issued. Should the type certificate for that model be amended later to include any other model that incorporates the same novel or unusual design features, the special conditions would also apply to the other model under provisions of § 21.101.

Novel or Unusual Design Features

The GVI is equipped with a novel or unusual design feature: A high incidence protection system that replaces the stall warning system during normal operating conditions, prohibits the airplane from stalling, limits the angle of attack at which the airplane can be flown during normal low speed operation, and cannot be overridden by the flight crew. The system's application of this angle of attack limit impacts the stall speed determination, the stall characteristics, the stall warning demonstration, and the longitudinal airplane handling characteristics. The current regulations, including §§ 25.103, 25.145, 25.201, 25.203, 25.207 and 25.1323, do not address this type of protection feature.

Discussion of Proposed Special Conditions

Special conditions are proposed to address this novel or unusual design feature of the GVI. These special conditions, which include airplane performance requirements, will establish a level of safety equivalent to the current regulations for reference stall speeds, stall warning, stall characteristics, and miscellaneous other minimum reference speeds.

Applicability

As discussed above, these proposed special conditions are applicable to the high incidence protection system on the GVI. Should Gulfstream apply at a later date for a change to the type certificate to include another model incorporating the same novel or unusual design features, these proposed special conditions would apply to that model as well.

Conclusion

This action affects only certain novel or unusual design features of the GVI. It is not a rule of general applicability.

List of Subjects in 14 CFR Part 25

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701, 44702, 44704.

The Proposed Special Conditions

Accordingly, the Federal Aviation Administration (FAA) proposes the following special conditions as part of the type certification basis for the GVI airplanes.

1. Definitions. For terminology that does not appear in the regulations, the following definitions apply to these proposed special conditions:

(a) *Electronic Flight Control System (EFCS)*—The electronic and software command and control elements of the flight control system.

(b) *High Incidence Protection Function*—An airplane level function that automatically limits the maximum angle of attack that can be attained to a value below that at which an aerodynamic stall would occur.

(c) *Alpha-Limit*—The maximum angle of attack at which the airplane stabilizes with the high incidence protection function operating and the longitudinal control held on its aft stop.

(d) *Vmin*—The minimum stabilized flight speed in calibrated airspeed obtained when the airplane is decelerated at an entry rate not exceeding 1 knot/sec until the longitudinal pilot control is on the aft stop with the high incidence protection function operating.

(e) *Vmin1g*—Vmin corrected to 1g conditions. The minimum calibrated airspeed at which the airplane can develop a lift force normal to the flight path and equal to its weight when at an angle of attack not greater than that determined for Vmin.

2. Capability and Reliability of the High Incidence Protection System—In lieu of §§ 25.103, 25.145, 25.201, 25.203, 25.207 and 25.1323 the following special conditions are proposed for capability and reliability requirements:

(a) It must not be possible during pilot-induced maneuvers to encounter a stall, and handling characteristics must be acceptable as required by paragraphs 5 and 6 of this proposed special condition.

(b) The airplane must be protected against stalling due to the effects of environmental conditions such as windshear and gusts at low speeds as required by paragraph 7 of this proposed special condition.

(c) The ability of the high incidence protection function to accommodate any reduction in stalling angle of attack resulting from flight in the atmospheric icing conditions of 14 CFR part 25, appendix C, must be verified.

(d) The reliability of the high incidence protection function and the effects of failures must be acceptable in accordance with § 25.1309.

(e) The high incidence protection function must not impede maneuvering for pitch angles up to the maximum required for normal maneuvering including an all-engines operating takeoff plus a suitable margin to allow for satisfactory speed control.

3. Minimum Steady Flight Speed and Reference Stall Speed—In lieu of the requirements of § 25.103, the following special condition is proposed:

(a) *Vmin*—The minimum steady flight speed, for the airplane configuration under consideration and with the high incidence protection function operating, is the final stabilized calibrated airspeed obtained when the airplane is decelerated at an entry rate not exceeding 1 knot per second until the longitudinal pilot control is on its stop.

(b) The minimum steady flight speed, Vmin, must be determined with:

(1) The high incidence protection function operating normally.

(2) Idle thrust.

(3) All combinations of flap settings and landing gear positions.

(4) The weight used when V_{SR} is being used as a factor to determine compliance with a required performance standard.

(5) The most unfavorable center of gravity allowable.

(6) The airplane trimmed for straight flight at a speed selected by the applicant, but not less than 1.13 V_{SR} and not greater than 1.3 V_{SR}.

(7) The settings of the high incidence protection function, stall warning system, and stall identification system (if applicable) set at the low angle of attack tolerance limit, unless the production tolerances are acceptably small so as to produce insignificant changes in performance determinations.

(c) *Vmin1g*—Vmin corrected to 1g conditions, which is the minimum calibrated airspeed at which the airplane can develop a lift force normal to the flight path and equal to its weight when at an angle of attack not greater than that determined for Vmin. Vmin1g is defined as follows:

$$V\min lg = \frac{V\min}{\sqrt{n_{zw}}}$$

Where:

n_{ZW} = load factor normal to the flight path at V_{min}.

(d) The reference stall speed, V_{SR}, is a calibrated airspeed selected by the applicant. V_{SR} may not be less than a 1g stall speed. V_{SR} is expressed as:

$$V_{SR} \geq Vs1g = \frac{V_{CL_{MAX}}}{\sqrt{n_{zw}}}$$

Where:

$V_{CL_{MAX}}$ is the calibrated airspeed obtained when the load factor-corrected lift coefficient

$$\left(\frac{n_{zw}W}{qS} \right)$$

is first a maximum during the maneuver prescribed in paragraph 3(e)(7) of this special condition.

n_{ZW} = Load factor normal to the flight path at V_{CLMAX}

W = Airplane gross weight;

S = Aerodynamic reference wing area; and

q = Dynamic pressure.

(e) V_{SR} must be determined with the following conditions:

(1) Engines idling, or, if that resultant thrust causes an appreciable decrease in stall speed, not more than zero thrust at the stall speed.

(2) The airplane in other respects (such as flaps and landing gear) in the condition existing in the test or performance standard in which V_{SR} is being used.

(3) The weight used when V_{SR} is being used as a factor to determine compliance with a required performance standard.

(4) The center of gravity position that results in the highest value of reference stall speed.

(5) The airplane trimmed for straight flight at a speed selected by the applicant, but not less than 1.13 V_{SR} and not greater than 1.3 V_{SR}.

(6) The high incidence protection function disabled, or adjusted to a high enough incidence to allow full development of the maneuver to the angle of attack corresponding to V_{SR}.

(7) From the stabilized trim condition, apply the longitudinal control to decelerate the airplane so that the speed reduction does not exceed one knot per second.

(f) The flight characteristics at the angle of attack corresponding to V_{SR} must be suitable in the traditional sense at forward and aft center of gravity in straight and turning flight at IDLE power.

(g) If V_{SR} is chosen equal to $V_{MIN,1g}$, an equivalent safety finding to the intent of § 25.103 may be considered to have been met. The applicant may choose V_{SR} to be less than $V_{MIN,1g}$ but not less than V_{S1g} if compensating factors are provided to ensure safe characteristics.

4. Stall Warning

(a) *Normal Operation*—If the conditions of paragraph 2 of this proposed special condition are satisfied, a level of safety equivalent to that intended by § 25.207, Stall warning, will have been met.

(b) *Failure Cases*—Following failures of the high incidence protection function not shown to be extremely improbable, if the function no longer satisfies paragraphs 2(a), 2(b), and 2(c) of this proposed special condition, stall warning must be provided in accordance with § 25.207. The stall warning should prevent inadvertent stall in the following conditions:

(1) Power off straight stall approaches to a speed 5 percent below the warning onset.

(2) Turning flight stall approaches with at least 1.5g load factor normal to the flight path at an entry rate of at least 2 knots per second when recovery is initiated not less than one second after the warning onset.

5. High Incidence Handling Demonstrations—In lieu of the requirements of § 25.201, the following special conditions are proposed:

(a) Maneuvers to the limit of the longitudinal control, in the nose up direction, must be demonstrated in straight flight and in 30 degree banked turns under the following conditions:

(1) The high incidence protection function operating normally.

(2) Power off.

(3) At a power level necessary to maintain level flight at 1.5 V_{SR1}, where V_{SR1} is the reference stall speed with the flaps in the approach position, the landing gear retracted, and with the aircraft at its maximum landing weight. The flap position to be used to determine this power setting is that position in which the stall speed, V_{SR1}, does not exceed 110% of the stall speed, V_{SR0}, with the flaps in the most extended landing position.

(b) In each condition required by paragraph (a) of this section, it must be possible to meet the applicable requirements of § 25.203 defined in paragraph 6 of this proposed special condition with:

(1) Flaps, landing gear, and deceleration devices in any likely combination of positions not prohibited.

(2) Deceleration devices include spoilers and other drag devices when used as air brakes, and thrust reversers. High incidence maneuver demonstrations with deceleration devices deployed should be carried out with power off except where power is normally applied during operations (*e.g.,* use of extended airbrakes during landing).

(3) Representative weights within the range for which certification is requested.

(4) The most adverse center of gravity.

(5) The airplane trimmed for straight flight at the speed prescribed in paragraph 3(e)(5) of this proposed special condition.

(6) The settings of the high incidence protection function, stall warning system, and stall identification system (if applicable) set at the high angle of attack tolerance limit, unless the production tolerances are acceptably small so as to produce insignificant changes in performance determinations.

(c) The following procedures must be used to show compliance with § 25.203 as amended by paragraph 6 of this proposed special condition:

(1) Starting at a speed sufficiently above the minimum steady flight speed to ensure that a steady rate of speed reduction can be established, apply the longitudinal control so that the speed reduction does not exceed one knot per second until the control reaches the stop.

(2) The longitudinal control must be maintained at the stop until the airplane has reached a stabilized flight condition and then recovered by normal recovery techniques.

(3) The requirements for turning flight maneuver demonstrations must also be met with accelerated rates of entry to the incidence limit, up to the maximum rate achievable.

6. Characteristics in High Incidence Maneuvers—In lieu of the requirements of § 25.203, the following special condition is proposed:

(a) Throughout maneuvers with a rate of deceleration of not more than 1 knot per second, both in straight flight and in 30 degree banked turns, the airplane's characteristics must be as follows:

(1) No abnormal airplane nose-up pitching.

(2) No uncommanded nose-down pitching (which is indicative of stall). However, reasonable attitude changes associated with stabilizing the incidence at alpha limit as the longitudinal control reaches the stop is acceptable. Any reduction of pitch attitude associated with stabilizing the incidence at the alpha limit should be achieved smoothly and at a low pitch rate, so it is not likely to be mistaken for natural stall identification.

(3) No uncommanded lateral or directional motion, and the pilot must retain good lateral and directional control by conventional use of the cockpit controls throughout the maneuver.

(4) The airplane must not exhibit buffeting of a magnitude or severity that would act as a deterrent to completing the maneuver specified in § 25.201(a) as amended by this proposed special condition.

(b) In maneuvers with increased rates of deceleration, some degradation of characteristics associated with a transient excursion beyond the stabilized alpha-limit is acceptable. However, the airplane must not exhibit dangerous characteristics or characteristics that would deter the pilot from holding the longitudinal control on the aft stop for a period of time appropriate to the maneuvers.

(c) It must always be possible to reduce incidence by conventional use of the longitudinal control.

(d) The rate at which the airplane can be maneuvered from trim speeds associated with scheduled operating speeds, such as V_2 and V_{REF} up to alpha-limit, should not be unduly damped or significantly slower than can be achieved on conventionally controlled transport airplanes.

7. Atmospheric Disturbances—Operation of the high incidence protection function must not adversely affect aircraft control during expected levels of atmospheric disturbances, nor impede the application of recovery procedures in case of windshear. Simulator tests and analysis may be used to evaluate such conditions, but must be validated by limited flight testing to confirm handling qualities at critical loading conditions.

8. Longitudinal Control—In lieu of the requirements of § 25.145(a), (a)(1) and (b)(6), the following special conditions are proposed:

(a) It must be possible, at any point between the trim speed prescribed in § 25.103(b)(6) as amended by this proposed special condition and Vmin, to pitch the nose downward so that the acceleration to this selected trim speed is prompt.

(b) With the landing gear extended, no change in trim control, or exertion of more than 50 pounds control force (representative of the maximum short-term force that can be applied readily by one hand) may be required for the following maneuver: With power off, flaps extended and the airplane trimmed at 1.3 V_{SR1}, obtain and maintain airspeeds between Vmin and either 1.6V_{SR1} or V_{FE}, whichever is lower.

9. Airspeed Indicating System—In lieu of § 25.1323(c)(1) and (c)(2), the following special conditions are proposed:

(a) VMO to Vmin with the flaps retracted; and

(b) Vmin to VFE with flaps in the landing position.

Issued in Renton, Washington, on December 13, 2010.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2010–32236 Filed 12–22–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–0847; Directorate Identifier 2008–NM–056–AD]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Model 777–200, –200LR, –300, and –300ER Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Supplemental notice of proposed rulemaking (NPRM); reopening of comment period.

SUMMARY: We are revising an earlier proposed airworthiness directive (AD) for certain Model 777–200, –200LR, –300, and –300ER series airplanes. The original NPRM would have required doing an inspection to identify the part number of the motor operated valve (MOV) actuators of the main and center fuel tanks; replacing certain MOV actuators with new MOV actuators; and measuring the electrical resistance of the bond from the adapter plate to the airplane structure, and doing corrective actions if necessary. The original NPRM also would have required revising the Airworthiness Limitations section of the Instructions for Continued Airworthiness. The original NPRM resulted from fuel system reviews conducted by the manufacturer. This action revises the original NPRM by adding airplanes to the applicability. This action also revises the original NPRM by removing the requirement for revising the Airworthiness Limitations section of the Instructions for Continued Airworthiness. We are proposing this supplemental NPRM to prevent electrical current from flowing through an MOV actuator into a fuel tank, which could create a potential ignition source inside the fuel tank. This condition, in combination with flammable fuel vapors, could result in a fuel tank explosion and consequent loss of the airplane.

DATES: We must receive comments on this supplemental NPRM by January 18, 2011.

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

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

For service information identified in this proposed AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P. O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; e-mail *me.boecom@boeing.com;* Internet *https://www.myboeingfleet.com*. You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Tak Kobayashi, Aerospace Engineer, Propulsion Branch, ANM–140S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6499; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2008–0847; Directorate Identifier 2008–NM–056–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

Discussion

We issued a notice of proposed rulemaking (NPRM) (the "original NPRM") to amend 14 CFR part 39 to include an airworthiness directive (AD) that would apply to certain Model 777–200, –200LR, –300, and –300ER series airplanes. That original NPRM was published in the **Federal Register** on August 7, 2008 (73 FR 45893). That original NPRM proposed to require doing an inspection to identify the part number of the motor operated valve (MOV) actuators of the main and center fuel tanks; replacing certain MOV actuators with new MOV actuators; and measuring the electrical resistance of the bond from the adapter plate to the airplane structure, and doing corrective actions if necessary. The original NPRM also would have required revising the Airworthiness Limitations section of the Instructions for Continued Airworthiness (ICA).

Actions Since Original NPRM Was Issued

Since we issued the original NPRM, the manufacturer has informed us that certain airplanes were missing from the effectivity in Boeing Alert Service Bulletin 777–28A0034, dated August 2, 2007, which was referenced in the original NPRM as the appropriate source of service information.

In addition, since we issued the original NPRM, we have determined that the proposed requirement for revising the Airworthiness Limitations (AWL) section of the ICA is unnecessary. Incorporation of AWL No. 28–AWL–19 and AWL No. 28–AWL–20 is already mandated by AD 2008–11–13, Amendment 39–15536 (73 FR 30737, May 29, 2008), which is applicable to Model 777–200, –200LR, –300, and –300ER series airplanes. Therefore, we have removed Note 1 and paragraphs (h), (i), and (j) from the original NPRM.

Relevant Service Information

Since the issuance of the original NPRM, we reviewed Boeing Alert Service Bulletin 777–28A0034, Revision 1, dated May 20, 2010, which adds airplanes to the effectivity, and corrects an MOV actuator part number. We also reviewed Boeing Service Bulletin 777–28A0034, Revision 2, dated September 20, 2010, which specifies to cap seal the bonding jumper fasteners when installing the MOV actuator. Boeing Service Bulletin 777–28A0034, Revision 2, dated September 20, 2010, specifies that no more work is necessary on airplanes modified in accordance with Boeing Alert Service Bulletin 777–28A0034, dated August 2, 2007; and Revision 1, dated May 20, 2010.

We have revised paragraphs (c), (g), and (h) of this supplemental NPRM to refer to Boeing Service Bulletin 777–28A0034, Revision 2, dated September 20, 2010. In addition, we have added new paragraph (j) to this supplemental NPRM to provide credit for actions accomplished before the effective date of this AD in accordance with Boeing Alert Service Bulletin 777–28A0034, dated August 2, 2007; and Revision 1, dated May 20, 2010.

Comments

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

Request To Use Later Revisions of the Maintenance Planning Data (MPD) Document

Boeing, and Air Transport Association (ATA) on behalf of its member United Airlines (UAL), requested that the FAA reference later revisions of the MPD document in paragraph (h) of the original NPRM.

As stated previously, we have removed paragraph (h) (the requirement to revise the AWL section of the ICA) of the original NPRM. Therefore, no revision to this supplemental NPRM is necessary in this regard.

Allow the Use of Later Revisions of Alternative Critical Design Configuration Control Limitations (CDCCLs)

ATA, on behalf of its member UAL, stated that paragraph (i) of the original NPRM should include instructions similar to those in paragraph (i) of AD 2008–11–13, which allows operators to use alternative "CDCCLs that are part of a later revision of February 2008 of the MPD" that is approved by the FAA to avoid confusion and to promote common compliance rules.

As stated previously, we have removed paragraph (i) of the original NPRM. Therefore, no revision to this supplemental NPRM is necessary in this regard.

Request To Revise the Costs of Compliance

Boeing, and ATA on behalf of its member UAL, requested that we revise the Costs of Compliance section in the original NPRM to include the cost of parts. ATA stated that the cost of parts presents a significant expense to the operators since there are 11 MOV actuators on each of the 197 airplanes affected by the original NPRM, costing $5,477 per actuator. Boeing stated that the cost of parts is substantial and, when accounted alongside with the cost of labor, estimated work-hours, and the total number of affected airplanes, the cost would be higher than what is stated in the original NPRM.

We agree to include the cost of parts in this supplemental NPRM. We have revised the Costs of Compliance section accordingly.

Request To Clarify the Accomplishment Instructions in the Service Bulletin

ATA, on behalf of its member UAL, requested clarification of the Accomplishment Instructions in Boeing Alert Service Bulletin 777–28A0034, dated August 2, 2007. UAL asserted that the logical flow ("if—then" condition) of the installation instructions is incomplete and can be further clarified. UAL also stated that certain Boeing 777 aircraft maintenance manuals referenced as sources of guidance in Boeing Alert Service Bulletin 777–28A0034, dated August 2, 2007, have two sections, "Pre" and "Post" Boeing Alert Service Bulletin 777–28A0034, and that the service bulletin should specify which section is applicable.

We agree with UAL that some of the instructions in Boeing Alert Service Bulletin 777–28A0034, dated August 2, 2007, are unclear. Those issues have been clarified in Boeing Alert Service Bulletin 777–28A0034, Revision 1, dated May 20, 2010; and Boeing Service Bulletin 777–28A0034, Revision 2, dated September 20, 2010. As stated previously, we have revised this supplemental NPRM to refer to Boeing Service Bulletin 777–28A0034, Revision 2, dated September 20, 2010, and to provide credit for accomplishment of Boeing Alert Service Bulletins 777–28A0034, dated August 2, 2007, and to

Revision 1, dated May 20, 2010, before the effective date of the AD.

Request To Prohibit the Installation of Part Number (P/N) MA20A1001–1

ATA, on behalf of its member UAL, expressed that the intent of the original NPRM is to remove the MOV actuator having P/N MA20A1001–1 and to prohibit installation of P/N MA20A1001–1 once the AD has been complied with. UAL stated that it has reviewed the NPRM and cannot find language that prohibits the installation of P/N MA20A1001–1; UAL stated that such language should be in this proposed AD.

We partially agree. We disagree that it is necessary to specifically prohibit the installation of P/N MA20A1001–1 once the AD has been complied with because after accomplishing the mandatory actions, operators are required to maintain airplanes in compliance with the AD. To ensure that the unsafe condition cannot be introduced before compliance with the AD, we have added paragraph (i) to this supplemental NPRM to prohibit installation of an MOV actuator, P/N MA20A1001–1, after the effective date of this AD.

Request To Postpone the AD or Extend the Compliance Time

ATA, on behalf of its member UAL, requested that the FAA postpone the proposed AD or extend the compliance time until reliability issues pertaining to the MOV actuator with P/N MA30A1001 are resolved. UAL stated that Boeing Fleet Team Digest 737NG–FTD–28–07002 discusses the potential of the P/N MA30A1001 actuator having cracked or damaged capacitors. UAL stated that if the MOV actuators with the defective design are installed due to regulatory mandate, the opportunity of actuator failure is introduced, which creates unnecessary economic burden for operators.

We disagree with UAL's request to postpone the AD or extend the compliance time. The problem of the capacitor does not constitute a new unsafe condition. The investigation conducted by the supplier of the affected MOV actuators concluded that damage to the capacitors was introduced due to certain manufacturing processes. To address this issue, the supplier changed manufacturing processes in March 2007. We are aware that a number of MOV actuators that were produced under the manufacturing processes before that change were returned to the supplier between December 2006 and October 2007. Boeing also informed us that no actuators have been returned to the supplier due to damaged capacitors since October 2007. We have determined that the manufacturing process changes have adequately addressed the reliability issues; therefore, the current inventory of spare MOV actuators would be unlikely to contain a discrepant part. We consider it inappropriate to delay this AD since we have determined that an unsafe condition exists and that replacement of certain parts must be accomplished to ensure continued safety. We have not changed this supplemental NPRM in this regard.

FAA's Determination and Proposed Requirements of the Supplemental NPRM

We are proposing this supplemental NPRM because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design. Certain changes described above expand the scope of the original NPRM. As a result, we have determined that it is necessary to reopen the comment period to provide additional opportunity for the public to comment on this supplemental NPRM.

Additional Changes to the Original NPRM

In the Costs of Compliance section in the original NPRM, 197 airplanes were estimated to be affected. The correct number of affected airplanes in this supplemental NPRM is 127 airplanes. We have revised the Costs of Compliance section accordingly.

We have determined that a review of airplane records will be adequate to identify the MOV actuator part number. Therefore, we have added a records review as an option to the inspection in paragraph (g) of this supplemental NPRM (paragraph (f) in the original NPRM).

We have revised paragraph (h) of this supplemental NPRM (paragraph (g)(1) in the original NPRM) to specify the correct replacement actuator part number. We have also revised paragraph (h) of this supplemental NPRM to allow the installation of a serviceable MOV actuator. In addition, we have revised paragraph (h) of this supplemental NPRM to clarify that measuring the electrical resistance of the bond from the adapter plate is only required at certain MOV actuator locations.

We have added a new paragraph (d) to this supplemental NPRM to provide the Air Transport Association of America (ATA) Code 28, Fuel. This code is added to make this supplemental NPRM parallel with other new AD actions. We have reidentified subsequent paragraphs accordingly.

We have revised this AD to identify the legal name of the manufacturer as published in the most recent type certificate data sheet for the affected airplane models.

Costs of Compliance

We estimate that this proposed AD will affect 127 airplanes of U.S. registry. We estimate the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspection of MOV Actuators	Up to 6 work-hours × $85 per hour = $510	$0	Up to $510	Up to $64,770.

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

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Replacement of MOV Actuator Without Fuel Tank Access.	Up to 47 work-hours × $85 per hour = $3,995.	Up to $5,477, per actuator	Up to $9,472.

ON-CONDITION COSTS—Continued

Action	Labor cost	Parts cost	Cost per product
Replacement of MOV Actuator With Fuel Tank Access.	Up to 423 work-hours × $85 per hour = $35,955.	Up to $5,477, per actuator	Up to $41,432.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

1. Is not a "significant regulatory action" under Executive Order 12866,

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

3. 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.

You can find our regulatory evaluation and the estimated costs of compliance in the AD Docket.

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The FAA amends § 39.13 by adding the following new AD:

The Boeing Company: Docket No. FAA–2008–0847; Directorate Identifier 2008–NM–056–AD.

Comments Due Date

(a) We must receive comments by January 18, 2011.

Affected ADs

(b) None.

Applicability

(c) This AD applies to The Boeing Company Model 777–200, –200LR, –300, and –300ER series airplanes, certificated in any category; as identified in Boeing Service Bulletin 777–28A0034, Revision 2, dated September 20, 2010.

Subject

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

Unsafe Condition

(e) This AD results from fuel system reviews conducted by the manufacturer. The Federal Aviation Administration is issuing this AD to prevent electrical current from flowing through a motor operated valve (MOV) actuator into a fuel tank, which could create a potential ignition source inside the fuel tank. This condition, in combination with flammable fuel vapors, could result in a fuel tank explosion and consequent loss of the airplane.

Compliance

(f) You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

Inspection

(g) Within 60 months after the effective date of this AD, do an inspection of the MOV actuators of the main and center fuel tanks for part number (P/N) MA20A1001–1, in accordance with the Accomplishment Instructions of Boeing Service Bulletin 777–28A0034, Revision 2, dated September 20, 2010. A review of airplane maintenance records is acceptable in lieu of this inspection if the part number can be conclusively determined from that review.

Replacement

(h) If any P/N MA20A1001–1 is found during the inspection required by paragraph (g) of this AD, within 60 months after the effective date of this AD, replace the MOV actuator with a new or serviceable MOV actuator, P/N MA30A1001; and as applicable, measure the electrical resistance of the bond from the adapter plate to the airplane structure and do all applicable corrective actions; in accordance with the Accomplishment Instructions of Boeing Service Bulletin 777–28A0034, Revision 2, dated September 20, 2010. Do all applicable corrective actions before further flight.

Part Installation

(i) As of the effective date of this AD, no person may install an MOV actuator, P/N MA20A1001–1, on any airplane.

Credit for Actions Accomplished in Accordance With Previous Service Information

(j) Actions done in accordance with Boeing Alert Service Bulletin 777–28A0034, dated August 2, 2007; or Boeing Alert Service Bulletin 777–28A0034, Revision 1, dated May 20, 2010; are considered acceptable for compliance with the corresponding actions required by paragraphs (g) and (h) of this AD; except that replacement of an MOV actuator in accordance with Boeing Alert Service Bulletin 777–28A0034, dated August 2, 2007, is acceptable for the replacement required by paragraph (h) of this AD, provided that the replacement P/N is MA30A1001.

Alternative Methods of Compliance (AMOCs)

(k)(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. Send information to ATTN: Tak Kobayashi, Aerospace Engineer, Propulsion Branch, ANM–140S, FAA, Seattle ACO, 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone (425) 917–6499; fax (425) 917–6590. Information may be e-mailed to: *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov*.

(2) To request a different method of compliance or a different compliance time for this AD, follow the procedures in 14 CFR 39.19. Before using any approved AMOC on any airplane to which the AMOC applies, notify your principal maintenance inspector (PMI) or principal avionics inspector (PAI), as appropriate, or lacking a principal inspector, your local Flight Standards District Office. The AMOC approval letter must specifically reference this AD.

Issued in Renton, Washington, on December 16, 2010.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2010–32208 Filed 12–22–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–1202; Directorate Identifier 2010–NM–167–AD]

RIN 2120–AA64

Airworthiness Directives; McDonnell Douglas Corporation Model MD–90–30 Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for all Model MD–90–30 airplanes. This proposed AD would require repetitive inspections for cracking of the left and right upper center skin panels of the horizontal stabilizer, and corrective action if necessary. This proposed AD was prompted by a report of a crack found in the upper skin panel at the aft inboard corner of a right horizontal stabilizer. We are proposing this AD to detect and correct cracks in the horizontal stabilizer upper center skin panel. Uncorrected cracks might ultimately lead to the loss of overall structural integrity of the horizontal stabilizer.

DATES: We must receive comments on this proposed AD by February 7, 2011.

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

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

For service information identified in this proposed AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, 3855 Lakewood Boulevard, MC D800–0019, Long Beach, California 90846–0001; telephone 206–544–5000, extension 2; fax 206–766–5683; e-mail *dse.boecom@boeing.com;* Internet *https://www.myboeingfleet.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (phone: 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Roger Durbin, Aerospace Engineer, Los Angeles ACO, Airframe Branch, ANM–120L, FAA Los Angeles Aircraft Certification Office, 3960 Paramount Blvd, Lakewood, CA 90712–4137; telephone: (562) 627–5233; fax: (562) 627–5210; e-mail: *roger.durbin@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2010–1202; Directorate Identifier 2010–NM–167–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

Discussion

We have received a report of a crack to a Model MD–80 airplane upper center skin panel of the right horizontal stabilizer at the aft inboard corner during an inspection for cracks in the upper and lower aft skin panels of the horizontal stabilizer in accordance with AD 2007–10–04, Amendment 39–15045 (72 FR 25960, May 8, 2007). That airplane had accumulated 47,146 total flight hours and 26,490 total flight cycles when the crack was found. The cause of the cracking is suspected to be fatigue. The Model MD–90–30 airplane horizontal stabilizer is similar in design and loading to that of the Model MD–80 airplane horizontal stabilizer. Therefore, Model MD–90–30 airplanes may also be subject to the identified unsafe condition.

A crack in the upper center skin panel may transfer the load to the upper aft skin panel. This may result in the upper aft skin panel cracking faster than the existing inspection intervals that are required by AD 2009–13–08, Amendment 39–15947 (74 FR 30922, June 29, 2009). Uncorrected cracking could result in loss of the overall structural integrity of the horizontal stabilizer.

Relevant Service Information

We reviewed Boeing Alert Service Bulletin MD90–55A015, dated July 16, 2010. This service bulletin describes procedures for repetitive eddy current inspections, either (Option 1) two high frequency eddy current (ETHF) scans and one low frequency eddy current (ETLF) scan, or (Option 2) three ETHF scans, to detect cracking of the right and left upper center skin panels of the horizontal stabilizer. Corrective actions include replacing any cracked horizontal stabilizer upper center skin panel with a serviceable panel or contacting Boeing for possible temporary repair instructions.

The repetitive interval is 5,200 flight cycles or 2,500 flight cycles depending on the eddy current inspection option selected.

FAA's Determination

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

Proposed AD Requirements

This proposed AD would require accomplishing the actions specified in the service information described previously, except as discussed under "Differences Between the Proposed AD and the Service Information."

Differences Between the Proposed AD and the Service Information

Boeing Alert Service Bulletin MD90–55A015, dated July 16, 2010, provides an option to contact the manufacturer for instructions on how to repair

cracking, but this proposed AD would require replacing the cracked skin panel.

Costs of Compliance

We estimate that this proposed AD will affect 19 airplanes of U.S. registry.

We estimate the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspection	4 work-hours × $85 per hour = $340 per inspection cycle.	$0	$340 per inspection cycle.	$6,460 per inspection cycle

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

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Skin panel replacement	648 work-hours × $85 per hour = $55,080	$55,608	$110,688

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

McDonnell Douglas Corporation: Docket No. FAA–2010–1202; Directorate Identifier 2010–NM–167–AD.

Comments Due Date

(a) We must receive comments by February 7, 2011.

Affected ADs

(b) None.

Applicability

(c) This AD applies to all McDonnell Douglas Corporation Model MD–90–30 airplanes, certificated in any category.

Subject

(d) Joint Aircraft System Component (JASC)/Air Transport Association (ATA) of America Code 55: Stabilizers.

Unsafe Condition

(e) This AD was prompted by a report of a crack found in the upper center skin panel at the aft inboard corner of a right horizontal stabilizer. We are issuing this AD to detect and correct cracks in the upper center skin panel of the horizontal stabilizer. Uncorrected cracks might ultimately lead to the loss of overall structural integrity of the horizontal stabilizer.

Compliance

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

Inspections

(g) Before the accumulation of 20,000 total flight cycles, or within 3,778 flight cycles after the effective date of this AD, whichever occurs later, do eddy current inspections to detect cracking of the left and right upper center skin panels of the horizontal stabilizer, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin MD90–55A015, dated July 16, 2010.

(1) If no crack is found during any inspection required by paragraph (g) of this AD, repeat the applicable inspections thereafter at the applicable times specified in paragraph 1.E., "Compliance," of Boeing Alert Service Bulletin MD90–55A015, dated July 16, 2010.

(2) If any crack is found during any inspection required by paragraph (g) of this AD, before further flight, replace the skin panel with a serviceable skin panel, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin MD90–55A015, dated July 16, 2010. Within 20,000 flight cycles after the replacement, do eddy current inspections as required by paragraph (g) of this AD.

Alternative Methods of Compliance (AMOCs)

(h)(1) The Manager, Los Angeles Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19,

send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in the Related Information section of this AD.

(2) Before using any approved AMOC, notify your Principal Maintenance Inspector or Principal Avionics Inspector, as appropriate, or lacking a principal inspector, your local Flight Standards District Office.

(3) An AMOC that provides an acceptable level of safety may be used for any repair required by this AD if it is approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) that has been authorized by the Manager, Los Angeles 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.

Related Information

(i) For more information about this AD, contact Roger Durbin, Aerospace Engineer, Los Angeles ACO, Airframe Branch, ANM–120L, FAA Los Angeles Aircraft Certification Office, 3960 Paramount Blvd, Lakewood, CA 90712–4137; telephone: (562) 627–5233; fax: (562) 627–5210; e-mail: *roger.durbin@faa.gov*.

(j) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, 3855 Lakewood Boulevard, MC D800–0019, Long Beach, California 90846–0001; telephone 206–544–5000, extension 2; fax 206–766–5683; e-mail *dse.boecom@boeing.com;* Internet *https://www.myboeingfleet.com*. You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, the FAA, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, Washington, on December 16, 2010.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2010–32207 Filed 12–22–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–1203; Directorate Identifier 2010–NM–168–AD]

RIN 2120–AA64

Airworthiness Directives; McDonnell Douglas Corporation Model DC–9–81 (MD–81), DC–9–82 (MD–82), DC–9–83 (MD–83), DC–9–87 (MD–87), and MD–88 Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for all Model DC–9–81 (MD–81), DC–9–82 (MD–82), DC–9–83 (MD–83), DC–9–87 (MD–87) and MD–88 airplanes. This proposed AD would require repetitive inspections for cracking of the left and right upper center skin panels of the horizontal stabilizer, and corrective action if necessary. This proposed AD was prompted by a report of a crack found in the upper skin panel at the aft inboard corner of a right horizontal stabilizer. We are proposing this AD to detect and correct cracks in the horizontal stabilizer upper center skin panel. Uncorrected cracks might ultimately lead to the loss of overall structural integrity of the horizontal stabilizer.

DATES: We must receive comments on this proposed AD by February 7, 2011.

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

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

For service information identified in this proposed AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, 3855 Lakewood Boulevard, MC D800–0019, Long Beach, California 90846–0001; telephone 206–544–5000, extension 2; fax 206–766–5683; e-mail *dse.boecom@boeing.com;* Internet *https://www.myboeingfleet.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue. SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (phone: 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Roger Durbin, Aerospace Engineer, Los Angeles ACO, Airframe Branch, ANM–120L, FAA Los Angeles Aircraft Certification Office, 3960 Paramount Blvd, Lakewood, CA 90712–4137; telephone: (562) 627–5233; fax: (562) 627–5210; e-mail: *roger.durbin@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2010–1203; Directorate Identifier 2010–NM–168–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

Discussion

We have received a report of a crack to a Model MD–80 airplane upper center skin panel of the right horizontal stabilizer at the aft inboard corner during an inspection for cracks in the upper and lower aft skin panels of the horizontal stabilizer in accordance with AD 2007–10–04, Amendment 39–15045 (72 FR 25960, May 8, 2007). That airplane had accumulated 47,146 total flight hours and 26,490 total flight cycles when the crack was found. The cause of the cracking is suspected to be fatigue.

A crack in the upper center skin panel may transfer the load to the upper aft skin panel. This may result in the upper aft skin panel cracking faster than the existing inspection intervals that are specified by Boeing Alert Service Bulletin MD80–55A065. Uncorrected cracking could result in loss of the overall structural integrity of the horizontal stabilizer.

Relevant Service Information

We reviewed Boeing Alert Service Bulletin MD80–55A068, dated July 16, 2010. This service bulletin describes procedures for repetitive eddy current inspections, either (Option 1) two High Frequency Eddy Current (ETHF) scans

and one Low Frequency Eddy Current (ETLF) scan, or (Option 2) three ETHF scans, to detect cracking of the right and left upper center skin panels of the horizontal stabilizer. Corrective actions include replacing any cracked horizontal stabilizer upper center skin panel with a serviceable panel or contacting Boeing for possible temporary repair instructions.

The repetitive interval is 5,200 flight cycles or 2,500 flight cycles depending on the type of eddy current inspection option selected.

Boeing Alert Service Bulletin MD80–55A068, dated July 16, 2010, refers to an inspection done for Boeing Alert Service Bulletin MD80–55A065, dated April 25, 2007, which we referred to as the appropriate source of service information for AD 2007–10–04. Boeing Alert Service Bulletin MD80–55A065, dated April 25, 2007, addresses cracking issues for the horizontal stabilizer's upper and lower aft skin panels and rear spar upper caps.

FAA's Determination

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

Proposed AD Requirements

This proposed AD would require accomplishing the actions specified in the service information described previously, except as discussed under "Differences Between the Proposed AD and the Service Information."

Differences Between the Proposed AD and the Service Information

Alert Service Bulletin MD80–55A068, dated July 16, 2010, provides an option to contact the manufacturer for instructions on how to repair cracking, but this proposed AD would require replacing the cracked skin panel.

Costs of Compliance

We estimate that this proposed AD will affect 668 airplanes of U.S. registry.

We estimate the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspection	4 work-hours × $85 per hour = $340 per inspection cycle.	$0	$340 per inspection cycle	$227,120 per inspection cycle.

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

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Group 1: Skin panel replacement	648 work-hours × $85 per hour = $55,080	$36,405	$91,485
Group 2: Skin panel replacement	648 work-hours × $85 per hour = $55,080	54,071	109,151

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

McDonnell Douglas Corporation: Docket No. FAA–2010–1203; Directorate Identifier 2010–NM–168–AD.

Comments Due Date

(a) We must receive comments by February 7, 2011.

Affected ADs

(b) None.

Applicability

(c) This AD applies to all McDonnell Douglas Corporation Model DC–9–81 (MD–81), DC–9–82 (MD–82), DC–9–83 (MD–83), DC–9–87 (MD–87) and MD–88 airplanes, certificated in any category.

Subject

(d) Joint Aircraft System Component (JASC)/Air Transport Association (ATA) of America Code 55: Stabilizers.

Unsafe Condition

(e) This AD was prompted by a report of a crack found in the upper center skin panel at the aft inboard corner of a right horizontal stabilizer. We are issuing this AD to detect and correct cracks in the horizontal stabilizer upper center skin panel. Uncorrected cracks might ultimately lead to the loss of overall structural integrity of the horizontal stabilizer.

Compliance

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

Inspections

(g) Before the accumulation of 20,000 total flight cycles, or within 4,379 flight cycles after the effective date of this AD, whichever occurs later, do eddy current inspections to detect cracking of the left and right upper center skin panels of the horizontal stabilizer, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin MD80–55A068, dated July 16, 2010.

(1) If no crack is found during any inspection required by paragraph (g) of this AD, repeat the applicable inspections thereafter at the applicable times specified in paragraph 1.E., "Compliance," of Boeing Alert Service Bulletin MD80–55A068, dated July 16, 2010.

(2) If any crack is found during any inspection required by paragraph (g) of this AD, before further flight, replace the skin panel with a serviceable skin panel, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin MD80–55A068, dated July 16, 2010. Within 20,000 flight cycles after the replacement, do eddy current inspections as required by paragraph (g) of this AD.

Alternative Methods of Compliance (AMOCs)

(h)(1) The Manager, Los Angeles Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in the Related Information section of this AD.

(2) Before using any approved AMOC, notify your Principal Maintenance Inspector or Principal Avionics Inspector, as appropriate, or lacking a principal inspector, your local Flight Standards District Office.

(3) An AMOC that provides an acceptable level of safety may be used for any repair required by this AD if it is approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) that has been authorized by the Manager, Los Angeles ACO, to make those findings. For a repair method to be approved, the repair must meet the certification basis of the airplane and 14 CFR 25.571, Amendment 45, and the approval must specifically refer to this AD.

Related Information

(i) For more information about this AD, contact Roger Durbin, Aerospace Engineer, Los Angeles ACO, Airframe Branch, ANM–120L, FAA Los Angeles Aircraft Certification Office, 3960 Paramount Blvd, Lakewood, CA 90712–4137; telephone: (562) 627–5233; fax: (562) 627–5210; e-mail: *roger.durbin@faa.gov.*

(j) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, 3855 Lakewood Boulevard, MC D800–0019, Long Beach, California 90846–0001; telephone 206–544–5000, extension 2; fax 206–766–5683; e-mail *dse.boecom@boeing.com;* Internet *https://www.myboeingfleet.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, the FAA, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, Washington, on December 16, 2010.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2010–32209 Filed 12–22–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 135

[Docket No. FAA–2010–1259]

Interpretation of Rest Requirements

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed interpretation.

SUMMARY: This action proposes to interpret the application of 14 CFR 135.263 and the rest requirements of § 135.267(d) to situations in which a flight crewmember's flight time exceeds the permissible limits due to circumstances beyond his or her control. As discussed below, the FAA issued several interpretations addressing this issue in the 1990s. However, because the proposed interpretation relies heavily on a seminal FAA interpretation issued in 2000, the proposed interpretation would supersede any previous contrary interpretations of §§ 135.263 and 135.267(d).

DATES: Comments must be received on or before January 24, 2011.

ADDRESSES: You may send comments identified by docket number FAA–2010–1259 using any of the following methods:

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

FOR FURTHER INFORMATION CONTACT: Alex Zektser, Attorney, Regulations Division, Office of Chief Counsel, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; *telephone:* (202) 267–3073; *e-mail: Alex.Zektser@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites interested persons to submit written comments, data, or views concerning this proposal. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, please send only one copy of written comments, or if you are filing comments electronically, please submit your comments only one time.

The FAA will file in the docket all comments received, as well as a report summarizing each substantive public contact with FAA personnel concerning this proposal. Before acting on this proposal, the FAA will consider all comments received on or before the closing date for comments and any late-filed comments if it is possible to do so without incurring expense or delay. The FAA may change this proposal in light of comments received.

Availability of This Proposed Interpretation

You can get an electronic copy using the Internet by—

(1) Searching the Federal eRulemaking Portal (*http://www.regulations.gov*);

(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.gpoaccess.gov/fr/index.html.*

You can also get a copy 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. Make sure to identify the docket number or notice number of this proposal.

Background

The FAA has been asked to provide a legal interpretation regarding the application of 14 CFR 135.263 and 135.267(d) to the following factual scenario.

An operator plans a flight that is anticipated to be completed within a 13.5-hour duty day. However, unanticipated delays (such as late passengers and late cargo) occur before the last leg of the flight, and these delays would extend the flight beyond a 14-hour duty day if the last leg is completed. The proposed interpretation would clarify whether the crew may take off on the last leg of the flight, knowing in advance that they will not receive the 10 hours of rest required in a 24-hour period by section 135.267(d).

Discussion of the Proposal

Section 135.267(d) of Title 14 of the Code of Federal Regulations requires that a flight assignment operating under section 135.267(b) and (c) must provide for at least 10 consecutive hours of rest during the 24-hour period that precedes the planned completion time of the assignment. Under this section, a duty day may not exceed 14 hours in a 24-hour period without infringing on the required rest time. However, section 135.267(d) works in conjunction with 14 CFR 135.263(d), which provides that:

> A flight crewmember is not considered to be assigned flight time in excess of flight time limitations if the flights to which he is assigned normally terminate within the limitations, but due to circumstances beyond the control of the certificate holder or flight crewmember (such as adverse weather conditions), are not at the time of departure expected to reach their destination within the planned flight time.

In the 1990s, the FAA interpreted sections 135.263(d) and 135.267(d) to permit flight crewmembers to take off on flights that were scheduled to be completed within a 14-hour duty period even though circumstances beyond the crewmembers' control extended the actual duty time beyond the permissible 14-hour period. *See, e.g.,* Aug. 30, 1993, Letter to Mr. Ross from Donald P. Byrne, Assistant Chief Counsel for Regulations and Enforcement; Mar. 30, 1992, Letter to Kevin Wilson from Donald P. Byrne.

However, in 2000, the FAA issued a seminal interpretation of a section that is nearly identical to section 135.263(d). That section, 14 CFR 121.471(g), states that:

> A flight crewmember is not considered to be scheduled for flight time in excess of flight time limitations if the flights to which he is assigned are scheduled and normally terminate within the limitations, but due to circumstances beyond the control of the certificate holder (such as adverse weather conditions), are not at the time of departure expected to reach their destination within the scheduled time.

The FAA's 2000 interpretation stated that the language of section 121.471(g) created an exception to pilot flight time limitations, but did not provide an exception for pilot rest requirements. *See* Nov. 20, 2000, Letter to Captain Richard D. Rubin from James W. Whitlow, Deputy Chief Counsel ("Whitlow Letter"). The Whitlow Letter's validity was subsequently upheld by the U.S. Court of Appeals for the DC Circuit, and since that time, the FAA has consistently applied the Whitlow Letter in its interpretations of section 121.471(g). *See Air Transport Ass'n of America, Inc.* v. *F.A.A.,* 291 F.3d 49 (DC Cir. 2002) (upholding the validity of the Whitlow Letter). *See, e.g.,* Mar. 18, 2009, Letter to William E. Banks, Jr. from Rebecca B. MacPherson, Assistant Chief Counsel for Regulations (noting that section 121.471(g) does not provide an exception for rest requirements); Jan. 11, 2005, Letter to Jan Marcus from Rebecca B. MacPherson, Assistant Chief Counsel for Regulations (same).

The FAA has determined that it is illogical that the nearly-identical regulatory language in sections 121.471(g) and 135.263(d) is interpreted in two different ways. *See Air Transport Ass'n,* 291 F.3d at 51 n.1 (stating that "[t]he substance of the rules in Parts 121 and 135 is essentially the same and the rules are likewise interpreted"). As such, the FAA proposes to apply the Whitlow Letter's interpretation of 121.471(g) to sections 135.263(d) and 135.267(d). Because the Whitlow Letter and the subsequent interpretations based on the Whitlow Letter are more recent than the 1990s interpretations of sections 135.263(d) and 135.267(d), the Whitlow Letter line of interpretations best reflects the FAA's current understanding of the pertinent regulatory language. As such, the proposed application of the Whitlow Letter to sections 135.263(d) and 135.267(d) would supersede any contrary pre-Whitlow interpretations of these sections.

Under the proposed interpretation, section 135.263(d) would not create an exception for flight crewmember rest requirements. As such, if a flight crewmember was to be aware at the time of departure on the last leg of the flight that he or she has not had the required rest, 14 CFR 135.267(d) would prohibit him or her from departing on the last leg of the flight.

Issued in Washington, DC, on December 17, 2010.

Rebecca B. MacPherson,

Assistant Chief Counsel for Regulations, AGC–200.

[FR Doc. 2010–32234 Filed 12–22–10; 8:45 am]

BILLING CODE 4910–13–P

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 39

RIN 3038–AD10

End-User Exception to Mandatory Clearing of Swaps

AGENCY: Commodity Futures Trading Commission.

ACTION: Proposed rule.

SUMMARY: The Commodity Futures Trading Commission ("CFTC" or "Commission") is proposing new requirements governing the elective exception to mandatory clearing of swaps available for swap counterparties meeting certain conditions under Section 2(h)(7) of the Commodity Exchange Act, as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act. The Commission is requesting comments on the proposed rule and related matters.

DATES: Comments must be received on or before February 22, 2011.

ADDRESSES: You may submit comments, identified by RIN number 3038–AD10, by any of the following methods:

- *Agency Web site, via its Comments Online process: http://comments.cftc.gov.* Follow the instructions for submitting comments through the Web site.
- *Mail:* David A. Stawick, 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.

Please submit your comments using only one method. All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to *http://www.cftc.gov.* You should submit only information that you wish to make

available publicly. If you wish the Commission to consider information that is exempt from disclosure under the Freedom of Information Act, a petition or confidential treatment of the exempt information may be submitted according to the established procedures in § 145.9 of the Commission's regulations.[1] The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse, or remove any or all of your submission from *http://www.cftc.gov* that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act.

FOR FURTHER INFORMATION CONTACT: Lee Ann Duffy, Assistant General Counsel, (202) 418–6763, *lduffy@cftc.gov*, or Mark Fajfar, Assistant General Counsel, (202) 418–6636, *mfajfar@cftc.gov*, Office of General Counsel, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

SUPPLEMENTARY INFORMATION: The Commission is proposing § 39.6 to govern the elective exception to mandatory clearing of swaps available to swap counterparties meeting certain conditions. The Commission is requesting comments on all aspects of the proposed rules and related matters. The Commission will carefully consider any comments received and will respond as necessary or appropriate.

I. Introduction

The Commodity Exchange Act ("CEA" or "Act"),[2] as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act" or "DFA"),[3] establishes a comprehensive new regulatory framework for swaps, security-based swaps, and related instruments. The Dodd-Frank Act was enacted to reduce risk, increase transparency, and promote market integrity within the financial system by, among other things: (1) Providing for the registration and comprehensive regulation of swap dealers and major swap participants; (2) imposing clearing and trade execution requirements on standardized derivative products; (3) creating rigorous recordkeeping and real-time reporting regimes; and (4) enhancing the Commission's rulemaking and enforcement authorities over all registered entities and intermediaries subject to the Commission's oversight.

The Dodd-Frank Act amended the CEA to require that: (1) Swaps be cleared through a derivatives clearing organization ("DCO") if they are of a type that the Commission determines must be cleared, unless an exception from mandatory clearing applies; (2) swaps be reported to a registered swap data repository ("SDR") or the Commission; and (3) if a swap is subject to a clearing requirement, it be executed on a registered trading platform, *i.e.,* a swap execution facility or a designated contract market ("DCM"), unless no facility or market is available for execution of such swap.[4]

CEA Section 2(h)(1) provides that it shall be unlawful for any person to engage in a swap unless that person submits such swap for clearing to a DCO if the swap is required to be cleared.[5] However, Section 2(h)(7) of the CEA also provides that a swap otherwise subject to mandatory clearing is subject to an elective exception from clearing if one party to the swap is not a financial entity, is using swaps to hedge or mitigate commercial risk, and notifies the Commission, in a manner set forth by the Commission, how it generally meets its financial obligations associated with entering into non-cleared swaps (the "end-user clearing exception").[6]

The Dodd-Frank Act provides the Commission with authority to adopt rules governing the end-user clearing exception and to prescribe rules, issue interpretations, or request information from persons claiming the end-user clearing exception necessary to prevent abuse of the exception. The Commission is also required to consider whether to except small banks, savings associations, farm credit system institutions, and credit unions from the definition of "financial entity" contained in CEA Section 2(h)(7)(C)(ii).

The Commission is proposing § 39.6 to specify requirements for electing to use, and facilitating compliance with, the exception to mandatory clearing of swaps established by CEA Section 2(h)(7). The Commission is also requesting comments regarding the requirements that should apply to small banks, savings associations, farm credit system institutions, and credit unions that may wish to elect to use this clearing exception.

II. Description of Proposed Rule

A. Notification to the Commission

A non-financial entity[7] that enters into a swap to hedge or mitigate commercial risk must notify the Commission how it generally meets its financial obligations associated with non-cleared swaps in order to use the end-user clearing exception. The CEA authorizes the Commission to establish the manner of notification and to prescribe such rules as may be necessary to prevent abuse of the end-user clearing exception. The Commission is proposing in § 39.6(b) to require non-financial entities to notify the Commission each time the end-user clearing exception is elected by delivering specified information to an SDR in the manner required by proposed rules for swaps data recordkeeping and reporting.[8] The specified information would be

[1] 17 CFR 145.9.

[2] 7 U.S.C. 1 *et seq.*

[3] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010).

[4] The Dodd-Frank Act amends the Securities Exchange Act of 1934 ("Exchange Act") to provide for a similar regulatory framework for transactions in security-based swaps regulated by the Securities and Exchange Commission ("SEC").

[5] *See* Process for Review of Swaps for Mandatory Clearing, 75 FR 67277 (Nov. 2, 2010).

[6] When entering into a swap with a swap dealer or a major swap participant, non-financial counterparties are granted a right to forgo the exception and require clearing for a swap subject to a clearing mandate from the Commission. Non-financial counterparties are granted a similar elective right regarding clearing where a swap has been listed for clearing, but is not the subject of a Commission clearing mandate. *See* CEA Section 2(h)(7)(E). The choice to require or forgo clearing is solely at the nonfinancial counterparty's discretion. *See* CEA Section 2(h)(7)(B).

[7] CEA Section 2(h)(7)(A)(i) limits availability of the end-user clearing exception to counterparties to the swap that are not a financial entity. The term financial entity is defined in CEA Section 2(h)(7)(C)(i), and includes the following eight entities: (i) A swap dealer; (ii) a security-based swap dealer; (iii) a major swap participant; (iv) a major security-based swap participant; (v) a commodity pool as defined in CEA Section 1a(10); (vi) a private fund as defined in section 202(a) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-2(a)); (vii) an employee benefit plan as defined in paragraphs (3) and (32) of section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002); or (viii) a person predominantly engaged in activities that are in the business of banking or financial in nature, as defined in section 4(k) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(k)). Four of these terms, "swap dealer", "major swap participant", "security-based swap dealer" and "major security-based swap participant" are themselves the subject of current proposed joint rulemaking by the Commission and the SEC. *See Further Definition of Swap Dealer, Security-Based Swap Dealer, Major Swap Participant, Major Security-Based Swap Participant and Eligible Contract Participant,* approved by the Commission on December 1, 2010, to be published in the **Federal Register** on December 21, 2010.

[8] *See Swap Data Recordkeeping and Reporting Requirements,* 75 FR 76573, December 8, 2010. The recordkeeping and reporting rules contemplate that this information may be delivered to the Commission directly in limited circumstances when an SDR is not available. When permitted, such delivery would also meet the end-user clearing exception notice requirement.

delivered to the SDR by the reporting counterparty defined in the swap data recordkeeping and reporting rules together with other information regarding the swap that is subject to the end-user clearing exception to form the central record of the swap held by the SDR.

Under the approach set forth in proposed § 39.6(b), whenever the end-user clearing exception is elected, ten additional items of information would be required to be provided to the SDR. If the counterparty electing to use the end-user clearing exception is an issuer of securities under Exchange Act Section 12 or required to file periodic reports with the SEC under Exchange Act Section 15(d), two further items of information would be required: the electing counterparty's SEC Central Index Key number, and whether the appropriate governing body of that counterparty has reviewed and approved the decision not to clear the swap.

1. Meeting Financial Obligations

A non-financial entity electing to use the end-user clearing exception must notify the Commission of "how it generally meets its financial obligations associated with non-cleared swaps" ("Financial Obligation Notice"). *See* CEA Section 2(h)(7)(A)(iii). A principal feature distinguishing cleared swaps from non-cleared swaps is that non-cleared swaps do not have a uniform method of mitigating counterparty credit risk.[9] Proposed § 39.6(b)(5) would require a person relying on the end-user clearing exception to provide additional information regarding the methods used to mitigate credit risk in connection with non-cleared swaps. If more than one method is used by the person electing to use the end-user clearing exception, information must be provided for each of the methods being used.

a. Credit Support

Proposed § 39.6(b)(5)(i) requires an indication of whether a written credit support agreement is being used with respect to the non-financial entity or entities in connection with the non-cleared swap. For these purposes, the term credit support agreement may refer to any agreement, or annex, amendment or supplement to another agreement, which contemplates the periodic transfer of specified collateral to or from another party to support payment obligations associated with the swap or a related portfolio, basket or other combination of securities, swaps and other instruments. Agreements of this kind are frequently used to mitigate the counterparty credit risk of swaps and other instruments that are not centrally cleared, but the use of such arrangements may be more or less common among certain types of counterparties and for certain types of swaps.[10] The proposed notification would provide the Commission with information regarding the extent to which credit support agreements are used by non-financial entities to support their meeting financial obligations associated with non-cleared swaps.

b. Pledged or Segregated Assets

Proposed Rule 39.6(b)(5)(ii) requires an indication of whether payment of all or any portion of the financial obligations associated with the non-cleared swap are secured by collateral that has been pledged pursuant to a documented security arrangement not requiring the transfer of possession of collateral to the swap counterparty. Examples of this type of arrangement include, but are not limited to, agreements granting security interests over property of the non-financial entity, whether or not such security interests are perfected by the filing of a mortgage, financing statement or similar document, agreements to transfer assets to collateral agents or escrow agents acting pursuant to instructions agreed by both parties to a swap, or the posting or receiving of margin. While such arrangements may be somewhat less commonly used to mitigate credit risk associated with non-cleared swaps, the Commission preliminarily believes this method may have particular importance for certain categories of non-financial entities, such as enterprises with high levels of fixed assets relative to cash flows.[11] Accordingly, the Commission considers it appropriate to separately categorize this information in the data being collected.

c. Guarantee

Proposed § 39.6(b)(5)(iii) requires an indication of whether all or any portion of the financial obligations associated with the non-cleared swap are guaranteed in writing by a person or entity other than the non-financial entity or entities that are party to the swap. The proposed notification would provide the Commission with information regarding the role that guarantees by third parties (such as parent companies, affiliated parties or others) play in meeting financial obligations associated with non-cleared swaps.[12]

d. Sole Reliance on Available Financial Resources

Proposed Rule 39.6(b)(5)(iv) requires an indication of whether the non-financial entity or entities that are party to the swap intend(s) to meet the obligations associated with the swap solely by utilizing available financial resources.[13] Financial resources available to meet obligations associated with non-cleared swaps may include various liquidity sources, including existing assets, investments and cash balances, cash flow from operations, short-term and long-term lines of credit, and capital market sources of funding.

e. Other Means

Proposed § 39.6(b)(5)(v) requires an indication of whether the non-financial entity or entities that are party to the swap intend(s) to employ means other than those described in proposed § 39.6(b)(5)(i) through (iv) to meet the financial obligations associated with a swap. This item is intended to separately categorize all other methods that may be used in the markets today or that may develop in the future. The Commission anticipates many entities would meet their financial obligations through one of the specific methods listed in § 39.6(b)(5)(i) through (iv). The information collected pursuant to proposed § 39.6(b)(5)(v), however, together with other information collected, may allow the Commission to gain greater insight regarding whether additional data concerning methods used to mitigate credit risk should be collected in the future.

[9] *See* "ISDA Collateral Steering Committee, Market Review of OTC Derivative Bilateral Collateralization Practices (2.0)" (available at *http://www.idsa.org/c_and_a/pdf/Collateral-Market-Review.pdf*) ("ISDA Collateralization Practices")(describing methods of risk mitigation used in connection with swaps and key legal foundations supporting collateralization).

[10] *See* ISDA Collateralization Practices. *See also* "ISDA Margin Survey 2010" (available at *http://www.isda.org/c_and_a/pdf/ISDA–Margin-Survey-2010.pdf*) ("ISDA Margin Survey 2010")

[11] *See e.g.* ISDA Margin Survey 2010 at 9 (noting types of non-ISDA collateral agreements used and frequency of use).

[12] *See* ISDA Collateralization Practices at 20 (identifying master cross-netting and cross-guarantee structures as common credit risk mitigation practices).

[13] For a variety of reasons one or both of the counterparties to some non-cleared swaps may choose not to mitigate credit risk and instead rely on the general creditworthiness of their opposite counterparty, given the circumstances and financial terms of the transaction. *See, e.g.* Office of the Comptroller of Currency "Risk Management of Financial Derivatives" Comptroller's Handbook (Jan.1997) at 50 (available at *http://www.occ.gov/static/publications/handbook/deriv.pdf*) (contemplating that evaluations of individual counterparty credit limits should aggregate limits for derivatives with credit limits established for other activities, including commercial lending).

2. Preventing Abuse of the End-User Clearing Exception

The remaining items of information required by proposed § 39.6 are designed to confirm compliance with particular requirements of CEA Section 2(h)(7) or otherwise produce information necessary or useful to aid the Commission in its efforts to prevent abuse of the end-user clearing exception as contemplated by CEA Section 2(h)(7)(F).

a. Person Electing to Use the End-User Clearing Exception

Proposed § 39.6(b)(1) requires identification of which of the parties to the swap is electing to use the end-user clearing exception.

b. Financial Entity Status

Proposed § 39.6(b)(2) requires an indication of whether a person electing to use the end-user clearing exception is a financial entity as defined in CEA Section 2(h)(7)(C)(i). The exception to mandatory clearing of swaps under CEA Section 2(h)(7) is only available to persons that are not financial entities, or are affiliates of non-financial entities satisfying the requirements of CEA Sections 2(h)(7)(C)(iii) or 2(h)(7)(D).

c. Finance Affiliate Status

Proposed § 39.6(b)(3) requires an indication of whether a person electing to use the end-user clearing exception is an affiliate of another person qualifying for the exception under CEA Section 2(h)(7), and satisfies the additional requirements of CEA Sections 2(h)(7)(C)(iii) or 2(h)(7)(D). These sections of the CEA contain provisions specially designed for captive finance affiliates of persons qualifying for the end-user clearing exception.[14] Given the nature of these provisions, the Commission preliminarily believes it is appropriate to separately categorize swaps transacted by such finance affiliates in particular.

d. Hedging or Mitigating Commercial Risk

Proposed § 39.6(b)(4) requires an indication of whether a person electing to use the end-user clearing exception is using the swap being reported to hedge or mitigate commercial risk. The exception to mandatory clearing of swaps under Section 2(h)(7) of the CEA is only available to persons that use such swaps to hedge or mitigate commercial risk. The definition of "hedging or mitigating commercial risk" is discussed below in Section B.

e. End-User Board Approval

Proposed § 39.6(b)(6) requires all persons electing the end-user clearing exception to indicate whether they are an issuer of securities registered under Exchange Act Section 12 or required to file reports under Exchange Act Section 15(d) ("SEC Filer").[15] Under CEA Section 2(j), the exception to mandatory clearing of swaps under CEA Section 2(h)(7) is available to SEC Filers only if an appropriate committee of the issuer's board or governing body has reviewed and approved the issuer's decision to enter into swaps that are subject to the exception.[16] When the person electing to use the end-user clearing exception is an SEC Filer, two additional items of information must be provided:

- Proposed § 39.6(b)(6)(i) requires an SEC Filer electing to use the end-user clearing exception to specify its SEC Central Index Key number. Collection of this information will allow the CFTC to cross reference materials filed with the relevant SDR with information in periodic reports and other materials filed by the SEC Filer with the SEC.[17]
- Proposed § 39.6(b)(6)(ii) requires confirmation that an appropriately authorized committee of the board of directors or equivalent governing body of the SEC Filer has reviewed and approved the decision of the electing person not to clear the swap being reported, as required by CEA Section 2(j).[18]

Given the requirements of CEA Section 2(j) and its relationship to the end-user clearing exception, the Commission preliminarily believes collection of this information is appropriate to promote compliance with the requirements of the end-user clearing exception.

Request for Comment:

The Commission generally requests comments on all aspects of the proposed rules. Additionally, the Commission requests comments on the following specific issues:

- Is it sufficiently clear what information the Commission is requiring to be reported under proposed § 39.6? If not, why not? Is it sufficiently clear how information would be reported under proposed § 39.6 if a swap is between two non-financial entities both seeking to elect to use the end-user clearing exception? If not, why not? Are there clarifications or instructions the Commission could adopt that are useful for parties seeking to elect to use the end-user clearing exception? If so, what are they and what would be the benefits of adopting them?
- Would it be difficult or prohibitively expensive for persons to report the information required under the proposed § 39.6? If so, why?
- Is the information the Commission proposes to collect in connection with the Financial Obligation Notice sufficient? Is other information needed to achieve the purposes of the Dodd-Frank Act? For example, is it necessary or appropriate for the Commission to collect: Additional general information on the credit support agreement and the

[14] CEA Section 2(h)(7)(D)(i) provides that affiliates of persons qualifying for the end-user clearing exception will also qualify for the end-user clearing exception if the affiliate (1) acts on behalf of the person and as agent, (2) uses the swap to hedge or mitigate commercial risk of that person or another affiliate of that person that is not a financial entity as defined in CEA Section 2(h)(7)(C)(i), and (3) is not itself one of seven entities defined in CEA Section 2(h)(7)(D)(ii). The seven entities are: (i) A swap dealer; (ii) a security-based swap dealer; (iii) a major swap participant; (iv) a major security-based swap participant; (v) an issuer that would be an investment company, as defined in section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a–3), but for paragraph (1) or (7) of subsection c of that Act (15 U.S.C. 80a–3(c)); (vi) a commodity pool; or (vii) a bank holding company with over $50,000,000,000 in consolidated assets. *See* CEA Section 2(h)(7)(D)(ii). In addition, an affiliate, subsidiary, or wholly owned entity of a person that qualifies for an exception under CEA Section 2(h)(7)(A) and which is predominantly engaged in providing financing for the purchase or lease of merchandise or manufactured goods of the person shall be excepted from both the margin requirements described in CEA Section 4s(e) and the clearing requirement in CEA Section 2(h)(1), provided that the swaps in question are entered into to mitigate the risk of the financing activities. *See* CEA Section 2(h)(7)(D)(iii). Finally, excluded from the definition of financial entity are those entities (1) whose primary business is providing financing, and (2) who are using derivatives to hedge underlying commercial risks related to interest rate and foreign currency exposures, if 90% or more of those risks arise from the finance or lease of products, and if 90% or more of those products are manufactured by the parent company or another subsidiary of the parent. *See* CEA Section 2(h)(7)(C)(iii).

[15] For these purposes, a counterparty electing to use the end-user clearing exception is considered to be an issuer of securities registered under Exchange Act Section 12 or required to file reports pursuant to Exchange Act Section 15(d) if it is controlled by a person that is an issuer of securities registered under Exchange Act Section 12 or required to file reports pursuant to Exchange Act Section 15(d). *See* Rule 1–02(x) of SEC Regulation S–X, 17 CFR § 210.1–02(x) (defining subsidiary for purposes of the financial statements required to be filed as part of registration statements under Exchange Act Section 12, and annual and other reports under Exchange Act Sections 13 and 15(d)).

[16] *See* CEA Section 2(j). For these purposes, the Commission considers a committee to be appropriate if it is specifically authorized to review and approve the issuer's decisions to enter into swaps.

[17] *See* Item 305 of SEC Regulation S–K, 17 CFR 229.305.

[18] For example, a board resolution or an amendment to a board committee's charter could expressly authorize such committee to review and approve decisions of the electing person not to clear the swap being reported. In turn, such board committee could adopt policies and procedures to review and approve decisions not to clear swaps, on a periodic basis or subject to other conditions determined to be satisfactory to the board committee.

collateral practices under the agreement, such as the level of margin collateral outstanding (*e.g.,* less than or equal to a specified dollar amount, or greater than a series of progressively higher dollar amounts); the types of collateral provided (*e.g.,* cash, government securities, other securities, other collateral), or the frequency of portfolio reconciliation? Additional general information on specific terms of the credit support agreement, such as whether the collateral requirements are unilateral or bilateral provisions and whether there are contractual terms triggered by changes in the credit rating or other financial circumstances of one or both of the counterparties? Additional general information about the guarantor, such as whether or not the guarantor is a parent or affiliate of the person electing to use the end-user clearing exception? Additional general information regarding the assets pledged, such as the type of security interest or the type of property being used as collateral? Additional general information regarding the segregation arrangements, such as the identity of the collateral agent or other third party involved in the arrangement, and information regarding whether the arrangement involves a custodian, tri-party or different type of relationship? Additional general information regarding the adequacy of other means being used, or the adequacy of the financial resources available, to meet the financial obligations associated with the non-cleared swap?

- Should the Commission provide additional clarity to the terms used in CEA Sections 2(h)(7)(C)(iii) and 2(h)(7)(D) in proposed § 39.6 for affiliates electing to use the end-user clearing exception? Should the Commission adopt more specific requirements to implement the provisions of CEA Sections 2(h)(7)(C)(iii) and 2(h)(7)(D)? Is there need for the Commission to address the factors to be taken into account or the manner of calculating the percentage standards established in CEA Section 2(h)(7)(C)(iii)? Should the Commission provide further guidance on other terms used in these sections, such as the meaning of the term "predominantly engaged" in CEA Section 2(h)(7)(D)? If so, what specific rules or guidance should the Commission consider and what would be the benefits of adopting them?
- Should the Commission provide additional clarity to the requirements of CEA Section 2(j) to facilitate compliance with proposed § 39.6 by parties electing to use the end-user clearing exception? Should the Commission adopt more specific requirements to implement the provisions of CEA Section 2(j)? If so, what specific rules should the Commission consider and what would be the benefits of adopting them?
- Should the Commission provide additional guidance as to the meaning of the term "issuer of securities" as used in CEA Section 2(j)?
- Should the Commission consider requiring parties electing to use the end-user clearing exception to report additional types of information, either in order to limit abuse of the exception or for other reasons? If so, what other information should be reported and what would be the benefit of requiring such information to be reported? What categories of information, if any, should not be required to be reported and why?
- What does it mean to abuse the clearing exception under CEA Section 2(h)(7)(F)? Will some types of swaps be more susceptible to such abuse than others? For example: Are large or small companies or other identifiable sub-categories of swap users more or less likely to abuse the end-user clearing exception than other persons? Are there certain swap products or counterparties that the Commission should monitor for abuse more closely than others?
- Are there different considerations for small companies or other identifiable categories of persons who may wish to elect to use the end-user clearing exception? If so, what are they and how should the Commission take these considerations into account?

3. Form of Notice to the Commission

Proposed Rule 39.6 provides that a person electing to use the end-user clearing exception for a swap shall satisfy the notice requirements of CEA Section 2(h)(7)(A)(iii) upon providing the information specified in proposed § 39.6 to a registered SDR or, if no registered SDR is available, the Commission, in the form and manner generally required for delivery of information specified under proposed swap data recordkeeping and reporting rules.[19] Under this approach, rather than collecting information through a separate process established by the Commission for these purposes, the information delivered in compliance with the requirements of proposed § 39.6 and the proposed swap data recordkeeping and reporting rules would serve as the official notice of a swap covered by the end-user clearing exception.

The CEA, as amended by the Dodd-Frank Act, requires all swaps (whether cleared or non-cleared) to be reported to a registered SDR or, if no registered SDR is available, the Commission. *See* CEA Sections 2(a)(13)(G) (reporting of swaps to SDRs) and 4r (reporting alternatives for non-cleared swaps). As centralized recordkeeping facilities of swaps, SDRs are intended to play a critical role in enhancing transparency in the swap markets. SDRs will enhance transparency by having complete records of swaps, maintaining the integrity of those records, and providing effective access to those records to relevant authorities and the public in line with their respective information needs.[20] The Commission recently proposed a series of new rules relating to the SDR registration process, duties, and core principles to ensure that SDRs operate in the manner contemplated by the Dodd-Frank Act amendments to the CEA.[21]

The Commission is proposing to collect notice information for the end-user clearing exception through SDRs. This will permit detailed information on the use of the end-user clearing exception to be collected in conjunction with other swap information in a format well suited to analysis by the Commission and consistent with the development of straight-through processing for swaps. Using SDRs should also help to reduce the administrative burdens of the notice requirement because the information would be incorporated into a transaction record already required by the Dodd-Frank Act in connection with each swap and subject to standards designed to assure the accuracy of the information collected. The Commission anticipates that empirical data collected in this manner will aid its ability to evaluate how the end-user clearing exception is being used and encourage appropriate deliberation by counterparties prior to its use. The

[19] Proposed §§ 45.2 and 45.3 establish the recordkeeping and reporting requirements for swaps. *See Swap Data Recordkeeping and Reporting Requirements,* 75 FR 76573 (Dec. 8, 2010). The information required under proposed Rule 39.6 would be in addition to these requirements but would be delivered to the SDR by the reporting counterparty in the same manner as required by the proposed swap data recordkeeping and reporting rules.

[20] In the case of non-cleared swaps, CEA Section 21(c)(2) requires each SDR to confirm with both parties to the swap the accuracy of the data submitted to the SDR. CEA Section 4r(c) requires each party to a non-cleared swap to maintain records of the swaps held by such party in the form required by the Commission, and CEA Section 4r(d) provides that these records shall be in a form not less comprehensive than required to be collected by SDRs. These records are available for inspection by the Commission and other specified authorities under CEA Section 4r(c)(2).

[21] *See Swap Data Repositories,* approved by the Commission on Novovember 19, 2010, to be published in a forthcoming issue of the **Federal Register**.

Commission also preliminarily believes receiving notification and other information in connection with CEA Sections 2(h)(7)(A)(iii) and 2(h)(7)(F) through SDRs should allow monitoring for potentially abusive practices, and timely action to address abusive practices if they were to develop.[22]

Request for Comment:

The Commission generally requests comments on all aspects of the proposed rules. Additionally, the Commission requests comments on the following specific issues:

- Is it appropriate for the Commission to require notification regarding use of the end-user clearing exception to be made through SDRs? What are the advantages or disadvantages of the Commission's proposal?
- Does collecting Financial Obligation Notice information through SDRs provide sufficient assurance that the end-user clearing exception will be available to non-financial entities wishing to use the exception? Are SDRs reliable enough to be used for these purposes?
- Is Financial Obligation Notice information different from other information collected by SDRs in any respect that makes use of SDRs for these purposes inappropriate? If so, how is the notice information different and why is it inappropriate to use SDRs to collect the information?
- Is there a more feasible and cost effective way for the Commission to receive notification regarding the use of the end-user clearing exception? If so, what is the better alternative and in what ways is it better?
- Do the CEA and the associated rules and proposed rules regulating SDRs and parties to swaps create sufficient assurance that notice information collected through SDRs will be accurate? Are there additional protections the Commission should establish to create greater assurance that the notice information collected will be accurate? If so, what are they and how will they improve the information collection process?
- Would the person reporting information to the SDR be in a position to have or be able to obtain, in all cases, the information the Commission is requiring to be reported under proposed Rule 39.6. If not, why not? Are there special considerations in this regard when a swap is between two non-financial entities that are each seeking to elect to use this exception? Are representations and warranties and similar established market practices associated with documenting swaps adequate to ensure the person reporting information to the SDR can obtain such information when necessary?
- How long would it be expected to take for the person reporting information to the SDR to gather the information required under proposed § 39.6? Will the time needed to gather the required information disrupt the transaction process for swaps to any material extent?
- Should the Commission require persons electing to use the end-user clearing exception to follow additional compliance practices in some circumstances? For example, should the Commission require electing persons to create a record of the means being used to mitigate the credit risk of the swap? Would such a requirement be redundant or duplicative of other proposed recordkeeping requirements?
- Will collecting notice information together with other transaction information have the advantages expected by the Commission? For example, will it be useful to analyze information regarding use of the end-user clearing exception by product type and other transaction characteristics? Are there other advantages or disadvantages related to collecting notice information through SDRs that the Commission should consider? If so, what are they?
- Is there reason to believe that collecting information through SDRs will make it more or less difficult for the Commission to take action to prevent abuse of the clearing exception? If so, what Commission actions might be more or less difficult and what alternatives should the Commission consider?
- Does collecting notice information regarding use of the end-user clearing exception through SDRs create significantly greater burdens for some parties to swaps compared to others? For example, will parties who frequently enter into swaps face higher or lower burdens compared to parties that enter swaps less frequently? Will small companies face different burdens than large companies? Will non-financial entities that enter into swaps with other non-financial entities face different burdens? If so, what steps should the Commission consider taking to account for these differences?
- Are there international or cross-border issues related to the end-user exception that the Commission should address?

B. Hedging or Mitigating Commercial Risk

To qualify to use the end-user clearing exception with respect to a particular swap, CEA Section 2(h)(7)(A)(ii) requires that a non-financial entity must be using the swap to hedge or mitigate commercial risk. The Commission's proposal deems that the use of a swap is for hedging purposes in three circumstances. While the proposed definition in Proposed § 39.6(c) includes swaps that are recognized as hedges for accounting purposes or as bona fide hedging for purposes of an exemption from position limits under the CEA, the swaps included within the clearing exception are not limited to those two circumstances. *See* Proposed § 39.6(c)(1)(ii) and (iii). The proposal also covers swaps used to hedge or mitigate any of a person's business risks, as defined by six categories in the proposal, regardless of their status under accounting guidelines or the bona fide hedging exemption. *See* Proposed § 39.6(c)(1)(i). Proposed § 39.6(c)(2) further provides, however, that a swap is disqualified from the clearing exception if it is held for a speculative, investing, or trading purpose,[23] or if it hedges another swap unless that swap itself is held for hedging purposes.

The phrase "hedging or mitigating commercial risk" is the subject of current joint rulemaking by the Commission and the SEC.[24] Through this joint rulemaking exercise, the Commission is proposing a definition of "hedging or mitigating commercial risk"

[22] The proposed notification method is supported by the recordkeeping requirements under CEA Section 4r, which will permit the Commission to review transaction information and take such action as may be necessary to prevent abuses of the end-user clearing exception. Such Commission action would be taken in a manner consistent with our review practices for other transaction information submitted to SDRs, rather than through a separate process developed for these purposes, thereby helping to maintain consistency of regulatory action in comparable areas.

[23] The Commission preliminarily believes that swap positions that are held for the purpose of speculation or trading are, for example, those positions that are held primarily to take an outright view on the direction of the market, including positions held for short term resale, or to obtain arbitrage profits. Swap positions that hedge other positions that themselves are held for the purpose of speculation or trading are also speculative or trading positions.

The Commission preliminarily believes that swap positions that are held for the purpose of investing are, for example, those positions that are held primarily to obtain an appreciation in value of the swap position itself, without regard to using the swap to hedge an underlying risk. In contrast, a swap position related to a non-swap investment (such as the purchase of an asset that a commercial enterprise will use to produce income or otherwise advance its commercial interests) may be a hedging position if it otherwise qualifies for the definition of hedging or mitigating commercial risk.

[24] *See Further Definition of Swap Dealer, Security-Based Swap Dealer, Major Swap Participant, Major Security-Based Swap Participant and Eligible Contract Participant,* approved by the Commission on December 1, 2010, to be published in the **Federal Register** on December 21, 2010.

that would govern for purposes of the major swap participant definition under CEA Section 1a(33). The Commission has determined to propose nearly identical regulatory language in Proposed § 39.6(c) to define the meaning of the phrase "hedge or mitigate commercial risk" as found in CEA Section 2(a)(7)(A)(ii) for purposes of the elective end-user clearing exception. This parallel approach should allow consistency of interpretation across the CEA as a whole and help provide for fair and equivalent treatment for similarly situated parties.[25]

The Commission proposes an inclusive, multi-pronged definition that allows end users to qualify their hedging transactions in a manner that best fits their businesses. The Commission preliminarily believes that such an approach is appropriate, given the elective nature of this exception. While the line between speculation and hedging can at times be difficult to discern, the Dodd-Frank Act nonetheless requires such determinations to be made, and the Commission believes its rules proposal provides guidance and a measure of certainty in this regard.

Proposed § 39.6(c)(1)(i) takes a narrative approach similar to that used in § 1.3(z) of the Commission's regulations, which defines what activities qualify as hedging when used in futures markets, by enumerating specific risk shifting practices that are deemed to qualify for purposes of the clearing exception. Proposed § 39.6(c)(1)(ii) and (iii) assure counterparties that if their swap qualifies for the bona fide hedge exemptions from positions limits, or if their swap qualifies for hedge accounting treatment under the FASB hedge accounting standards, the swap also qualifies for the clearing exception.

As a general matter, the Commission preliminarily believes that whether a position is used to hedge or mitigate commercial risk should be determined by the facts and circumstances at the time the swap is entered into, and should take into account the person's overall hedging and risk mitigation strategies. The Commission expects that a person's overall hedging and risk management strategies will help inform whether or not a particular position is properly considered to hedge or mitigate commercial risk for purposes of the clearing exception. In this regard, the Commission preliminarily believes the question whether an activity is commercial should not be determined solely by an entity's organizational status as a for-profit company, a non-profit organization, or a governmental entity. Instead, the determinative factor should be whether the underlying activity to which the swap relates is commercial in nature.

Request for Comment:

The Commission generally requests comments on all aspects of the proposed rules. Additionally, the Commission requests comments on the following specific issues:

- Should swaps qualifying as hedging or risk mitigating be limited to swaps where the underlying hedged item is a non-financial commodity? Commenters may also address whether swaps qualifying as hedging or risk mitigating should hedge or mitigate commercial risk on a single risk or an aggregate risk basis, and on a single entity or a consolidated basis. The Commission also invites comment on whether risks such as the foreign exchange, currency, or interest rate risk relating to offshore affiliates, should be covered; whether industry-specific rules on hedging, or rules that apply only to certain categories of commodity or asset classes, are appropriate at this time; whether swaps facilitating asset optimization or dynamic hedging should be included; and whether hedge effectiveness should be addressed. The Commission is interested in whether special considerations are warranted with respect to the use of non-cleared swaps by agricultural cooperatives as well as by non-profit, governmental, or municipal entities engaged in electric power or energy activities. Commenters are requested to discuss both the policy and legal bases underlying such comments.
- Should the Commission consider adopting a definition of "hedge or mitigate commercial risk" in proposed § 39.6(c) that is different from definition of "hedging or mitigating commercial risk" in the major swap participant definitions rule and is specifically designed to address the circumstances of the end-user clearing exception? If so, what are the specific considerations associated with the end-user clearing exception that make a separate definition desirable? What features would such a definition need in order to be effective and what would be the benefits of adopting them?
- Should the Commission consider adopting a definition of "hedge or mitigate commercial risk" in proposed § 39.6(c) that is different from definition of "hedging or mitigating commercial risk" in the major swap participant definitions rule and is specifically designed to address the circumstances of the end-user clearing exception? If so, what are the specific considerations associated with the end-user clearing exception that make a separate definition desirable? What features would such a definition need in order to be effective and what would be the benefits of adopting them?

III. Consideration of a Clearing Exception for Small Banks, Savings Associations, Farm Credit System Institutions, and Credit Unions

Pursuant to CEA Section 2(h)(7)(C)(ii), the Commission is considering whether to except small banks, savings associations, farm credit systems institutions, and credit unions from the Act's definition of financial entity, including specifically those with total assets of $10,000,000,000 or less ("Small Financial Institutions"). This type of exception would permit Small Financial Institutions to use the end-user exception from the mandatory clearing requirement, which is otherwise unavailable to financial entities.

To inform its consideration of whether it would be appropriate for the Commission to grant any exception for Small Financial Institutions, the Commission requests comments on the following specific issues:

- Would such an exception be appropriate? If so, what terms and conditions should apply? Would it be better for the Commission to simply require Small Financial Institutions to follow the same practices as other financial institutions in the future? Would such an exception pose any risks to the swap markets or the financial system? Why or why not?
- How should the Commission take into account the supervisory regimes to which Small Financial Institutions are currently subject, and whether those regulatory regimes adequately mitigate any risks associated with an exception?
- Should the Commission consider treating different types of swaps differently when considering whether any exception should be available for Small Financial Institutions? If so, what specific distinctions should be considered by the Commission and what would be the benefits of adopting them?
- Should the Commission consider limiting the availability of any end-user clearing exception to only some Small Financial Institutions? Are there differences between Small Financial

[25] The Commission notes that the major swap participant definitional rule does not contemplate applying the definition of hedging or mitigating commercial risk to affiliates. CEA Sections 2(h)(7)(C)(iii) and 2(h)(7)(D) create certain additional requirements for affiliates of non-financial entities seeking to elect the end-user clearing exception, and these requirements must also be satisfied for the end-user clearing exception to be available.

Institutions that should lead to differences in the availability of the exception? If so, what specific distinctions should be considered by the Commission and what would be the benefits of adopting them? Would an across-the-board application of an exception to all Small Financial Institutions create any advantages or disadvantages for certain Small Financial Institutions? Would a differentiated application of an exception create any advantages or disadvantages?

• In CEA Section 2(h)(7)(C)(ii), Congress directed the Commission to consider whether to exempt small banks, savings associations, farm credit institutions, and credit unions, including those with total assets of $10 billion or less. The Commission invites public comment on the $10 billion total assets level. Are there measures other than total assets of $10 billion, such as financial risk or capital, which could be used for determining whether an entity qualifies for an exception, and if so, what are the advantages or disadvantages of utilizing the alternative measures? Would utilizing these alternative measures create additional risks, and if so, should the Commission consider additional measures to address them?

IV. General Request for Comments

The Commission is requesting comments from all members of the public. The Commission will carefully consider the comments that it receives. The Commission seeks comment generally on all aspects of the proposed rules. In addition, the Commission seeks comment on the following:

• Should the Commission clarify or modify any of the definitions included in the proposed rules? If so, which definitions and what specific modifications are appropriate or necessary?

• Are there aspects of the CEA, the Investment Advisers Act of 1940 (15 U.S.C. 80), the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002), or the Bank Holding Company Act of 1956 (12 U.S.C. 184) that are incorporated in the definition that may need to be taken into consideration by the Commission to ensure the end-user clearing exception is available in appropriate circumstances? If so, what specific changes should the Commission consider and what would be the benefits of adopting them?

• Are the obligations in the proposed rules sufficiently clear? Is additional guidance from the Commission necessary?

• What are the technological or administrative burdens of complying with the rules proposed by the Commission?

• Should the Commission implement substantive requirements in addition to, or in place of, the policies and procedures required in the proposed rules?

• If an entity is designated as a swap dealer or a major swap participant with respect to only certain of its swaps or activities, should it be treated as a financial entity under CEA Section 2(h)(7)(C)(i) and thereby be disqualified from electing to use the end-user clearing exception with respect to its other swaps or activities? If so, why? If not, should the Commission require such an entity to separate those swaps or activities for which it is designated as a swap dealer or major swap participant from its other swaps or activities? If so, how? If not, why not?

In addition, the Commission seeks commenters' views regarding any potential impact of the proposals on non-financial entities expecting to elect to use the end-user clearing exception, SDRs, other market participants, and the public generally. The Commission seeks comments on the proposals as a whole, including their interaction with the other provisions of the Dodd-Frank Act. The Commission seeks comments on whether the proposals would help achieve the broader goals of increasing transparency and accountability in the swap market.

The Commission requests comment generally on whether its proposed actions today to govern the elective exception to mandatory clearing of swaps available under CEA Section 2(h)(7) are necessary or appropriate for those purposes. If commenters do not believe one or all such actions are necessary and appropriate, why not? What would be the preferred action?

Title VII requires that the Commission consult and coordinate to the extent possible with the SEC for the purposes of assuring regulatory consistency and comparability, to the extent possible, and states that in adopting rules, the Commission and SEC shall treat functionally or economically similar products or entities in a similar manner. Specifically, do the regulatory approaches under the Commission's proposed rulemaking under DFA Section 723(a) and the SEC's proposed rulemaking under DFA Section 763(a) result in duplicative or inconsistent efforts on the part of market participants subject to both regulatory regimes or result in gaps between those regimes? If so, in what ways do commenters believe that such duplication, inconsistencies, or gaps should be minimized? Do commenters believe the approaches proposed by the Commission and the SEC to govern the elective exception to mandatory clearing of swaps and security-based swaps are comparable? If not, why? Do commenters believe there are approaches that would make the elective exception to mandatory clearing of swaps and security-based swaps more comparable? If so, what are they and what would be the benefits of adopting such approaches? Do commenters believe that it would be appropriate for us to adopt an approach proposed by the SEC that differs from our proposal? If so, which one? Are there further distinctions or clarifications that should be made by the Commission for purposes of the end-user clearing exception that are different from those being made in connection with the proposed joint rulemaking by the Commission and the SEC? If so, what are they and what would be the benefits of adopting them?

Commenters should, whenever possible, provide the Commission with empirical data to support their views. Commenters suggesting alternative approaches should provide comprehensive proposals, including any conditions or limitations that they believe should apply, the reasons for their suggested approaches, and their analysis regarding why their suggested approaches would satisfy the statutory mandate contained in DFA Section 723(a) governing the exception to mandatory clearing of swaps.

V. Related Matters

A. Cost-Benefit Analysis

Section 15(a) of the Act requires that the Commission, before promulgating a regulation or issuing an order, consider the costs and benefits of its action. By its terms, CEA Section 15(a) does not require the Commission to quantify the costs and benefits of a new regulation or determine whether the benefits of the regulation outweigh its costs. Rather, CEA Section 15(a) simply requires the Commission to "consider the costs and benefits" of its action.

CEA Section 15(a) specifies that costs and benefits shall be evaluated in light of the following considerations: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. Accordingly, the Commission could, in its discretion, give greater weight to any of the five considerations and could, in its

discretion, determine that, notwithstanding its costs, a particular regulation was necessary or appropriate to protect the public interest or to effectuate any of the provisions or to accomplish any of the purposes of the Act.

Costs

Proposed § 39.6 specifies requirements for using the elective end-user exception to the mandatory clearing of swaps established by CEA Section 2(h)(7). The proposal calls for a user-friendly, check-the-box approach to the Dodd-Frank Act's notification requirement. Proposed Rule 39.6 would simply require an indication of each method used to mitigate the credit risk associated with non-cleared swaps. Additional boxes would indicate whether finance affiliate or a SEC Filer is involved. The reporting counterparty would further be required to check a box in order to indicate whether the swap was being used to hedge or mitigate commercial risk, as defined by proposed § 39.6(c). These data elements would be provided as part of the overall package of swap-related information that must generally be submitted by reporting counterparties to SDRs under the Dodd-Frank Act.

With respect to costs, the Commission has determined that the notification requirement imposed by the rule proposal will present an increased cost. Currently, there is no requirement to notify the Commission of how a swap counterparty generally meets its financial obligations associated with its non-cleared swaps; therefore, the new notification requirement necessarily introduces a new cost to the system. While the Commission must be notified each time an election to forgo clearing is made, the cost incurred should be minimal since only general information must be included in the notification. In most cases, this check-the-box notification process will be performed by the swap dealer or major swap participant for whom such notification will represent only a small added cost to the overall cost of complying with its general reporting and recordkeeping obligations for swaps under the DFA. End users will provide the notification only for those swaps that do not involve a swap dealer or a major swap participant.

Benefits

With respect to benefits, the Commission has determined that the rule proposal should enhance the level of transparency associated with the OTC swap activity of non-financial entities, grant the Commission new insights into the practices of non-financial entities, and help the Commission and other regulators in their efforts to reduce risk in the financial system.

Proposed § 39.6's collateralization reporting requirements should allow the Commission to identify the collateral activities of non-financial entities. The role of OTC swaps in the financial system came into focus in the aftermath of the financial crisis of 2007; instituting the proposed rule would strengthen the regulatory regime that governs OTC swaps, and provide a greater degree of transparency with regard to non-financial entities in general.

When non-financial entities report that they use alternative methods to meet their financial obligations related to OTC swaps, they would provide the Commission with a valuable insight into the practices of non-financial entities of various types. Although the Commission expects that most transactions rely on one of the specific methods listed in § 39.6(b)(5)(i), (ii), (iii), or (iv), the reporting of the use of alternative methods should help the Commission determine whether additional data collection could be needed in the future.

Finally, the rule proposal represents a more rigorous reporting regime, a stated goal of the Dodd-Frank Act. While the reporting requirements contained in the rule proposal might present increased costs to non-financial entities seeking to engage in OTC swaps, they provide the benefits of a greater body of information for the Commission to analyze.

Summary

In summary, the Commission, after considering the CEA Section 15(a) factors, finds that the incremental cost imposed by the proposed rules is outweighed by their expected benefit. Accordingly, the Commission has determined to propose the rules. The Commission invites public comment on its cost-benefit considerations. Commenters also are invited to submit any data or other information that they may have quantifying or qualifying the costs and benefits of the proposed rules.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA") requires federal agencies, in proposing regulations, to consider the impact of those regulations on "small entities." [26] The proposed rules detailed in this release would affect organizations including eligible contract participants ("ECPs") [27] and SDRs. The Commission has previously determined that ECPs are not "small entities" for purposes of the RFA.[28] Since SDRs are new entities to be regulated by the Commission pursuant to the Dodd-Frank Act, the Commission has not previously determined whether they are small entities for the purpose of the RFA. The Commission therefore has determined that SDRs are not small entities for purposes of the RFA. Specifically, the Commission has determined that SDRs should not be considered small entities based on the central role they will play in the national regulatory scheme overseeing the trading of swaps, similarly to DCMs and DCOs, which the Commission has previously determined not to be small entities on the same grounds.[29] Moreover, because they will be required to accept swaps across asset classes, SDRs will require significant operational resources.

Accordingly, the Commission does not expect the proposed rules to have a significant impact on a substantial number of small entities. Therefore, the Chairman, on behalf of the Commission, hereby certifies, pursuant to 5 U.S.C. 605(b), that the proposed regulation would not have a significant economic impact on a substantial number of small entities. The Commission invites the public to comment on whether the entities covered by these proposed regulations should be considered small entities for purposes of the RFA.

C. Paperwork Reduction Act

1. Overview

The Paperwork Reduction Act ("PRA") [30] imposes certain requirements on Federal agencies in connection with their conducting or sponsoring any collection of information as defined by the PRA. This proposed rulemaking would result in new collection of information requirements within the meaning of the PRA. The Commission therefore is submitting this proposal to the Office of Management and Budget ("OMB") for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The title for this collection of information is "Rule 39.6 End-User Non-Cleared Swap Notification" (OMB control number [3038–NEW]). If

[26] 5 U.S.C. 601 *et seq.*

[27] Under CEA Section 2(e), only ECPs are permitted to participate in a swap subject to the end-user clearing exception.

[28] *See Opting Out of Segregation,* 66 FR 20740 at 20743 (April 25, 2001).

[29] *See A New Regulatory Framework for Clearing Organizations,* 66 FR 45604 at 45609 (Aug. 29, 2001)(DCOs); *Policy Statement and Establishment of Definitions of "Small Entities" for Purposes of the Regulatory Flexibility Act,* 47 FR 18618 at 18618–18619 (April 30, 1982)(DCMs).

[30] 44 U.S.C. 3501 *et seq.*

adopted, responses to this collection of information would be mandatory.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. OMB has not yet assigned a control number to the new collection for proposed rule 39.6. The requirements of new rule 39.6 are not currently covered by any existing OMB control number.

Proposed Rule 39.6 would require non-financial entities to notify the Commission each time the end-user clearing exception is elected by delivering specified information to a registered SDR or, if no registered SDR is available, the Commission in the manner required by the proposed part 49 rules for swaps data recordkeeping and reporting. The notification will occur only once at the beginning of the swap life cycle. If one of the counterparties to the swap transaction is a swap dealer or a major swap participant, notification would be provided through that counterparty. The non-financial counterparty would provide notice only in the event its counterparty is not a swap dealer or a major swap participant.

The Commission estimates that there are approximately 30,000 end users who are counterparties to a swap in a given year. Of these end users, the Commission estimates that the majority will not be required to report under proposed § 39.6 because their counterparty is a swap dealer or major swap participant. In that case, as described above, the swap dealer or major swap participant is required to make the report on behalf of the end user. Also, end users who are counterparties to a swap entered into in a previous year will presumably have already made the notification under proposed § 39.6 and therefore will not be required to make further notifications under the rule in subsequent years. Reducing the number of annual end users by these factors, the Commission estimates that there are approximately 1,000 end users who must report in a given year.[31] The Commission estimates that the report will require between approximately 10 minutes and one hour of burden, per end user per year.[32] The number of burden hours per end user may vary depending on various factors, such as the number of swaps entered into by that end user in the given year. Therefore, the number of estimated aggregate annual burden hours is between approximately 167 and 1,000 hours.

2. Confidentiality

The Commission protects proprietary information pursuant to the Freedom of Information Act and 17 CFR part 145, "Commission Records and Information." In addition, Section 8(a)(1) of the CEA 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."[33] The Commission also is required to protect certain information contained in a government system of records pursuant to the Privacy Act of 1974, 5 U.S.C. 552a.

3. Information Collection Comments

The Commission invites the public and other federal agencies to comment on any aspect of the reporting burden discussed above. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments in order to: (i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information would have practical utility; (ii) evaluate the accuracy of the Commission's estimate of the burden of the proposed collection of information; (iii) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (iv) minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Comments may be submitted directly to the Office of Information and Regulatory Affairs ("OIRA") in OMB, by fax at (202) 395–6566 or by e-mail at *OIRAsubmissions@omb.eop.gov.* Please provide the Commission with a copy of submitted comments so that all comments can be summarized and addressed in the final rule preamble. Refer to the Addresses section of this notice of proposed rulemaking for comment submission instructions to the Commission. A copy of the supporting statements for the collections of information discussed above may be obtained by visiting *RegInfo.gov.*

D. Antitrust Considerations

Section 15(b) of the CEA requires the Commission, before adopting a rule or issuing an order, to take into consideration the public interest protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the objectives of the Act, as well as the purposes and policies of the CEA.[34] The Commission did not identify any means by which the proposed end-user exception could be implemented to achieve the objectives, purposes and policies of the CEA in a less anticompetitive manner. The Commission invites comments on all aspects of its rules proposal in this regard.

E. Consideration of Impact on the Economy

Under the Small Business Enforcement Fairness Act of 1996 ("SBREFA"), federal agencies are called upon to advise the Administrator of the OIRA in the OMB whether their proposed rules constitute "major" rules.[35] A rule is considered major where, if adopted, it results, or is likely to result, in: (1) An annual effect on the economy of $100 million or more (either in the form of an increase or a decrease); (2) a major increase in the costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.[36] If a rule is "major," its effectiveness will generally be delayed for 60 days pending Congressional review.

The Commission requests comment on whether its proposed rule would, if adopted, constitute a major rule under SBREFA. Commenters are requested to provide empirical data and other factual support for their view to the extent possible.

VI. Statutory Authority

Pursuant to the CEA, and particularly Section 2(h)(7) thereof, the Commission proposes new Rule 39.6, as set forth below, governing the exception to mandatory clearing of swaps established by CEA Section 2(h)(7).

[31] The Commission requests public comment on this estimate.

[32] The Commission requests public comment on this estimate.

[33] 7 U.S.C. 12(a)(1).

[34] *See also* Section 6 of the Dodd-Frank Act.

[35] *See* Public Law 104–121 (March 29, 1996), as amended by Public Law 110–28 (May 25, 2007). The provisions governing congressional review of agency rulemaking are set forth in SBREFA Subtitle E, which is codified at 5 U.S.C. 801–808.

[36] *See* 5 U.S.C. 804(2).

List of Subjects in 17 CFR Part 39

Business and industry, Reporting requirements, Swaps.

For the reasons stated in the preamble, the Commission proposes to amend 17 CFR part 39 as follows:

PART 39—DERIVATIVES CLEARING ORGANIZATIONS

1. The authority citation for part 39 is revised to read as follows:

Authority: 7 U.S.C. 2, 5, 6, 6d, 7a–1, 7a–2, and 7b, as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010).

2. Section 39.6 is revised to read as follows:

§ 39.6 Electing to use the end-user exception to mandatory swap clearing.

(a) A counterparty to a swap (an "electing counterparty") may elect to use the exception to mandatory clearing under section 2(h)(7)(A)(iii) of the Act if the electing counterparty is not a "financial entity" as defined in section 2(h)(7)(C)(i) of the Act, is using the swap to hedge or mitigate commercial risk as defined in § 39.6(c), and provides or causes to be provided to a registered swap data repository or, if no registered swap data repository is available, the Commission, the information specified in § 39.6(b). More than one counterparty to a swap may be an electing counterparty. If there is more than one electing counterparty to a swap, the information specified in § 39.6(b) shall be provided with respect to each of the electing counterparties.

(b) When an electing counterparty to a swap elects to use the exception to mandatory clearing under section 2(h)(7)(A)(iii) of the Act, one of the counterparties to the swap (the "reporting counterparty") shall provide or cause to be provided the following information to a registered swap data repository or, if no registered swap data repository is available, the Commission, in the form and manner required for delivery of information specified under the Commission's rules:

(1) The identity of the electing counterparty to the swap;

(2) Whether the electing counterparty is a "financial entity" as defined in section 2(h)(7)(C)(i) of the Act;

(3) Whether the electing counterparty is a finance affiliate meeting the requirements described in sections 2(h)(7)(C)(iii) or 2(h)(7)(D) of the Act;

(4) Whether the swap is used by the electing counterparty to hedge or mitigate commercial risk as defined in § 39.6(c) under the Act;

(5) Whether the electing counterparty generally expects to meet its financial obligations associated with its non-cleared swap by using:

(i) A written credit support agreement;

(ii) Pledged or segregated assets (including posting or receiving margin);

(iii) A written third-party guarantee;

(iv) Solely the electing counterparty's available financial resources; or

(v) Means other than those described in § 39.6(b)(5)(i), (ii), (iii) or (iv); and

(6) Whether the electing counterparty is an entity that is an issuer of securities registered under section 12 of, or is required to file reports under 15(d) of, the Securities Exchange Act of 1934, and if so:

(i) The relevant SEC Central Index Key number for that counterparty; and

(ii) Whether an appropriate committee of the board of directors (or equivalent body) has reviewed and approved the decision not to clear the swap.

(c) For purposes of section 2(a)(7)(A)(ii) of the CEA and § 39.6(b)(4), a swap shall be deemed to be used to hedge or mitigate commercial risk when:

(1) Such swap:

(i) Is economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise, where the risks arise from:

(A) The potential change in the value of assets that a person owns, produces, manufactures, processes, or merchandises or reasonably anticipates owning, producing, manufacturing, processing, or merchandising in the ordinary course of business of the enterprise;

(B) The potential change in the value of liabilities that a person has incurred or reasonably anticipates incurring in the ordinary course of business of the enterprise; or

(C) The potential change in the value of services that a person provides, purchases, or reasonably anticipates providing or purchasing in the ordinary course of business of the enterprise;

(D) The potential change in the value of assets, services, inputs, products, or commodities that a person owns, produces, manufactures, processes, merchandises, leases, or sells, or reasonably anticipates owning, producing, manufacturing, processing, merchandising, leasing, or selling in the ordinary course of business of the enterprise;

(E) Any potential change in value related to any of the foregoing arising from foreign exchange rate movements associated with such assets, liabilities, services, inputs, products, or commodities; or

(F) Any fluctuation in interest, currency, or foreign exchange rate exposures arising from a person's current or anticipated assets or liabilities; or

(ii) Qualifies as bona fide hedging for purposes of an exemption from position limits under the Act; or

(iii) Qualifies for hedging treatment under Financial Accounting Standards Board Accounting Standards Codification Topic 815, Derivatives and Hedging (formerly known as Statement No. 133); and

(2) Such swap is:

(i) Not used for a purpose that is in the nature of speculation, investing, or trading; or

(ii) Not used to hedge or mitigate the risk of another swap or securities-based swap, unless that other swap itself is used to hedge or mitigate commercial risk as defined by this rule or the equivalent definitional rule governing security-based swaps promulgated by the Securities and Exchange Commission under the Securities Exchange Act of 1934.

Issued in Washington, DC, on December 9, 2010, by the Commission.

David A. Stawick,

Secretary of the Commission.

Appendices to End-User Exception to Mandatory Clearing of Swaps—Commission Voting Summary and Statements of Commissioners

Note: The following appendices will not appear in the Code of Federal Regulations.

Appendix 1—Commission Voting Summary

On this matter, Chairman Gensler and Commissioners Dunn and Chilton voted in the affirmative; Commissioners Sommers and O'Malia voted in the negative.

Appendix 2—Statement of Chairman Gary Gensler

I support the proposed rule on the end-user exception. Congress decided that non-financial entities hedging or mitigating commercial risk will have a choice of whether to submit their transactions to clearinghouse.

In essence, the proposal says that, if a company is using a swap to hedge an asset, liability, input or service that it currently has or uses or anticipates having or using, it would qualify for the end-user exception. In addition, the proposal says that if the swap meets generally accepted accounting principles as a hedge or if it used for bona fide hedging, the transaction would qualify for the end-user exception. These non-financial entities would be able to hedge interest rate risk, currency risk, physical commodity risk or other types of risk.

The proposed rule does, however, say that if an entity is taking a position to speculate,

the transaction would not qualify for the end-user exception.

I also support the series of questions included in the proposal regarding small financial institutions. In the Dodd-Frank Act, Congress directed the commission to consider possible exemptions for small financial institutions. I look forward to hearing from the public on their views on this and what conditions would be appropriate for such exemptions.

[FR Doc. 2010–31578 Filed 12–22–10; 8:45 am]

BILLING CODE P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 284

[Docket No. RM11–4–000]

Storage Reporting Requirements of Interstate and Intrastate Natural Gas Companies

December 16, 2010.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Notice of inquiry.

SUMMARY: The Federal Energy Regulatory Commission is considering whether to revise regulations requiring interstate and intrastate natural gas pipelines to report semi-annually on their storage activities. This Notice of Inquiry will assist the Commission in determining what changes, if any, should be made to its regulations.

DATES: *Comment Date:* Comments are due February 22, 2011.

ADDRESSES: You may submit comments on the Notice of Inquiry, identified by Docket No. RM11–4–000, by one of the following methods:

- *Agency Web Site:* Documents created electronically using word processing software should be filed in native applications or print-to-PDF format, and not in a scanned format, at *http://www.ferc.gov/docs-filing/efiling.asp.*
- *Mail/Hand Delivery:* Commenters unable to file comments electronically must mail or hand deliver an original copy of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street, NE., Washington, DC 20426.

These requirements can be found on the Commission's Web site; see, *e.g.,* the "Quick Reference Guide for Paper Submissions," available at *http://www.ferc.gov/docs-filing/efiling.asp* or via phone from FERC Online Support at 202–502–6652 or toll-free at 1–866–208–3676.

FOR FURTHER INFORMATION CONTACT:

Vince Mareino (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–6167, *Vince.Mareino@ferc.gov.*

Kenneth Kohut (Technical Information), Office of Enforcement, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–6342, *Kenneth.Kohut@ferc.gov.*

Thomas Russo (Technical Information), Office of Enforcement, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–8792, *Thomas.Russo@ferc.gov.*

SUPPLEMENTARY INFORMATION:

Notice of Inquiry

December 16, 2010.

1. In this Notice of Inquiry, the Federal Energy Regulatory Commission (Commission) seeks comments on whether the Commission should modify the semi-annual storage reports required of interstate and intrastate natural gas companies pursuant to 18 CFR 284.13(e) and 284.126(c) of the Commission's regulations.[1] In particular, the Commission is interested in exploring whether it should modify the information currently collected in the semi-annual storage reports, whether there should be a standardized electronic format for the reports, and whether the storage reports must be public.

I. Background

2. Section 284.13(e) of the Commission's regulations requires interstate pipelines to file semi-annual storage reports at the end of each complete storage injection and withdrawal season. Section 284.126(c) requires similar reports by (1) intrastate natural gas pipelines providing interstate transportation service pursuant to section 311 of the Natural Gas Policy Act of 1978 (NGPA)[2] and (2) Hinshaw pipelines providing interstate service subject to the Commission's Natural Gas Act (NGA) section 1(c) jurisdiction pursuant to blanket certificates issued under 18 CFR 284.224.[3] The reports by both sets of pipelines must include:

(1) The identity of each customer injecting gas into storage and/or withdrawing gas from storage (including, for interstate pipelines, any affiliate relationship),

(2) the rate schedule (for interstate pipelines) or docket number (for intrastate pipelines) authorizing the storage injection or withdrawal service,

(3) the maximum storage quantity and maximum daily withdrawal quantity applicable to each storage customer,

(4) for each storage customer, the volume of gas (in dekatherms) injected into and/or withdrawn from storage during the period,

(5) the unit charge and total revenues received during the injection/withdrawal period from each storage customer (including, for interstate pipelines, any discounts), and

(6) for intrastate pipelines, any related docket numbers under which the intrastate pipeline reported storage related injection/withdrawal transportation services.

The pipelines must file these reports within 30 days of the end of each complete storage injection and withdrawal season, and the reports must be signed under oath by a senior official. The Commission has not adopted any standardized electronic form for pipelines to submit the semi-annual storage reports. Nor has the Commission expressly required that the reports be public.

3. The Commission adopted the existing semi-annual storage reporting requirements for both interstate and intrastate pipelines in their current form in 1992 as part of Order No. 636,[4] and there have been only minor modifications in the semi-annual storage reporting requirements since

[1] The FERC Form No. 549B reporting requirements in 18 CFR 284.13(e) are approved by the Office of Management and Budget (OMB) under OMB Control No. 1902–0169. The Form No. 549 reporting requirements in 18 CFR 284.126(c) are approved under OMB Control No. 1902–0089.

[2] 15 U.S.C. 3372.

[3] Section 1(c) of the NGA exempts from the Commission's NGA jurisdiction those pipelines which transport gas in interstate commerce if (1) they receive natural gas at or within the boundary of a state, (2) all the gas is consumed within that state, and (3) the pipeline is regulated by a state Commission. This exemption is referred to as the Hinshaw exemption after the Congressman who introduced the bill amending the NGA to include section 1(c). *See ANR Pipeline Co.* v. *Federal Energy Regulatory Comm'n,* 71 F.3d 897, 898 (1995) (briefly summarizing the history of the Hinshaw exemption).

[4] *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol,* Order No. 636, FERC Stats. & Regs. ¶ 30,939, *order on reh'g,* Order No. 636–A, FERC Stats. & Regs. ¶ 30,950, *order on reh'g,* Order No. 636–B, 61 FERC ¶ 61,272 (1992), *order on reh'g,* 62 FERC ¶ 61,007 (1993), *aff'd in part and remanded in part sub nom. United Distribution Cos.* v. *FERC,* 88 F.3d 1105 (DC Cir. 1996), *order on remand,* Order No. 636–C, 78 FERC ¶ 61,186 (1997).

that date.[5] In Order No. 637,[6] the Commission revised the reporting requirements for interstate pipelines in order to require them to post on their internet Web sites basic information on the terms of each transportation and storage contract with individual shippers, no later than the first nomination under a transaction.[7] These posting requirements are set forth in section 284.13(b) of the Commission's regulations.[8] However, Order No. 637 did not modify the semi-annual storage reporting requirement for either interstate pipelines or section 311 and Hinshaw pipelines.

4. In recent years, the Commission has updated almost all of its other reporting requirements to clarify their public status, standardize the filing format, and streamline the process of publishing the reported data to the general public. For example, in Order No. 2001,[9] the Commission amended its filing requirements for public utilities under the Federal Power Act (FPA) to require them to file Electric Quarterly Reports (EQR) summarizing the contractual terms and conditions in their contracts for all jurisdictional services during the most recent calendar quarter. The EQRs include information similar to that required by the semi-annual storage reports, including the quantities of service provided and the rates charged for all sales under the reported contracts. Order No. 2001 required that the EQRs be filed in a standardized electronic format and that they be public.[10] In Order No. 710,[11] the Commission revised the Commission's financial reporting requirements for natural gas pipelines, FERC Form Nos. 2, 2–A, and 3–Q, also adopting standardized electronic forms for the filing of these reports and requiring them to be public. Similarly, new forms, such as Form No. 552 issued pursuant to the transparency provisions of section 23 of the Natural Gas Act, have likewise emphasized standardization and transparency.[12]

5. Most relevant to this proceeding, on May 20, 2010, the Commission issued Order No. 735 to bring the less stringent transactional reporting requirements for NGPA section 311 intrastate pipelines and Hinshaw pipelines closer in line with the 18 CFR 284.13(b) posting requirements for interstate pipelines.[13] As part of that proceeding, the Commission revised the former annual transportation report at 18 CFR 284.126(b) to cover storage as well. Order No. 735 requires that section 311 and Hinshaw pipelines file quarterly reports in a standardized electronic format, and requires that those reports be public. As revised in a contemporaneous order on rehearing, the new quarterly reports must contain the following information on each transportation and storage transaction, aggregated by contract:

i. The full legal name, and identification number, of the shipper receiving the service, including whether there is an affiliate relationship between the pipeline and the shipper;

ii. The type of service performed (*i.e.,* firm or interruptible transportation, storage, or other service);

iii. The rate charged under each contract, specifying the rate schedule/name of service and docket where the rates were approved. The report should separately state each rate component set forth in the contract (*i.e.,* reservation, usage, and any other charges);

iv. The primary receipt and delivery points covered by the contract, identified by the list of points that the pipeline has published with the Commission, which shall include the industry common code for each point where one has already been established;

v. The quantity of natural gas the shipper is entitled to transport, store, or deliver under each contract;

vi. The duration of the contract, specifying the beginning and (for firm contracts only) ending month and year of the current agreement;

vii. Total volumes transported, stored, injected, or withdrawn for the shipper; and

viii. Annual revenues received for each shipper, excluding revenues from storage services. The report should separately state revenues received under each component, and need only be reported every fourth quarter.

6. Order No. 735 did not modify the existing semi-annual storage reporting requirement for section 311 and Hinshaw pipelines in section 284.126(c) of the Commission's regulations in any way. That semi-annual storage report collects certain information that the new quarterly reports do not. This includes (1) the volumes actually injected and withdrawn from storage during the injection and withdrawal seasons and (2) revenues collected from each customer. Moreover, because the semi-annual reporting periods are tied to the injection and withdrawal season, the time periods covered by each report do not correspond precisely. Similarly, the 18 CFR 284.13(b) posting requirements for interstate pipelines do not collect this information.

II. Discussion

7. The Commission is issuing this Notice of Inquiry to consider whether and how the semi-annual storage reports required of both interstate and intrastate pipelines should be modified in light of (1) changes in the natural gas market since the Commission originally adopted the semi-annual storage reporting requirements and (2) recent improvements in the Commission's other reporting requirements.

8. Both the evolution of natural gas markets, and the Commission's experience in improving the usefulness and accessibility of other informational reports filed by natural gas pipelines and public utilities, warrant a review of the continued usefulness of the semi-annual storage reports in their current

[5] In 1995 in Order No. 581, the Commission held that it would "retain the semi-annual storage reports," and "not exempt intrastate storage companies charging market-based rates from the requirement to file semi-annual storage reports," and made minor changes to the regulatory text. *Revisions to Uniform System of Accounts, Forms, Statements, and Reporting Requirements for Natural Gas Companies,* Order No. 581, 60 FR 53019, 53049–51, FERC Stats. & Regs. ¶ 31,026 (1995), *order on reh'g,* Order No. 581–A, FERC Stats. & Regs. ¶ 31,032 (1996).

[6] *Regulation of Short-Term Natural Gas Transportation Services and Regulation of Interstate Natural Gas Transportation Services,* Order No. 637, FERC Stats. & Regs. ¶ 31,091, *clarified,* Order No. 637–A, FERC Stats. & Regs. ¶ 31,099, *reh'g denied,* Order No. 637–B, 92 FERC ¶ 61,062 (2000), *aff'd in part and remanded in part sub nom. Interstate Natural Gas Ass'n of America* v. *FERC,* 285 F.3d 18 (DC Cir. 2002), *order on remand,* 101 FERC ¶ 61,127 (2002), *order on reh'g,* 106 FERC ¶ 61,088 (2004), *aff'd sub nom. American Gas Ass'n* v. *FERC,* 428 F.3d 255 (DC Cir. 2005).

[7] The information to be posted includes the name of the shipper, the contract number (for firm service), the rate charged, the maximum rate, the duration (for firm service), the receipt and delivery points and zones covered, the quantity of natural gas covered, any special terms or details (such as any deviations from the tariff), and whether any affiliate relationship exists.

[8] 18 CFR 284.13(b).

[9] *Revised Public Utility Filing Requirements,* Order No. 2001, FERC Stats. & Regs. ¶ 31,127, *reh'g denied,* Order No. 2001–A, 100 FERC ¶ 61,074, *reh'g denied,* Order No. 2001–B, 100 FERC ¶ 61,342, *order directing filing,* Order No. 2001–C, 101 FERC ¶ 61,314 (2002), *order directing filing,* Order No. 2001–D, 102 FERC ¶ 61,334, *order refining filing requirements,* Order No. 2001–E, 105 FERC ¶ 61,352 (2003), *order on clarification,* Order No. 2001–F, 106 FERC ¶ 61,060 (2004), *order revising filing requirements,* Order No. 2001–G, 120 FERC ¶ 61,270, *order on reh'g and clarification,* Order No. 2001–H, 121 FERC ¶ 61,289 (2007), *order revising filing requirements,* Order No. 2001–I, 125 FERC ¶ 61,103 (2008).

[10] Order No. 2001, FERC Stats. & Regs. ¶ 31,127 at P 44–46, 74–85, 104–117, *reh'g denied,* Order No. 2001–A, 100 FERC ¶ 61,074 at P 13–17, 30–35.

[11] *Revisions to Forms, Statements, and Reporting Requirements for Natural Gas Pipelines,* Order No. 710, 73 FR 19389, FERC Stats. & Regs. ¶ 31,267 (2008), *reh'g and clarification,* Order No. 710–A, 123 FERC ¶ 61,278 (2008).

[12] *See Transparency Provisions of Section 23 of the Natural Gas Act,* Order No. 704, 73 FR 1014, FERC Stats. & Regs. ¶ 31,260 (2007), *order on reh'g,* Order No. 704–A, 73 FR 55726, FERC Stats. & Regs. ¶ 31,275 (2008), *order on reh'g,* Order No. 704–B, 125 FERC ¶ 61,302 (2008), *order on reh'g,* Order No. 704–C, 75 FR 35632, 131 FERC ¶ 61,246 (2010).

[13] *Contract Reporting Requirements of Intrastate Natural Gas Companies,* Order No. 735, 75 FR 29404, FERC Stats. & Regs. ¶ 31,310, 131 FERC ¶ 61,150 (2010), *order on reh'g,* Order No. 735–A, Docket No. RM09–2–001 (Dec. 16, 2010).

format. The semi-annual storage reports are now the only significant report required of regulated entities for which the Commission has not established a standardized electronic format and required to be public. As a result, many respondents file these reports subject to requests for confidential treatment, and/or file the data in a format that is not conducive to automated data review and posting on the Commission's Web site for public review. The Commission has often had to rely on exhaustive data requests in individual rate filings in order to fulfill its oversight duty, a method that is administratively burdensome to the pipelines and the Commission. Perhaps more importantly, significant information in the reports is either not available to the public at all or, if available, is difficult to analyze because of the different reporting formats.

9. Further, improved storage technology and the increased use of natural gas in industry and electric generation have helped transform the storage market since 1992. There has been a sharp increase in demand for natural gas outside of the traditional winter months. Withdrawals and injections, instead of occurring on a uniform annual schedule based on heating needs, now occur dynamically year-round in response to market forces.

10. Also, on rehearing of Order No. 735, several parties argued that, because the new quarterly transportation reports for section 311 and Hinshaw pipelines will include storage transactions, Order No. 735 has made the existing 18 CFR 284.126(c) semi-annual storage reporting requirement for those pipelines duplicative and therefore the semi-annual storage report should be eliminated. However, while there is significant overlap between the two reports, as described above the semi-annual storage reports for section 311 and Hinshaw pipelines still require the reporting of certain information not included in the new quarterly transportation report, including volumes injected and withdrawn from storage during each injection and withdrawal season and per-customer storage revenues. The 18 CFR 284.13(e) semi-annual storage reports by interstate pipelines are also the only place where interstate pipelines report this information.

11. Accordingly, the Commission requests comment on the following questions concerning the semi-annual storage reports by both interstate pipelines and by section 311 and Hinshaw pipelines.

(1) Should the Commission require that the semi-annual storage reports be public? In recent years, the Commission has clarified that Form Nos. 2, 2a, 3Q, 552, and other similar reports must be filed publicly with no provision for redacting data. The EQR, which Order No. 2001 requires to be public, contain reporting requirements quite similar to the semi-annual storage reports. In the contemporaneous order on rehearing of Order No. 735, the Commission affirmed that the new quarterly transportation reports by section 311 and Hinshaw pipelines will be public as well. Is there any reason why the natural gas storage reports by interstate and intrastate pipelines should not be made public?

(2) Should the natural gas storage reporting requirements be standardized into an electronic form with standard fields and definitions?

(3) Storage injections and withdrawals are no longer done exclusively on a seasonal basis, but occur dynamically year-round. Should any reporting on storage be filed on a quarterly schedule, instead of semi-annually by injection and withdrawal season?

(4) If a standardized electronic form is developed for storage reports by interstate pipelines, what data elements from the Data Dictionary for the new quarterly transportation reports for section 311 and Hinshaw pipelines should be used in the revised interstate pipeline storage reports? What additional data elements should be included?

(5) Should the Commission require that interstate and section 311 and Hinshaw pipelines must report the different rate components in each storage customer's contracts separately? What data elements should be included?

(6) In Order No. 735–A, the Commission removed from the new quarterly transportation report the requirement that section 311 and Hinshaw pipelines report revenues received from each storage customer, partly on the grounds that the semi-annual storage reports require reporting such information. Should this reporting requirement be retained for interstate and intrastate storage companies? Is the revenue information primarily of use in the rate cases of cost-based rate storage providers, so that revenues need not be reported by market-based storage providers?

(7) Given the extensive overlap between the new quarterly Form No. 549D reports [14] and the current requirements of the intrastate semi-annual storage reports, should the *intrastate* storage reporting requirements be folded into Form No. 549D, or kept as a separate form?

[14] The information collection requirements included in Commission Order No. 735 for Form No. 549D were approved under OMB Control No. 1902–0253. The proposed revisions in the order on rehearing in Docket No. RM09–2–001 are being submitted to OMB for review and approval under the Paperwork Reduction Act.

III. Comment Procedures

12. The Commission invites interested persons to submit comments and other information on the matters, issues, and specific questions identified in this notice. Comments are due February 22, 2011. Comments must refer to Docket No. RM11–4–000, and must include the commenter's name, the organization it represents, if applicable, and its address.

13. To facilitate the Commission's review of the comments, commenters are requested to provide an executive summary of their position. Commenters are requested to identify each specific question posed by the Notice of Inquiry that their discussion addresses and to use appropriate headings. Additional issues the commenters wish to raise should be identified separately. The commenters should double-space their comments.

14. Comments may be filed electronically via the eFiling link on the Commission's Web site at *http://www.ferc.gov* or on paper. The Commission accepts most standard word processing formats and commenters may attach additional files with supporting information in certain other file formats (as detailed at *http://www.ferc.gov/help/submission-guide.asp*). Commenters filing electronically do not need to make a paper filing.

15. Commenters unable to file comments electronically must mail or hand deliver an original copy of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street, NE., Washington, DC 20426.

16. 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 are not required to serve copies of their comments on other commenters.

IV. Document Availability

17. 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 p.m. Eastern time) at 888 First Street, NE., Room 2A, Washington, DC 20426.

18. From the Commission's Home Page on the Internet, this information is available in the Commission's document management system, 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) in the docket number field.

19. User assistance is available for eLibrary and the Commission's Web site during normal business hours. For assistance, please contact the Commission's Online Support at 1–866–208–3676 (toll free) or (202) 502–6652 (e-mail at *FERCOnlineSupport@ferc.gov* or the Public Reference Room at (202) 502–8371, TTY (202) 502–8659 (e-mail at *public.referenceroom@ferc.gov*).

By direction of the Commission.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2010–32109 Filed 12–22–10; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[EPA–HQ–OAR–2008–0708, FRL–9244–2]

RIN 2060–AP36

National Emission Standards for Hazardous Air Pollutants for Reciprocating Internal Combustion Engines

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of public meeting and extension of public comment period.

SUMMARY: On December 7, 2010, EPA published a notice announcing reconsideration of the March 3, 2010, final national emission standards for hazardous air pollutants for reciprocating internal combustion engines and requesting public comment on one issue arising from the final rule. Specifically, EPA requested public comment on the decision to amend the limitations on operation of emergency stationary engines to allow emergency engines to operate for up to 15 hours per year as part of an emergency demand response program. In order to provide further opportunity for public participation, EPA has scheduled a public meeting in Research Triangle Park, North Carolina, for January 13, 2011. More information on the location is shown in **SUPPLEMENTARY INFORMATION**. In addition, EPA is extending the deadline for the written comments on issue under reconsideration to February 14, 2011.

DATES: *Comments.* Comments must be received on or before February 14, 2011.

Public Meeting. A public meeting will be held on January 13, 2011, beginning at 10:30 a.m. EST. If you would like to attend the meeting, please notify Ms. Pamela Garrett, EPA, Office of Air Quality Planning and Standards, Sector Policies and Programs Division, Energy Strategies Group (D243–01), Research Triangle Park, NC 27711, telephone number 919–541–7966, e-mail address: *garrett.pamela@epa.gov* (preferred method for registering) by 5 p.m. EST on January 10, 2011. If using e-mail, please provide the following information: name, affiliation, address, e-mail address, and telephone and fax numbers.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2008–0708, by one of the following methods:

- *http://www.regulations.gov*: Follow the on-line instructions for submitting comments.
- *E-mail: a-and-r-docket@epa.gov*.
- *Fax:* (202) 566–1741.
- *Mail:* Air and Radiation Docket and Information Center, Environmental Protection Agency, Mailcode: 6102T, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Please include a total of two copies. EPA requests a separate copy also be sent to the contact person identified below (*see* **FOR FURTHER INFORMATION CONTACT**).
- *Hand Delivery:* Air and Radiation Docket and Information Center, U.S. EPA, Room B102, 1301 Constitution Avenue, NW., Washington, DC. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OAR–2008–0708. EPA's policy is that all comments received will be included in the public docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov*, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Public Meeting: A public meeting will be held on January 13, 2010, in room C111A at EPA's campus located at 109 T.W. Alexander Drive in Research Triangle Park, NC. The meeting will begin at 10:30 a.m. EST.

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. EPA also relies on documents in Docket ID Nos. EPA–HQ–OAR–2002–0059, EPA–HQ–OAR–2005–0029, and EPA–HQ–OAR–2005–0030, and incorporated those dockets into the record for this action. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Air and Radiation Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Ms. Melanie King, Energy Strategies Group, Sector Policies and Programs Division (D243–01), Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number (919) 541–2469; facsimile number (919) 541–5450; e-mail address *king.melanie@epa.gov.*

SUPPLEMENTARY INFORMATION:

Public Meeting

The public meeting will provide interested parties the opportunity to present data, views, or arguments concerning the issue under reconsideration. Written statements and supporting information submitted during the comment period will be considered with the same weight as any oral comments and supporting information presented at the public meeting. Written comments must be postmarked by the last day of the comment period, which is February 14, 2011.

How can I get copies of the final rule, notice of reconsideration, and other related information?

The final rule was published on March 3, 2010, and the notice of reconsideration and request for public comment was published on December 7, 2010. Both actions can be accessed at the following Web site: *http://www.epa.gov/ttn/atw/rice/ricepg.html.* EPA has established the public docket for the rulemaking under docket ID No. EPA–HQ–OAR–2008–0708, and a copy of the final rule is available in the docket. Information on how to access the docket is presented above in the **ADDRESSES** section.

List of Subjects in 40 CFR Part 63

Administrative practice and procedure, Air pollution control, Hazardous substances, Intergovernmental relations.

Dated: December 20, 2010.

Gina McCarthy,

Assistant Administrator, Office of Air and Radiation.

[FR Doc. 2010–32454 Filed 12–22–10; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Part 489

[CMS–1350–ANPRM]

RIN 0938–AQ51

Medicare Program; Emergency Medical Treatment and Labor Act: Applicability to Hospital and Critical Access Hospital Inpatients and Hospitals With Specialized Capabilities

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Advance notice of proposed rulemaking with comment.

SUMMARY: This advance notice of proposed rulemaking announces the intention of CMS to solicit comment on the need to publish a proposed rule to address two policies related to the Emergency Medical Treatment and Labor Act (EMTALA). Specifically, this document serves as a request for comments regarding our need to revisit the policies articulated in the September 9, 2003 **Federal Register** (68 FR 53243) and the August 19, 2008 **Federal Register** (73 FR 48656) concerning the applicability of EMTALA to hospital inpatients and the responsibilities of hospitals with specialized capabilities, respectively.

DATES: To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. EST on February 22, 2011.

ADDRESSES: In commenting, please refer to file code CMS–1350–ANPRM. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

You may submit comments in one of four ways (please choose only one of the ways listed):

1. *Electronically.* You may submit electronic comments on this regulation to *http://www.regulations.gov.* Follow the "Submit a comment" instructions.

2. *By regular mail.* You may mail written comments to the following address ONLY:

Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–1350–ANPRM, P.O. Box 8013, Baltimore, MD 21244–8013.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments to the following address ONLY:

Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–1350–ANPRM, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850.

4. *By hand or courier.* If you prefer, you may deliver (by hand or courier) your written comments before the close of the comment period to either of the following addresses:

a. For delivery in Washington, DC—

Centers for Medicare & Medicaid Services, Department of Health and Human Services, Room 445–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201.

(Because access to the interior of the Hubert H. Humphrey Building is not readily available to persons without Federal government identification, commenters are encouraged to leave their comments in the CMS drop slots located in the main lobby of the building. A stamp-in clock is available for persons wishing to retain a proof of filing by stamping in and retaining an extra copy of the comments being filed.)

b. For delivery in Baltimore, MD—

Centers for Medicare & Medicaid Services, Department of Health and Human Services, 7500 Security Boulevard, Baltimore, MD 21244–1850.

If you intend to deliver your comments to the Baltimore address, please call telephone number (410) 786–7195 in advance to schedule your arrival with one of our staff members.

Comments mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and received after the comment period.

FOR FURTHER INFORMATION CONTACT: Renate Dombrowski (410) 786–4645.

SUPPLEMENTARY INFORMATION: *Inspection of Public Comments:* All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all comments received before the close of the comment period on the following Web site as soon as possible after they have been received: *http://www.regulations.gov.* Follow the search instructions on that Web site to view public comments.

Comments received timely will also be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, at the headquarters of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, Maryland 21244, Monday through Friday of each week from 8:30 a.m. to 4 p.m. To schedule an appointment to view public comments, phone 1–800–743–3951.

I. Overview

We are issuing this advance notice of proposed rulemaking (ANPRM) to solicit public comments on the need to revisit through a notice of proposed rulemaking CMS' current policy on the applicability of the Emergency Medical Treatment and Labor Act (EMTALA). Specifically, this notice concerns the applicability of EMTALA to individuals who are determined in the hospital's dedicated emergency department to have an emergency medical condition (EMC) who, prior to being stabilized, are subsequently admitted to the hospital as inpatients, and then need to be transferred to another hospital with

specialized capabilities for stabilizing treatment.

II. Background

Sections 1866(a)(1)(I), 1866(a)(1)(N), and 1867 of the Social Security Act (the Act) were enacted as parts of the Emergency Medical Treatment and Labor Act (EMTALA). These statutory provisions impose specific obligations on certain Medicare-participating hospitals and critical access hospitals (CAHs). (Throughout this advance notice of proposed rulemaking, when we reference the obligation of a "hospital" under these sections of the Act and in our regulations, we mean to include CAHs as well.) These obligations concern individuals who come to a hospital's "dedicated emergency department" (as defined at 42 CFR 489.24(b)), and request examination or treatment for a medical condition, and apply to all of these individuals, regardless of whether they are beneficiaries of any program under the Act.

EMTALA, also known as the patient antidumping statute, was passed in 1986 as part of the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), Public Law 99–272. Congress incorporated these antidumping provisions within the Social Security Act to ensure that any individual with an EMC, regardless of the individual's insurance coverage, is not denied essential lifesaving services. Under section 1866(a)(1)(I)(i) of the Act, a hospital that fails to fulfill its EMTALA obligations under these provisions may be subject to termination of its Medicare provider agreement, which would result in the loss of all Medicare and Medicaid payments. In addition, section 1867(d) of the Act provides for the imposition of civil monetary penalties on a hospital and physician who negligently violate a requirement of EMTALA under section 1867 of the Act.

Section 1867 of the Act sets forth requirements for medical screening examinations for individuals who come to the hospital and request examination or treatment for a medical condition. The section further provides that if a hospital finds that such an individual has an EMC, it is obligated to provide that individual with either necessary stabilizing treatment or an appropriate transfer to another medical facility where stabilization can occur. The EMTALA statute also outlines the obligation of hospitals to receive appropriate transfers from other hospitals. Section 1867(g) of the Act states that a participating hospital that has specialized capabilities or facilities (such as burn units, shock-trauma units, neonatal intensive care units or with respect to rural areas, regional referral centers as identified by the Secretary in regulation) shall not refuse to accept an appropriate transfer of an individual who requires these specialized capabilities or facilities if the hospital has the capacity to treat the individual. The regulations implementing section 1867 of the Act are found at 42 CFR 489.24. The regulations at 42 CFR 489.20(l), (m), (q), and (r) also refer to certain EMTALA requirements outlined in section 1866 of the Act. The Interpretive Guidelines concerning EMTALA are found at Appendix V of the CMS State Operations Manual: *http://www.cms.gov/manuals/Downloads/som107ap_v_emerg.pdf.*

A. Applicability of EMTALA to Hospital Inpatients

Although the focus of EMTALA routinely involves the treatment of individuals who present to a hospital's dedicated emergency department with a request for treatment of a medical condition, concerns have also arisen about the applicability of EMTALA to hospital inpatients. We have previously discussed the applicability of EMTALA to hospital inpatients in the May 9, 2002 Hospital Inpatient Prospective Payment System (IPPS) proposed rule (67 FR 31475) and the September 9, 2003 stand-alone final rule on EMTALA (68 FR 53243).

As we noted in these prior proposed and final rules, in 1999, the United States Supreme Court considered a case (*Roberts* v. *Galen of Virginia,* 525 U.S. 249 (1999)) that involved, in part, the question of whether EMTALA applies to hospital inpatients. In the context of that case, the United States Solicitor General advised the Court that HHS would develop a regulation clarifying its position on this issue. In the May 9, 2002 proposed rule, we proposed that EMTALA continue to apply to admitted individuals who are not stabilized (who presented under EMTALA), but that it would not otherwise apply to inpatients. We indicated that individuals whose conditions go in and out of apparent stability rapidly and frequently would not be considered "stabilized" and the hospital would continue to have an obligation to such individuals even after they are admitted. However, for all other inpatients we stated that EMTALA was intended to provide protection to individuals coming to a hospital to seek care for an EMC. Therefore, we stated that we believed the EMTALA requirements did not extend to stabilized inpatients even if they subsequently become unstable because those inpatients are protected by a number of Medicare conditions of participation (CoPs) as well as the hospital's other legal, licensing, and professional obligations with respect to the continued proper care and treatment of its patients.

In the September 9, 2003 stand-alone final rule on EMTALA, we refined this position to state that a hospital's obligation under EMTALA ends either when the individual's EMC is stabilized or when that hospital, in good faith, admits an individual with an unstable EMC as an inpatient. That is, we stated that EMTALA does not apply to any inpatient, even one who was admitted through the dedicated emergency department, for whom the hospital had initially incurred an EMTALA obligation to stabilize, and who remained unstabilized after admission as an inpatient. We noted that other patient safeguards protect all inpatients, including the hospital CoPs as well as State malpractice law. In addition, judicial interpretation of the matter and comments we received on the proposed rule helped shape the policy articulated in the final rule. However, we also stated in the rule that a hospital could not escape liability under EMTALA by admitting an individual with no intention of treating the individual and then inappropriately transferring or discharging that individual without having met the stabilization requirement.

B. EMTALA Technical Advisory Group Recommendation Regarding Responsibilities of Hospitals With Specialized Capabilities

Section 945 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA), Public Law 108–173, required the Secretary to establish a Technical Advisory Group (TAG) to advise the Secretary on issues related to the regulations and implementation of EMTALA. The EMTALA TAG's functions, as identified in the charter for the EMTALA TAG, were as follows: (1) Review EMTALA regulations; (2) provide advice and recommendations to the Secretary concerning these regulations and their application to hospitals and physicians; (3) solicit comments and recommendations from hospitals, physicians, and the public regarding the implementation of such regulations; and (4) disseminate information concerning the application of these regulations to hospitals, physicians, and the public. The TAG met 7 times during its 30-month term, which ended on September 30, 2007. At its meetings, the TAG heard testimony

from representatives of physician groups, hospital associations, and others regarding EMTALA issues and concerns. During each meeting, subcommittees established by the TAG developed recommendations, which were then discussed and voted on by members of the TAG. One of these recommendations, presented by the TAG during its September 2007 meeting calls for CMS to revise its regulations to address the situation of an individual who: (1) Presents to a hospital that has a dedicated emergency department and is determined to have an unstabilized EMC; (2) is admitted to the hospital as an inpatient for purposes of stabilizing the EMC; and (3) subsequently needs a transfer to a hospital with specialized capabilities to receive stabilizing treatment that cannot be provided by the referring hospital that originally admitted the individual.

C. Applicability of EMTALA to Hospital Inpatients and Responsibilities of Hospitals With Specialized Capabilities

To further clarify our position on the applicability of EMTALA and the responsibilities of hospitals with specialized capabilities to accept appropriate transfers, the agency included as part of the April 30, 2008 IPPS proposed rule (73 FR 23669) two proposals that addressed the issue of hospital inpatients. First in the proposed rule, we stated that we believed that the obligation of EMTALA does not end for *all* hospitals once an individual is admitted as an inpatient to the hospital where the individual first presented with a medical condition that was determined to be an EMC. Rather, we stated, once the individual is admitted, the admission only affects the EMTALA obligation of the hospital where the individual first presented (the admitting hospital). In the proposed rule, we proposed that section 1867(g) of the Act (which refers to responsibilities of hospitals with specialized capabilities) requires a receiving hospital with specialized capabilities to accept a request to transfer an individual with an unstable EMC so long as the hospital has the capacity to treat that individual regardless of whether that individual was ultimately an inpatient at the admitting hospital. We stated that we believed that permitting inpatient admission at the admitting hospital to end EMTALA obligations for another hospital would seemingly contradict the intent of section 1867(g) of the Act to ensure that hospitals with specialized capabilities provide medical treatment to individuals with EMCs in order to stabilize those conditions. And we further noted that while a hospital inpatient is protected under Medicare CoPs and may also have additional protections under State law, the obligations of another hospital under the CoPs apply only to that hospital's patients, and there is no CoP that requires a hospital to accept the transfer of a patient from an admitting facility. We proposed to interpret section 1867(g) of the Act as creating an obligation on hospitals with specialized capabilities to accept appropriate transfers of individuals for whom the admitting hospital originally had an EMTALA obligation under section 1867 of the Act, if the hospital with specialized capabilities has the capacity to treat the individuals. Thus, in the April 30, 2008 IPPS proposed rule, we proposed that when an individual originally covered by EMTALA is admitted as an inpatient at that hospital and continues to have an unstabilized EMC, a hospital with specialized capabilities has an EMTALA obligation to accept a transfer of that individual, assuming that the transfer of the individual is an appropriate transfer and that the participating hospital with specialized capabilities has the capacity to treat the individual.

We received many comments opposing the proposal concerning hospitals with specialized capabilities included in the April 30, 2008 IPPS proposed rule. The commenters stated that the proposed rule would "reopen" EMTALA for an admitting hospital by extending EMTALA's requirements for an "appropriate transfer" despite the fact that the admitting hospital's EMTALA obligations ended, under regulation, when it admitted an individual as an inpatient. The commenters also stated that, because the original admitting hospital may claim that it lacks the capacity or capability to stabilize the individual's EMC, finalizing the proposed policy would result in an increase in patient dumping and inappropriate transfers, especially to teaching hospitals, tertiary care centers, and urban safety net hospitals.

Commenters further asserted that finalizing CMS' policy as proposed would exacerbate confusion surrounding the determination of whether an individual is considered stable. That is, the admitting hospital would be required to continuously monitor the individual to determine if at any point in the emergency department or even as an inpatient, the individual experienced a period of stability since such stability would end EMTALA obligations for all hospitals that might otherwise have obligations under the law. Under this scenario, the commenters asserted that the hospital with specialized capabilities would be forced to accept the transfer of an individual, potentially increasing the number of inappropriate or unnecessary transfers, because that hospital would be unable, with complete certainty, to determine whether or not the individual being transferred had ever experienced a period of stability.

As a result, in the August 19, 2008 IPPS final rule we stated that, due to the many concerns that the commenters raised, we believe it is appropriate to finalize a policy to state that if an individual with an unstable emergency medical condition is admitted as an inpatient, the EMTALA obligation has ended, even if the individual's EMC remains unstabilized and the individual requires treatment only available at a hospital with specialized capabilities. Put another way, we determined that a hospital with specialized capabilities does not have an EMTALA obligation to accept an appropriate transfer of an individual who had been admitted in good faith as an inpatient at the first hospital. We stated that we believed that finalizing the proposed policy might negatively impact patient care, due to an increase in inappropriate transfers, that could be detrimental to the physical and psychological health and well-being of patients. We further stated that we were concerned that finalizing the proposed rule could further burden the emergency system and could force hospitals providing emergency care to limit their services or care, thereby reducing access to emergency treatment. In addition, we stated that we were concerned about the possible disparate treatment of inpatients under the proposed policy because an individual who presented to a hospital under EMTALA might have different transfer rights than an inpatient who was admitted for an elective procedure. And we generally agreed that hospitals with specialized capabilities would accept the transfer of an inpatient with an unstable EMC even if there was no legal requirement under EMTALA to do so. We also noted that the recommendation provided by the TAG to apply EMTALA to hospital inpatients was endorsed by the group on the narrowest of margins, and that the majority of hospital representatives serving on the TAG were opposed to the recommendation. And while we adopted a final rule that limits the EMTALA responsibilities of a hospital with specialized capabilities, we encouraged the public to make us aware if the interpretation of section 1867(g) of the Act as set forth in the rule resulted in harmful refusals by hospitals with

specialized capabilities to accept the transfer of inpatients whose EMC remains unstabilized or any other unintended consequences.

D. Litigation Related to the Applicability of EMTALA to Hospital Inpatients

There have been several court cases involving the applicability of EMTALA to hospital inpatients. For example, in *Thorton* v. *Southwest Detroit Hospital,* 895 F.2d 1131, 1134 (6th Cir. 1990), the Sixth Circuit stated that, "once a patient is found to suffer from an [EMC] in the emergency room, she cannot be discharged until the condition is stabilized. * * * " However, other courts have concluded that a hospital's obligations under EMTALA end at the time that a hospital admits an individual to the facility as an inpatient. (*See Bryan* v. *Rectors and Visitors of the University of Virginia,* 95 F.3d 349 (4th Cir. 1996), *Bryant* v. *Adventist Health System/West,* 289 F.3d 1162 (9th Cir. 2002), and *Harry* v. *Marchant,* 291 F.3d 767 (11th Cir. 2002).) In *Lima-Rivera* v. *UHS of Puerto Rico Inc.,* (D.P.R. No. 04–1798, 2007), the U.S. District Court for the District of Puerto Rico rejected the claim that EMTALA does not apply to inpatients. Most recently in *Moses* v. *Providence Hospital and Medical Centers Inc.,* 561 F.3d 573 (6th Cir. 2009), the court concluded that a hospital's EMTALA obligations to an individual continue until that individual's EMC is stabilized regardless of the individual's status as an inpatient or outpatient.

III. Intention of This Notice

We are aware that there continues to be a range of opinions even at the Circuit Court level on the topic of EMTALA's application to inpatients. There also continues to be various opinions regarding whether EMTALA should apply to situations where a hospital seeks to transfer an individual, admitted as a hospital inpatient after seeking treatment for an EMC, to a hospital with specialized capabilities because the admitted inpatient continued to have an unstabilized EMC that required specialized treatment. Therefore, we are interested in receiving comments that address whether we should revisit the policies that were established in the September 9, 2003 final rule on EMTALA and the August 19, 2008 IPPS final rule, respectively.

We would find it particularly helpful if commenters could submit specific real world examples that demonstrate whether it would be beneficial to revisit the policies articulated in the September 9, 2003 final rule on EMTALA or the August 19, 2008 IPPS final rule. We also are interested in hearing whether commenters are aware of situations where an individual who presented under EMTALA with an unstable EMC was admitted to the hospital where he or she first presented and was then transferred to another facility, even though the admitting hospital had the capacity and capability to treat that individual's EMC.

We are also interested in receiving information regarding the accuracy of our statement in the August 19, 2008 IPPS final rule that a hospital with specialized capabilities would accept the transfer of an inpatient with an unstabilized EMC absent an EMTALA obligation. Specifically, we would be interested to know if commenters are aware of situations where an individual with an unstabilized EMC was admitted as an inpatient and continued to have an unstabilized EMC requiring the services of a hospital with specialized capabilities that refused to accept the transfer of the individual because current policy does not obligate hospitals with specialized capabilities to do so.

IV. Collection of Information Requirements

This document does not impose information collection and recordkeeping requirements. Consequently, it need not be reviewed by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995.

V. Response to Comments

Because of the large number of public comments we normally receive on **Federal Register** documents, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the **DATES** section of this preamble, and, when we proceed with a subsequent document, we will respond to the comments in the preamble to that document.

Authority: (Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance)

Dated: November 18, 2010.

Donald M. Berwick,

Administrator, Centers for Medicare & Medicaid Services.

Approved: December 14, 2010.

Kathleen Sebelius,

Secretary, Department of Health and Human Services.

[FR Doc. 2010–32267 Filed 12–22–10; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

49 CFR Parts 171, 173, 178, and 180

[Docket Number PHMSA–2010–0019 (HM–241)]

RIN 2137–AE58

Hazardous Materials: Adoption of ASME Code Section XII and the National Board Inspection Code

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Advance notice of proposed rulemaking (ANPRM).

SUMMARY: PHMSA is considering amending the Hazardous Materials Regulations (HMR) to incorporate the most recent edition of the American Society of Mechanical Engineers' *Boiler and Pressure Vessel Code, Section XII* for the design, construction, and certification of cargo tank motor vehicles, cryogenic portable tanks and multi-unit-tank car tanks (ton tanks). PHMSA is also considering incorporating by reference the National Board of Boiler and Pressure Vessel Inspectors' *National Board Inspection Code* as it applies to the continuing qualification and maintenance of ASME stamped cargo tank motor vehicles, portable tanks, and multi-unit-tank car tanks (ton tanks) constructed to standards in ASME Section VIII or ASME Section XII. In this ANPRM, PHMSA is soliciting comments on the advisability of incorporating the most recent editions of these two standards by reference. We request comments to identify any gaps or inconsistencies between current HMR requirements and these consensus standards. Additionally, we seek input regarding any potential costs, benefits, and burdens associated with compliance with these consensus standards.

DATES: Submit comments by March 23, 2011. To the extent possible, PHMSA will consider late-filed comments as we determine whether additional rulemaking is necessary.

ADDRESSES: You may submit comments identified by the docket number (PHMSA–2010–0019; HM–241) by any of the following methods:

- Federal eRulemaking Portal: Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- Fax: 1–202–493–2251.
- Mail: Docket Operations, U.S. Department of Transportation, West

Building, Ground Floor, Room W12–140, Routing Symbol M–30, 1200 New Jersey Avenue, SE., Washington, DC 20590.

• Hand Delivery: To Docket Operations, Room W12–140 on the ground floor of the West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Instructions: All submissions must include the agency name and docket number for this notice at the beginning of the comment. Note that all comments received will be posted without change to the docket management system, including any personal information provided.

Docket: For access to the dockets to read background documents or comments received, go to *http://www.regulations.gov,* or DOT's Docket Operations Office (*see* **ADDRESSES**).

Privacy Act: Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the document (or signing the document, if submitted on behalf of an association, business, labor union, *etc.*). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477) or you may visit *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Kurt Eichenlaub or Ben Supko, Standards and Rulemaking Division, (202) 366–8553, or Charles Hochman, Engineering and Research Division, (202) 366–4492, Pipeline and Hazardous Materials Safety Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590.

SUPPLEMENTARY INFORMATION:

I. Abbreviations and Terms Used in This Document

AI: Authorized Inspector
ANSI: American National Standards Institute
ASME: American Society of Mechanical Engineers
BPVC: Boiler and Pressure Vessel Code
CI: Certified Individual
CTMV: Cargo Tank Motor Vehicle
DCE: Design Certifying Engineer
FMCSA: Federal Motor Carrier Safety Administration
HMR: Hazardous Materials Regulations (49 CFR Parts 171–180)
MAWP: Maximum Allowable Working Pressure
NBIC: National Board Inspection Code
PHMSA: Pipeline and Hazardous Materials Safety Administration
PVMA: Pressure Vessel Manufacturers Association
QI: Qualified Inspector
RI: Registered Inspector
Section XII: ASME BPVC, Section XII

II. Background

The Federal hazardous materials transportation law (49 U.S.C. 5101 *et seq.* (Federal hazmat law)) authorizes the Secretary of Transportation to regulate the safe and secure transportation of hazardous materials in commerce. In accordance with its delegated authority from the Secretary, PHMSA has established hazardous materials safety regulations applicable to packagings used to transport hazardous materials in commerce, including requirements for the design, construction, qualification, maintenance, and repair of bulk packagings such as cargo tanks, portable tanks, and ton tanks.

Under 49 CFR 1.53, PHMSA is delegated the responsibility to enforce the Hazardous Materials Regulations. In addition, under 49 CFR 1.49(s) and 1.73(d), the Federal Railroad Administration and the Federal Motor Carrier Safety Administration (FMCSA) are delegated authority to enforce the Hazardous Materials Regulations (HMR; 49 CFR parts 171–180) with particular emphasis on railroad and highway transportation respectively. PHMSA, FRA and FMCSA work closely with the regulated industry through educational assistance activities and FRA's and FMCSA's compliance and enforcement programs.

General requirements for cargo tank motor vehicles (CTMVs), portable tanks, and ton tanks such as outage and filling limits, are prescribed in § 173.24b. Detailed design and construction requirements that encompass material of construction, structural integrity, closures, openings, inlets and outlets, pressure relief devices, valves and fittings, tests, certification, etc., are specified in 49 CFR part 178, subpart H for portable tanks, subpart J for CTMVs and 49 CFR part 179, subpart E for multi-unit tank car tanks (ton tanks). Requirements applicable to continuing qualification and maintenance encompassing periodic tests and inspections, repairs, modifications, alterations, and conversions are specified in 49 CFR part 180, subpart E for CTMVs, subpart F for ton tanks, and subpart G for portable tanks. Design, construction and qualification of rail tank cars (49 CFR part 179 and part 180, subpart F) and non-specification cargo tanks (*i.e.,* nurse tanks) are not being considered in the ANPRM.

Currently, the HMR incorporate by reference the ASME BPVC, Section VIII, Division I, as part of the standards for the design and construction of cryogenic portable tanks and CTMVs. Section VIII sets forth detailed criteria for the design, construction, certification, and marking of stationary boilers and pressure vessels. Many factors exerted on stationary tanks such as pressure, temperature changes, and atmospheric conditions are the same as those encountered by transportation tanks. However, Section VIII does not address unique conditions and stresses encountered by tanks in the transportation environment. To address differences between stationary tanks and transportation tanks, the HMR contain additional design and construction requirements to account for conditions and stresses likely to occur in transportation.

III. Petitions for Rulemaking

In this ANPRM, PHMSA is considering three petitions for rulemaking from ASME, the National Board, and the Pressure Vessel Manufacturers Association (PVMA).

1. On May 10, 2005, ASME petitioned PHMSA to revise the HMR to incorporate by reference the *ASME Boiler and Pressure Vessel Code, Section XII, Transport Tanks—2004 edition.* Section XII of the BPVC contains requirements for construction and continued service of ASME pressure vessels for the transportation of dangerous goods with design pressures appropriate for the transportation mode and volumes greater than 450 liters (120 gallons) via highway, railway, air, or water. The construction requirements cover materials, design, fabrication, examination, inspection, testing, certification, and over-pressure protection. The requirements for continued service cover inspection, testing, repair, alteration, and recertification of in-service ASME stamped transport tanks. These transport tank requirements include the pressure vessel, appurtenances, and additional components that are covered by Modal Appendices for the specific transport modes and unique service conditions of the specific application. The 2004 edition contains one Modal Appendix for portable tanks carrying cryogenic liquids. The 2007 edition was expanded to include the Modal Appendix for cargo tanks. The 2010 edition was expanded to include the Modal Appendix for ton tanks. [P–1459; Docket No. PHMSA–2005–21351].

2. On February 27, 2006, PVMA petitioned PHMSA to revise the HMR to incorporate by reference the *ASME Boiler and Pressure Vessel Code, Section XII Transport Tanks—2004 edition.* PVMA and several of its member companies participated in the development of Section XII, which

contains design requirements for tanks and pressure vessels that several of its members manufacture. [PHMSA; P–1474; Docket No. PHMSA–2006–24712].

3. On July 12, 2007, the National Board of Boiler and Pressure Vessel Inspectors petitioned PHMSA to revise the HMR to incorporate by reference the *National Board Inspection Code—2007 Edition.* The NBIC contains rules for continued service inspections, repairs, and modifications of transport tanks, including methods to be used and criteria for inspections, reports, document control, and inspector duties and responsibilities. The term "inspector" includes Authorized Inspector (AI), Qualified Inspector (QI), Certified Individual (CI) or Registered Inspector (RI) to address all aspects of continued service. The NBIC has updated the 2007 edition with a 2010 addendum. [P–1502; Docket No. PHMSA–2007–28809].

IV. ASME BPVC Section XII

ASME is a not-for-profit membership professional organization that enables collaboration, knowledge-sharing, and skill development across all engineering disciplines. ASME is recognized globally for its leadership in providing the engineering community with technical content and a forum for information exchange. Development committees meet regularly to consider revisions to the ASME codes and standards based on safety concerns, technological advances, new data, and changing environmental and industry needs. All meetings are free of charge and open to public participation. ASME subcommittees consider correspondence from the general public in the form of requests for interpretation and revision to existing codes, requests for code cases, and requests to develop new standards.

In 1995, at the request of the Research and Special Programs Administration, PHMSA's predecessor agency, the ASME Board on Pressure Technology Codes and Standards formed a subcommittee on transport tanks (SC XII) to develop new standards to specifically address transport tanks with active participation by PHMSA. SC XII presides over a main committee, three subgroups identified as: (1) General Requirements, (2) Fabrication and Examination, and (3) Design and Materials. Subsequently, SC XII developed and published in July of 2004 the *ASME BPVC Section XII, Rules for Construction and Continued Service of Transport Tanks* to address pressure vessels that are used in transportation. Section XII is based on the existing and long-established BPVC Section VIII. Section XII, 2010 edition, consists of ten parts, four modal appendices written to address different tank types, sixteen mandatory appendices, and eight non-mandatory appendices. Transport tanks are divided into categories designed specifically to mirror existing DOT specifications; for example, a DOT 406 cargo tank is a Category 406 tank in Article 1 of Modal Appendix 1. The 2010 edition contains modal appendices for cargo tanks, cryogenic portable tanks, and ton tanks. For the purposes of this notice, PHMSA is considering a proposal to incorporate Section XII, in its entirety, for Category 331, 338, 406, 407, and 412 cargo tanks, cryogenic portable tanks, and ton tanks. PHMSA is seeking comments as to whether Section XII should be proposed for incorporation into the HMR as an alternative or as a replacement for existing HMR requirements for DOT specification CTMVs, cryogenic portable tanks, and ton tanks.

Section VIII applies to construction of new tanks only. Tanks constructed and certified in accordance with Section VIII are marked with a "U" stamp. Section XII applies to new construction and continued service. As defined in Section XII, "continued service" is an all-inclusive term referring to the inspection, testing, repair, alteration, and recertification of transport tanks that have been in service. As stated earlier, Section XII is divided into ten parts. PHMSA is considering incorporating all ten parts, the three modal appendices for specification cargo tanks, cryogenic portable tanks, and ton tanks, and each of the non-mandatory appendices. The ten parts are: TG—GENERAL REQUIREMENTS; TM—MATERIAL REQUIREMENTS; TD—DESIGN REQUIREMENTS; TW—REQUIREMENTS FOR TANKS FABRICATED BY WELDING; TF-FABRICATION REQUIREMENTS; TE—EXAMINATION REQUIREMENTS; TT—TESTING REQUIREMENTS; TR—PRESSURE—RELIEF DEVICES; TS—STAMPING, MARKING, CERTIFICATION, REPORTS, AND RECORDS; and TP—REQUIREMENTS FOR REPAIR, ALTERATION, TESTING, AND INSPECTION FOR COTINUED SERVICE. Section XII requires newly constructed transport tanks to bear a "T" stamp. The "T" stamp is essentially equivalent to the current "U" stamp required for certain DOT cargo tanks designed and constructed to Section VIII standards, currently incorporated by reference in the HMR. PHMSA is considering whether to adopt Section XII, in its entirety, as a replacement for existing DOT specification tanks, or as an alternative to the design and construction requirements for DOT specification tanks.

In this ANPRM, PHMSA refers to the 2010 edition of ASME Section XII. However, ASME continues to work on updates to Section XII, and we will consider adoption of the most recent edition if PHMSA proceeds with a notice of proposed rulemaking (NPRM). A copy of Section XII, 2010 edition, is available for review at DOT's Docket Operations Office (*see* **ADDRESSES**). The current price of Section XII in hard copy is $450.

V. NBIC

The National Board of Boiler and Pressure Vessel Inspectors was formed in 1921 and is an American National Standards Institute (ANSI) accredited standards development organization. The National Board follows an approved set of standards development procedures (NB–240, National Board Inspection Code Procedures; *http://www.nationalboard.org*) and is subject to regular audits by ANSI.

First published in 1946, the NBIC was established by the National Board to provide rules and guidelines for the repair, alteration, inspection, installation, maintenance, and testing of boilers, pressure vessels, and other pressure retaining items. The NBIC is developed and maintained by a consensus committee comprised of industry experts (the NBIC Committee). The NBIC Committee consists of a main committee, subcommittees, subgroups, and task groups of industry experts and has Federal representation by PHMSA. Participants meet bi-annually to consider revisions to the NBIC based on safety concerns, technological advances, new data, and industry needs. All meetings are free of charge and open to public participation. The NBIC subcommittees consider correspondence from the general public in the form of requests for interpretation and revision of existing standards and requests to develop new standards. The standards-writing subcommittees, subgroups, and task groups are open to participation by representatives of groups that are materially affected by the code. Such groups include manufacturers, repair firms, authorized inspection agencies, and representatives of government agencies. Each year the NBIC Committee updates the NBIC and presents the updates on the National Board's website for public review in April-May and August-September. Finalized updates are published annually as an addendum.

Section XII requires all alterations and repairs to the pressure vessel of a

transport tank to be performed in accordance with the NBIC and requires an inspection to be performed by a National Board inspector. The NBIC Committee established a task group to develop requirements for continued service, repair, and alteration of Section XII transport tanks. The task group includes PHMSA and industry representatives. The Committee's efforts culminated in the issuance of two new supplements. The first is Supplement 6, "Continued Service and Inspection of DOT Transport Tanks." This appears in Section 6, "Supplements" of Part 2, "Inspection." This document describes inspection of in service transport tanks. The second is Supplement 6, "Repair, Alteration, and Modification of DOT Transport Tanks." This appears in Section 6, "Repairs and Alterations—Supplements" of Part 3—"Repair." This document contains general requirements that apply to welding, repairs, alterations, modifications, examinations, etc. made to DOT transport tanks used for the transportation of hazardous materials. These supplements also specify the type of inspection to be performed and establish the criteria for inspections, reports, document maintenance, and inspector duties and responsibilities. The criteria are generally based on requirements in Part 180 of the HMR.

PHMSA is considering whether to adopt the NBIC for alterations, repairs and inspections performed on ASME stamped portable tanks, specification cargo tanks, and ton tanks used for the transportation of hazardous materials. In this ANPRM, we refer to the 2007 edition of the NBIC and the 2010 addendum. However, the National Board continues to work on updates to the NBIC, and PHMSA will consider adoption of the most recent edition if we proceed with an NPRM. A copy of the 2007 edition of the NBIC is available for review at DOT's Docket Operations Office (see **ADDRESSES** appearing earlier in this notice). The current cost of the complete NBIC set is $150 for the hard copy and $395 for the electronic format.

VI. Voluntary Consensus Standards

The ASME BPVC and the NBIC are international voluntary consensus standards. The National Technology Transfer and Advancement Act of 1995, Public Law 104–113, requires agencies to use technical standards that are developed or adopted by voluntary consensus standards bodies unless the use of such a standard is inconsistent with applicable law or is otherwise impractical. Public Law 104–113 requires Federal agencies to use industry consensus standards to the extent practical; it does not require Federal agencies to endorse a standard in its entirety. The law does not prohibit an agency from generally adopting a voluntary consensus standard while taking exception to specific portions of the standard if those provisions are deemed to be "inconsistent with applicable law or otherwise impractical." Taking specific exceptions furthers the Congressional intent of Federal reliance on voluntary consensus standards because it allows the adoption of substantial portions of consensus standards without the need to reject the standards in their entirety because of limited provisions that are not acceptable to the agency. It has been PHMSA's practice to review new editions and addenda of the ASME BPVC and NBIC and periodically update § 171.7 to incorporate newer editions and addenda by reference. New editions of the subject codes are issued every three years; addenda to the editions are issued yearly except in years when a new edition is issued. The BPVC was last incorporated by reference into the regulations under Docket No. RSPA–99–6213 (HM–218) (August 18, 2000; 65 FR 50450). In that final rule, § 171.7 was revised to incorporate by reference the 1998 edition of Sections II (Parts A and B), V, VIII (Division I) and IX, of the BPVC. The NBIC 1992 Edition was incorporated by reference under Docket HM–183C (November 3, 1994; 59 FR 55162).

VII. Current HMR, Section XII, and NBIC Requirements

A. Design and Construction of Cryogenic Portable Tanks

Sections 178.274 and 178.277 of the HMR contain requirements for the design, construction, certification, inspection, and testing of UN portable tanks intended for the transportation of refrigerated liquefied gases. The HMR requires that the shells and welds of these portable tanks must be designed, constructed, certified, inspected, tested and stamped in accordance with Section VIII of the BPVC. BPVC Section XII includes rules for the design, construction, certification, inspection, and testing of cryogenic portable tanks that address conditions and stresses unique to the transportation of cryogenic portable tanks. However, Section XII differs from the HMR with respect to design margins for cryogenic portable tanks (*i.e.,* 3.5:1 rather than 4.0:1). The 3.5:1 design margin is based upon successful experience with vessels designed to the Code rules, improved materials and fabrication practices, new and more sophisticated design methods, toughness requirements, and nondestructive examination technology. PHMSA believes that adopting this new design margin by incorporating Section XII in the HMR would update current regulations in recognition of the technological enhancements referred to above, maintain an equivalent level of safety to existing regulations, and relieve unnecessary economic burden to manufacturers and users of cryogenic portable tanks by allowing for the design and construction of thinner walled tanks. Therefore, PHMSA is considering whether to permit the design, construction, certification, inspection, and testing of UN portable tanks intended for the transportation of refrigerated liquefied gases in accordance with Section XII.

B. Design and Construction of CTMVs: Identified Differences Between HMR and Section XII Requirements

Sections 178.337–178.348 of the current HMR contain requirements for the design, construction, certification, inspection, and testing of CTMVs intended for the transportation of hazardous materials. CTMVs conforming to the MC 331, MC 338, and DOT 407 specifications with a maximum allowable working pressure (MAWP) greater than 35 psig or designed to be loaded by vacuum, and to the DOT 412 specification with a MAWP greater than 15 psig must be designed, constructed, and certified in accordance with Section VIII, Division 1 of the 1998 ASME Code. As defined in § 173.320, the term "*constructed and certified in accordance with the ASME Code*" means a cargo tank is constructed and stamped in accordance with the ASME Codes and is inspected and certified by an AI. CTMVs conforming to the DOT 406, and the lower pressure DOT 407 and 412 specifications must be constructed in accordance with the ASME Code. The term "*constructed in accordance with the ASME Code*" means a cargo tank is constructed in accordance with Section VIII, Division 1 of the ASME Codes with authorized exceptions and is inspected and certified by a RI. The manufacturer of the cargo tank or CTMV must hold a current ASME Certificate for use of the ASME "U" stamp but the tank is not required to be ASME stamped. Under Section XII, all newly manufactured cryogenic portable tanks and specification CTMVs constructed in accordance with the Code must be stamped with a "T" stamp.

The Section XII requirements were harmonized with the HMR requirements to the extent practicable. During the development of Section XII, the SC XII

committees addressed various cargo tank concerns that industry brought to the attention of PHMSA and FMCSA, over the past several years.

At the request of PHMSA, ASME supplemented its original petition for rulemaking with information identifying particular differences between Section XII and the HMR requirements. PHMSA encourages commenters to review and comment on these and any other differences between ASME Section XII and the HMR that are relevant to this endeavor. In addition, the Docket for this ANPRM includes several reports containing research, analysis, and evaluation of various technical standards that have been adopted in ASME Section XII.

1. 3.5 Design Margin in Lieu of 4.0 for All Vessels

Improvements to Section VIII Division 1 Code rules over the past 50 years, successful experience with vessels designed to the Code rules, improved materials and fabrication practices, new and more sophisticated design methods, toughness requirements, and nondestructive examination technology have led to a reduced design margin in Section VIII, Division 1. In 1999, ASME adopted a design margin of 3.5 on ultimate tensile strength in lieu of the value of 4.0 that had existed since the 1940s. In Section XII, ASME adopted the new design margin after careful consideration and deliberations of the technical facts previously mentioned as well as other factors that influence transportation safety.

The new design margins may have a significant effect on newly constructed transport tanks. For those tanks where the minimum thicknesses are controlled by pressure, they may be thinner/lighter than those constructed using a design margin of 4.0. PHMSA has issued several special permits allowing a 3.5:1 design margin. PHMSA has reviewed the incident data for these tanks and has not identified any incidents that would indicate a reduction in safety. PHMSA is soliciting comments on potential safety and economic impacts of adopting the new Section XII requirement allowing a 3.5:1 design margin.

2. Special Materials Testing and Fabrication Requirements for MC 331 Tanks

Section XII Modal Appendix 1—"Cargo Tanks" discontinues certain obsolete requirements for construction of MC 331 cargo tanks that are still required in §§ 178.337–2 and 178.337–4. This revision modernizes material specification designations and eliminates obsolete material specifications. It also eliminates certain obsolete material impact test requirements, especially for quenched and tempered materials. PHMSA has issued several special permits allowing the use of the newer material specifications in the ASME Code for construction and repair. A review of historical incident data shows an acceptable safety history with no reported incidents. PHMSA is soliciting comments on the safety and economic impacts of adopting the new Section XII reqirements for the testing and fabrication of special materials for construction and repair of MC 331 cargo tanks.

3. Standardization of Allowable Peak Secondary Stresses for MC 331 CargoTanks

The requirements in Modal Appendix 1–3.5.5 and 1–3.5.1(a)(1)(b) standardize the allowable peak secondary stress levels resulting from short interval, non-persistent loads to that permitted for lading surge loads for MC 331 cargo tanks by § 178.337–3(d). See also 1–3.5.5 & 1–3.5.6 and footnote 1. The Appendix also aligns the MC 331 cargo tank design with the design standard of the DOT 400-series cargo tanks for short interval peak loads. PHMSA-sponsored research and guidance, and understanding of current ASME requirements, provide the basis for consideration of this revision. PHMSA solicits comments on the safety and economic impacts of adopting the Section XII requirement for allowable peak secondary stresses for MC 331 cargo tanks.

4. Rational Design of Non-circular Tanks

Rational design under Appendix VIII of Section XII leads to shell and head thicknesses of up to 15% less than what tank manufacturers currently use. Such a difference results in a tank with at least 2% more payload capacity. Co-operative research and development efforts by PHMSA, ASME, and industry have served as the technical basis for incorporation of the rational design method in Section XII. PHMSA is soliciting comments on the safety and economic impacts of incorporating the Section XII rational design method for non-circular tanks.

5. Non Mandatory Appendix C—Specified Minimum Thicknesses

Non-mandatory Appendix C contains data reports that specify minimum allowed thickness for pressure parts instead of nominal thickness and corrosion allowance currently specified. PHMSA is soliciting comments on the safety and economic impacts of using minimum allowed thickness for pressure parts instead of nominal thickness and corrosion allowance.

C. Continued Service of CTMVs, Portable Tanks, and Ton Tanks: Roles of Inspectors HMR

Part 180 of the HMR specifies continued service requirements for DOT and UN portable tanks and DOT specification and certain non-specification CTMVs. Specific requirements for the qualification, maintenance, repair, and testing of packagings are located in 49 CFR Part 180: Subpart E for CTMVs, Subpart F for ton tanks, and Subpart G for portable tanks. Incorporation of Section XII and the NBIC for continued service requirements for these ASME stamped bulk packagings could impact the roles and responsibilities of persons who perform tests, inspections, modifications, alterations, and repairs. PHMSA is soliciting comments on how the continued service requirements and the role of inspectors should be addressed in the HMR if Section XII and the NBIC are incorporated by reference.

To ensure that DOT specification cargo tanks are designed, constructed, and maintained in accordance with the applicable specification, the HMR require that each person who certifies CTMV design, construction, repair, or testing meet certain minimum qualifications. The qualification criteria are based on the function performed. Professionals who meet the qualifications set forth in the HMR for DCE, AI, and RI perform continued service functions.

The HMR require the use of a DCE to certify each specification cargo tank or CTMV design type, including its required accident damage protection; the design of a modified, stretched, or rebarrelled CTMV; or mounting of a cargo tank on a motor vehicle chassis involving welding on the cargo tank head or shell or any change or modification of the methods of attachment. A DCE as defined in § 171.8 means a person registered with the Department in accordance with subpart F of part 107 of the HMR who has the knowledge and ability to perform stress analysis of pressure vessels and otherwise determine whether a cargo tank design and construction meets the applicable DOT specification. A DCE must fulfill the knowledge and ability requirements by meeting any one of the following qualifications: (1) Have an engineering degree and one year of work experience in cargo tank structural or mechanical design: (2) be currently registered as a professional engineer by appropriate authority of a State of the United States or a Province of Canada;

or (3) have at least three years' experience in performing the duties of a DCE prior to September 1, 1991.

Additionally, the HMR require the use of an AI to certify cargo tanks constructed and certified in accordance with the ASME Code, as discussed earlier in this notice under "B. Design and Construction of CTMVs: Identified Differences Between HMR and Section XII Requirements." An AI is defined in § 171.8 to mean an Inspector who is currently commissioned by the National Board of Boiler and Pressure Vessel Inspectors and employed as an Inspector by an Authorized Inspection Agency. Also, this section defines an Authorized Inspection Agency to mean: (1) A jurisdiction which has adopted and administers one or more sections of the ASME Boiler and Pressure Vessel Code as a legal requirement and has a representative serving as a member of the ASME Conference Committee; or (2) an insurance company which has been licensed or registered by the appropriate authority of a State of the United States or a Province of Canada to underwrite boiler and pressure vessel insurance in such State or Province.

The HMR require the use of an RI to certify specification cargo tank motor vehicle construction, assembly, or repair of a tank "constructed in accordance with the ASME Code." Section 171.8 defines the RI as a person registered with the Department in accordance with subpart F of part 107 of the HMR who has the knowledge and ability to determine whether a cargo tank conforms to the applicable DOT specification. The RI must have: (1) An engineering degree and one year of work experience relating to the testing and inspection of cargo tanks; (2) an associate degree in engineering and two years of work experience relating to the testing and inspection of cargo tanks; (3) a high school diploma (or General Equivalency Diploma) and three years of work experience relating to the testing and inspection of cargo tanks; or (4) at least three years of experience performing the duties of an RI prior to September 1, 1991. The RI must be familiar with DOT specification cargo tanks and trained and experienced in use of the inspection and testing equipment used. While there are narrow exceptions that permit persons who do not qualify as RIs to perform select inspections and tests (see § 180.409(b), (c), and (d)), in general, a cargo tank constructed in accordance with a DOT specification for which a qualification test or inspection is due, may not be filled and offered for transportation or transported until the test or inspection has been successfully completed by the RI.

Section XII

Section XII requires all alterations and repairs to the pressure vessel of a transport tank to be performed in accordance with the NBIC and requires an inspection to be performed by a National Board inspector. The inspector, depending on the class designation of the transport tank, must be an *Authorized Inspector (AI), Qualified Inspector (QI),* or *Certified Individual (CI).*

Under Section XII, an AI is defined as an inspector regularly employed by an ASME-accredited Authorized Inspection Agency (AIA), who has been qualified to ASME-developed criteria to perform inspections under the rules of any jurisdiction that has adopted the ASME Code. The AI may not be in the employ of the manufacturer. The AIA's and supervisor's duties and qualifications and AI's qualifications are as required in the latest edition and addenda of ASME QAI–1, Qualifications for Authorized Inspection. Under ASME QAI–1, An Authorized Inspector must hold a valid Certificate of Competency (where required), as defined in National Board Rules for Commissioned Inspectors, and a valid National Board Commission with an "A" endorsement. The inspector must have satisfactory expertise, experience, and background for the inspection of boilers and pressure vessels and demonstrate the ability to perform shop and field (on-site) inspections to the satisfaction of the AIA. The inspector must have knowledge of applicable sections of the ASME Code, Quality Control Programs, and requirements for the maintenance and retention of in-transit and permanent records. Finally, the inspector must receive a passing grade on an examination given by the National Board that evaluates the individual's knowledge of, and familiarity with, the ASME Code, and comply with the National Board's rules for commissioned inspectors.

A QI is defined as an inspector regularly employed by an ASME Qualified Inspection Organization (QIO) who has been qualified to ASME-developed criteria by a written examination, to perform inspections under the rules of any jurisdiction that has adopted the ASME Code. The QI may not be in the employ of the manufacturer. The QIO's and supervisor's duties and qualifications and the QI's qualifications are as required in the latest edition and addenda of ASME QAI–1, Qualifications for Authorized Inspection. Under ASME QAI–1, a Qualified Inspector must hold a valid Certificate of Competency (where required), as defined in National Board Rules for Commissioned Inspectors, and a valid National Board certification as a Qualified Inspector. The inspector must have satisfactory expertise, experience, and background for the inspection of boilers and pressure vessels and demonstrate the ability to perform shop and field (on-site) inspections to the satisfaction of the QIA. The inspector must have knowledge of applicable sections of the ASME Code, Quality Control Programs, and requirements for the maintenance and retention of in-transit and permanent records. Finally, the inspector must receive a passing grade on an examination given by the National Board that evaluates the individual's knowledge of, and familiarity with, the ASME Code. The Qualified Inspector must comply with the National Board's rules for qualified inspectors.

A CI is defined as an individual certified by an ASME accredited organization authorized to use ASME marks, as either a full-time or part-time employee or contractor to the ASME certificate holder. The CI is neither an AI nor a QI and must be certified and qualified to perform inspections by the CI's employer. The CI may be in the employ of the manufacturer or assembler. Minimum qualifications include: (a) Knowledge of the requirements of Section XII for application of the appropriate Code Symbol stamp; (b) Knowledge of the Manufacturer's or Assembler's Quality System Program; and (c) Training commensurate with the scope, complexity, or special nature of the activities to which oversight is to be provided. A record must be maintained and certified by the manufacturer or assembler, containing objective evidence of the qualifications of the CI and training provided the CI's qualifications and duties are as required in the latest edition and addenda of ASME QAI–1, Qualifications for Authorized Inspection.

Additionally, for continued service, Users may perform inspections and tests if no rerating, repairs, or alterations requiring welding are performed. Users may perform continued service inspections, including repairs and alterations if the User possesses a valid National Board Owner/User Certificate of Authorization. Inspectors employed by the Owner/User may perform continued service inspections, including repairs and alterations if the individual possesses a National Board Owner/User commission.

Section XII assigns transport tanks to three separate classes depending on the design of the tank. Each class includes transport tank designs that generally correspond to existing DOT specifications. The NBIC inspection requirements correspond to the class of transport tank as assigned in the Section XII Modal Appendices. In the table below, PHMSA lists each class of transport tank to be constructed or repaired and the type of inspector required to perform the inspection. Currently there are no specifications in Section XII for Class 2 tanks. However, Class 2 tanks are expected to be added in future editions.

TRANSPORT TANK CLASSES UNDER ASME SECTION XII, 2010 EDITION

Class	Current specification in HMR	Type of inspector
Class 1	UN cryogenic portable tanks (See § 178.277); DOT 407 MAWP > 35 psi (See § 178.347); DOT 412 MAWP > 15 psi (See § 178.348); MC 338 (See § 178.338); MC 331 (See § 178.337); DOT 106A and 110AW (See § 179.300).	Authorized Inspector
Class 2		Qualified Inspector , or Authorized Inspector
Class 3	DOT 406 (See § 178.346); DOT 407 MAWP ≤ 35 psi (See § 178.347); DOT 412 MAWP ≤ 15 psi (See § 178.348).	Certified Individual, Authorized Inspector, or Qualified Inspector

Repairs and alterations must be performed by organizations holding a valid National Board "TR" certificate of Authorization and in possession of the appropriate National Board Code symbol stamp. Alternatively, organizations employing Owner/User/Inspectors and in possession of a valid Owner/User Certificate of Authorization issued by the National Board may repair and perform alterations on transport tanks owned and operated by the Owner/User Certificate of Authorization holder.

The periodic inspection and test frequencies for cargo tanks are specified in Modal Appendix 1 of Section XII. Periodic inspection and test frequencies for cryogenic portable tanks are specified in Modal Appendix 3 of Section XII. The periodic inspection and test frequencies are consistent with those specified currently in the HMR for cargo tanks and portable tanks.

VIII. Questions

PHMSA asks commenters to provide data and information on the following issues:

A. Cargo Tanks

1. Are there substantial differences between the construction and continued service requirements of the HMR and the ASME BPVC Section XII for cargo tanks? If so, what are the potential costs, burdens, or safety problems associated with incorporating Section XII and the NBIC for the construction and continued service of these tanks?

2. For existing cargo tanks designed, constructed and stamped with the ASME BPVC Section VIII "U" stamp, are there substantial differences between the continued service requirements of the HMR and the most recent edition of the NBIC? If so, what are the potential costs and burdens associated with incorporating the NBIC for existing "U" stamped bulk packagings?

3. Should PHMSA adopt through incorporation by reference the ASME BPVC Section XII and the most recent edition of the NBIC for construction and continued service of cargo tanks? If so, which existing requirements of the HMR should be replaced with references to these consensus standards?

4. Would incorporation of the ASME BPVC Section XII and the NBIC for construction and continued service of cargo tanks positively affect transportation safety, and/or reduce industry costs?

5. If PHMSA incorporates Section XII and the NBIC for the construction and continued service of cargo tanks, how long of a transition period would be needed to train employees to use these consensus standards? What are the associated costs of training?

6. Are the ASME BPVC Section XII and the NBIC rules of construction and continued service of cargo tanks consistent with current HMR requirements? If not, should PHMSA consider general adoption of the consensus standards while taking exception to specific portions of the standards?

7. Are there any potential compliance issues related to incorporating by reference Section XII and the newest edition of the NBIC in the HMR for the construction and continued service of cargo tanks?

B. Cryogenic Portable Tanks

1. Are there substantial differences between the construction and continued service requirements of the HMR and the ASME BPVC Section XII for cryogenic portable tanks? If so, what are the potential costs, burdens, or safety problems associated with incorporating Section XII and the NBIC for the construction and continued service of these tanks?

2. For existing cryogenic portable tanks designed, constructed and stamped ("U" stamp) in accordance with ASME BPVC Section VIII, are there substantial differences between the continued service requirements of the HMR and the most recent edition of the NBIC? If so, what are the potential costs and burdens associated with incorporating the latest edition of the NBIC?

3. Should PHMSA adopt through incorporation by reference the ASME BPVC Section XII and the most recent edition of the NBIC for construction and continued service of cryogenic portable tanks? If so, which existing requirements of the HMR should be replaced with references to these consensus standards?

4. Would incorporation of the ASME BPVC Section XII and the latest edition of the NBIC for construction and continued service of cryogenic portable tanks positively affect transportation safety, and/or reduce industry costs?

5. If PHMSA incorporates Section XII and the NBIC for the construction and continued service of cryogenic portable tanks, how long of a transition period would be needed to train employees to use these consensus standards? What are the associated costs of training?

6. Are the ASME BPVC Section XII and the NBIC rules of construction and continued service of cryogenic portable tanks consistent with current HMR requirements? If not, should PHMSA consider general adoption of the consensus standards while taking exception to specific portions of the standards?

7. Are there any potential compliance issues related to incorporating by reference Section XII and the newest edition of the NBIC in the HMR for the construction and continued service of cryogenic portable tanks?

C. Multi-Unit Tank Car Tanks (Ton Tanks)

1. Are there substantial differences between the construction and continued service requirements of the HMR and the ASME BPVC Section XII for multi-unit tank car tanks? If so, what are the potential costs, burdens, or safety problems associated with incorporating Section XII and the NBIC for the construction and continued service of these tanks?

2. For existing multi-unit tank car tanks designed and constructed in accordance with the HMR, are there substantial differences between current continued service requirements and the NBIC? If so, what are the potential costs and burdens associated with incorporating the latest edition of the NBIC?

3. Should PHMSA adopt through incoporation by reference the ASME BPVC Section XII and the most recent edition of the NBIC for construction and continued service of mult-unit tank car tanks? If so, which existing requirements of the HMR should be replaced with references to these consensus standards?

4. Would incorporation of the ASME BPVC Section XII and the latest edition of the NBIC for construction and continued service of mult-unit tank car tanks positively affect transportation safety, and/or reduce industry costs?

5. Are the ASME BPVC Section XII and the NBIC rules of construction and continued service of mult-unit tank car tanks consistent with current HMR requirements? If not, should PHMSA consider general adoption of the consensus standards while taking exception to specific portions of the standards?

6. Are there any potential compliance issues related to incorporating by reference Section XII and the the newest edition of the NBIC in the HMR for the construction and continued service of mult-unit tank car tanks?

IX. Additional Issues

PHMSA will base any future proposal for changes on the suggestions and comments provided by interested parties and our own initiatives. Additionally, any proposals would include the analyses required under the following statutes and executive orders in the event we determine that rulemaking is appropriate:

A. Executive Order 12866 and DOT Regulatory Policies and Procedures

Executive Order (E.O.) 12866 requires agencies to regulate in the "most cost-effective manner," to make a "reasoned determination that the benefits of the intended regulation justify its costs," and to develop regulations that "impose the least burden on society." We therefore request comments, including specific data if possible, concerning the costs and benefits that may be associated with revisions to the HMR based on the issues presented in this notice. A rule that is considered significant under E.O. 12866 must be reviewed and cleared by the Office of Management and Budget before it can be issued.

B. Executive Order 13132

E.O. 13132 requires agencies to assure meaningful and timely input by state and local officials in the development of regulatory policies that may 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. Incorporation of new consensus standards by reference in the HMR may impact state and local CTMV enforcement programs. Potential impacts include the cost of purchasing the consensus standards and training employees in the use of the consensus standards. We invite state and local governments with an interest in this rulemaking to comment on any effect that revisions to the HMR to address the issues outlined in this notice may cause.

C. Executive Order 13175

E.O. 13175 requires agencies to assure meaningful and timely input from Indian tribal government representatives in the development of rules that "significantly or uniquely affect" Indian communities and that impose "substantial and direct compliance costs" on such communities. We invite Indian tribal governments to provide comments if they believe there will be an impact.

D. Regulatory Flexibility Act, Executive Order 13272, and DOT Policies and Procedures

Under the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*), we must consider whether a proposed rule would have a significant economic impact on a substantial number of small entities. "Small entities" include small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations under 50,000. If you believe that revisions to the HMR to address the issues discussed in this notice would have a significant economic impact on small entities, please provide information on such impacts.

Any future proposed rule would be developed in accordance with Executive Order 13272 ("Proper Consideration of Small Entities in Agency Rulemaking") and DOT's procedures and policies to promote compliance with the Regulatory Flexibility Act to ensure that potential impacts on small entities of a regulatory action are properly considered.

E. Paperwork Reduction Act

Section 1320.8(d), Title 5, Code of Federal Regulations requires that PHMSA provide interested members of the public and affected agencies an opportunity to comment on information collection and recordkeeping requests. It is possible that new or revised information collection requirements could occur as a result of any future rulemaking action.

F. Environmental Assessment

The National Environmental Policy Act, 42 U.S.C. 4321–4375, requires federal agencies to analyze proposed actions to determine whether the action will have a significant impact on the human environment. The Council on Environmental Quality (CEQ) regulations order federal agencies to conduct an environmental review considering (1) the need for the proposed action, (2) alternatives to the proposed action, (3) probable environmental impacts of the proposed action and alternatives, and (4) the agencies and persons consulted during the consideration process. 40 CFR § 1508.9(b). PHMSA welcomes any data or information related to environmental impacts that may result from a future rulemaking addressing the issues discussed in this notice.

G. International Trade Analysis

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 any standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. For purposes of these requirements, Federal agencies may participate in the establishment of international standards, so long as the standards have a legitimate domestic objective, such as providing for safety, and do not operate to exclude 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. PHMSA participates in the establishment of international standards in order to protect the safety of the American public, and we would assess the effects of any rule to ensure that it does not exclude imports that meet this objective. Accordingly, any proposals would be consistent with PHMSA's obligations under the Trade Agreement Act, as amended.

H. Statutory/Legal Authority for This Rulemaking

49 U.S.C. 5103(b) authorizes the Secretary of Transportation to prescribe regulations for the safe transportation, including security, of hazardous materials in intrastate, interstate, and foreign commerce.

I. Regulation Identifier Number (RIN)

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

Issued in Washington, DC, on December 17, 2010 under authority delegated in 49 CFR part 106.

Magdy El-Sibaie,

Associate Administrator for Hazardous Materials Safety.

[FR Doc. 2010–32231 Filed 12–22–10; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 217

[Docket No. 100806326–0374–01]

RIN 0648–AY99

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Space Vehicle and Missile Launch Operations at Kodiak Launch Complex, Alaska

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS has received an application, pursuant to the Marine Mammal Protection Act (MMPA), from the Alaska Aerospace Corporation (AAC) for authorization to take small numbers of marine mammals incidental to launching space launch vehicles, long-range ballistic target missiles, and other smaller missile systems at the Kodiak Launch Complex (KLC) for the period of February 2011 through February 2016. Pursuant to the MMPA, NMFS is requesting comments on its proposal to issue regulations and subsequent Letters of Authorization (LOAs) to AAC to incidentally harass Steller sea lions (*Eumetopias jubatus*) and harbor seals (*Phoca vitulina*) during the specified activity.

DATES: Comments and information must be received no later than January 24, 2011.

ADDRESSES: You may submit comments, identified by 0648–AY99, by any one of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal eRulemaking Portal: *http://www.regulations.gov.*
- Hand delivery or mailing of paper, disk, or CD–ROM comments should be addressed to P. Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910–3225.

Instructions: All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information. 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, WordPerfect, or Adobe PDF file formats only. A copy of the application containing a list of references used in this document and Environmental Assessments (EAs) related to this action may be obtained by writing to the above address, by telephoning the contact listed under **FOR FURTHER INFORMATION CONTACT,** or on the Internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications.* Documents cited in this proposed rule may also be viewed, by appointment, during regular business hours at the above address. To help NMFS process and review comments more efficiently, please use only one method to submit comments.

FOR FURTHER INFORMATION CONTACT: Michelle Magliocca, Office of Protected Resources, NMFS, (301) 713–2289, ext 123.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the identified 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 in the regulations. 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 June 4, 2010, NMFS received a complete application for regulations from AAC for the taking of small numbers of marine mammals incidental to launching space launch vehicles, long-range ballistic target missiles, and other smaller missile systems at the KLC. Noise from space vehicles and missile launches may result in the behavioral (Level B) harassment of hauled-out Steller sea lions and harbor seals and injury (Level A harassment) or

mortality of harbor seal pups on Ugak Island. On January 19, 2006, NMFS issued regulations and subsequent LOAs to AAC authorizing the taking of marine mammals incidental to launches at KLC (71 FR 4297; January 26, 2006). Those regulations expire on February 28, 2011; hence, AAC has applied for new regulations. The proposed regulations, if issued, would be effective from March 1, 2011 through February 28, 2016.

Description of the Specified Activity

AAC conducts space vehicle and missile launches from the KLC. This facility occupies 3,717 acres of state-owned lands on the Narrow Cape Peninsula on the eastern side of Kodiak Island, Alaska, approximately 22 miles from the city of Kodiak. Ugak Island, which is used by Steller sea lions and harbor seals, lies approximately 3–4 miles to the southeast of the launch pads (see Figure 1 in application). The island is about 2 miles long by about 1 mile wide. The land slopes steeply upward from a spit on the island's northern most point, which is a traditionally used Steller sea lion haulout (see Figures 4 and 5 in application), to the southwest, culminating in cliffs that are approximately 1,000 feet in elevation. These cliffs run the entire length of the island's long axis. Eastward, the narrow Outer Continental Shelf (OCS) ends about 20 miles offshore, where it plunges precipitously to the North Pacific abyss. Near shore water depths to the immediate south and west of the island range to several hundred feet. Harbor seal haulouts are present mainly on Ugak Island's eastern shores.

The area considered to be affected by KLC launch operations was defined in a September 1996 meeting involving AAC and its environmental consultant (University of Alaska Anchorage's Environment and Natural Resources Institute), and government agencies represented by the Federal Aviation Administration (FAA), NMFS, the U.S. Fish and Wildlife Service (FWS), and the Alaska Department of Environmental Conservation (ADEC). Attendees at that meeting reviewed information on the known effects of rocket operations on the environment, and defined the expected impact area to be within a 6-mile radius of the launch pad area, including Ugak Island. There are several marine mammals present in the waters offshore and on haulouts on Ugak Island, which lies about 3.5 miles distance from the launch pad area; however, the only marine mammals anticipated to be affected by the specified activities are pinnipeds hauled-out on nearby Ugak Island.

The KLC primarily supports launches of small to medium space launch vehicles—which by definition are those used to boost satellites to orbit—ranging in size from the small space-launch Castor 120 motor (used in the Athena, Minotaur IV, Minotaur V, and Taurus I systems) to the under-development medium-lift Taurus II. The KLC is also configured to support launch of the Minuteman I-derived Minotaur I Space Launch System, and to support launch of long-range ballistic systems such as the Polaris derived A–3 STARS, the Minuteman-derived Minotaur II and III, and the C–4. Representative target vehicles that might be flown from KLC range in size from modified C–4 Trident I vehicles, which have a range measured in thousands of miles, down to small vehicles built up from modified second or third stage components of larger missile systems, which have much shorter ranges. The Quick Reaction Launch Vehicle (QRLV) family serves as an example of vehicles flown from KLC, being built around second stage motors used in the Minuteman I. Tactical missiles, such as the Patriot and Theater High Altitude Area Defense (THAAD) might also be flown from KLC, as well as very small sounding rockets.

Launches may occur day or night. The number of launches of space launch vehicles and ballistic target vehicles from KLC is variable. Launch planning is a dynamic process, and launch delays, which can last from hours to more than a year, can and do occur. Launch delays occur due to variables ranging from technical issues to adverse weather. The AAC anticipates the KLC can accommodate up to 45 launches, in total, for the effective period of the proposed regulations. Annually, an average of nine but maximum of twelve launches may occur. Most of these vehicles are expected to be of the Minotaur I through V class, including civil versions of the Castor 120 known as the Athena and Taurus I or smaller target vehicles. AAC estimates that of the 45 estimated launches from KLC over the five-year period in consideration, 32 will be of small space-launch and target vehicles of the Castor 120 or smaller size, 10 will be of THAAD or smaller size, and three will be of the medium-lift Taurus II. A description of each class of space launch and smaller launch vehicles are provided in the application and summarized here.

Castor 120

The Castor 120 is the largest (and loudest) vehicle motor used to launch systems into space from the KLC. The Castor 120 uses solid fuel and produces about 371,000 pounds of thrust. The motor mass is about 116,000 pounds and the motor is 347 inches long and 93 inches wide. Modeling shows the rocket is about 8 miles above the earth's surface when it overflies Ugak Island, and that the sonic boom reaches earth between 21 to 35 miles down range, which is past the OCS break and over the North Pacific abyss (US FAA 1996). Sound pressure levels from the Castor 120 measured at the traditional Steller sea lion haulout (located on the northern spit of Ugak Island) were 101.4 dBA (SEL) (Table 1). This location is 3.5 miles away from the launch pad. None of the vehicles expected to be flown from KLC over the five-year period covered by the proposed regulations are anticipated to produce higher sound pressures than the Castor 120.

Taurus II

The Taurus II is an under development, medium class launch vehicle similar in size and capability to the Delta II, which is being withdrawn from service. The U.S. Air Force reports that sound pressures of the Delta II were slightly less than those from the Taurus I (Castor 120) as measured from the same point (USAF 2008), thus the anticipated sound pressure from the very similar Taurus II at the traditional Steller sea lion haulout on Ugak Island is likely to be at or somewhat less than the 101.4 dBA (SEL) recorded for the Castor 120.

Minotaur I

The Minotaur I is a small lift solid propellant space launch vehicle, the first stage of which is a modified Minuteman II first stage. The first stage motor has a diameter of 4.5 feet. This launch vehicle has not yet been flown from KLC. Sound pressure monitoring of two Minotaur I launches was accomplished at Vandenberg Air Force Base, California (VAFB). The data were collected 1.4 miles away from the launch point and show sound pressure levels of 104.9 to 107.0 dBA (SEL) at that distance. Sound energy at sea level decreases with the square of the distance, and given that the traditional Steller sea lion haulout on Ugak Island is 2 miles farther away (*i.e.* the haulout is 3.5 miles from the launch point), AAC anticipates sound pressure levels from a Minotaur I at the Ugak Island traditional haulout would range in the low 90s dBA (SEL).

C–4 Trident

The C–4 Trident I is a solid-fueled vehicle and its first stage has a diameter of 6.1 feet, which is about 1.5 feet less than the Castor 120. The system's range

is around 4,000 miles. It has never been flown from KLC, but given it is significantly smaller in diameter than the Castor 120 and uses a similar fuel, it is anticipated that sound pressure levels at the traditional Steller sea lion haulout would be less than those of the Castor 120. NMFS is not aware of any available data on sound pressure for the C–4 Trident.

STARS

The Strategic Target System (STARS) utilizes the first stage of the Polaris A–3, which is solid fueled and measures 4.5 feet in diameter. Several STARS systems have been flown from KLC. Recorded sound pressure levels at Ugak Island have ranged from 90.2 to 91.4 dBA (SEL).

Smaller Target and Tactical Rocket Systems

A number of smaller tactical missile systems, such as the Patriot and Theater High Altitude Area Defense (THAAD), might also be flown from KLC, as might very small sounding rockets. Sound pressures from these smaller systems are not available, but will be substantially less than those from the space launch and ballistic vehicles described above and pose no potential for disturbance to marine mammals.

Launch Noise

Launch operations are a major source of noise on Kodiak Island, as the operation of launch vehicle engines produce substantial sound pressures. In air, all pressures are referenced to 20 micoPascals; therefore all dB levels in this notice are provided re: 20 microPa, unless otherwise noted. Generally, four types of noise occur during a launch: (1) Combustion noise; (2) jet noise from interaction of combustion exhaust gases with the atmosphere; (3) combustion noise proper; and (4) sonic booms. Sonic booms are not a concern for pinnipeds on Ugak Island, as sonic booms created by ascending rockets launched from KLC reach the Earth's surface over deep ocean, well past the edge of the OCS (FAA 1996). Spent first stage motors from space lift missions (*i.e.* those going to orbit) fall to Earth 11 to more than 300 miles down range (well past the edge of the OCS, depending on launch vehicle (US FAA 1996). In accordance with Federal Aviation Administration (FAA), Office of Associate Administrator for Commercial Space Transportation (AST), and with the facility's Environmental Assessment (EA) and stipulations in the EA's Finding of No Significant Impact (FONSI) (see 61 FR 32884, June 25, 1996), launch noise from various systems were measured on Ugak Island. In addition, a Natural Resource Management Plan (NRMP) was developed in coordination with NMFS to address monitoring and mitigation activities for protected species in the area and compare anticipated sound pressure levels from KLC launches with documented marine mammal disturbance responses to such noise. Motor diameters and representative sound pressures for various launch vehicles previously launched from KLC are presented in Table 1. A complete description of how and when these measurements were taken is described in NMFS' final rule for AAC's current regulations (71 FR 4297; January 26, 2006). The vehicles listed in Table 1 include various ballistic launch vehicles and the small-lift Castor 120 space launch vehicle, as well as smaller target/interceptor systems and tactical rocket systems. All KLC sound measurements reported in Table 1 were taken on Ugak Island. The Castor 120 would be the loudest space vehicle motor used during launches at the KLC. Copies of the NRMP referred to above may be obtained online at *http://www.nmfs.noaa.gov/pr/permits/incidental.htm* and from the contacts in **ADDRESSES,** above.

TABLE 1—RECORDED SOUND PRESSURE LEVELS AT UGAK ROCK HAULOUT DURING PREVIOUSLY LAUNCHED SPACE VEHICLES AND SIZE OF POTENTIALLY LAUNCHED SPACE VEHICLES (FOR COMPARATIVE PURPOSES)

Launch designator	Launch vehicle	Date	Distance to haulout	Motor diameter (feet)[1]	SEL (dBA)	Lmax (dBA)	LPeak (dCBA)
Previously Launched & Recorded at KLC							
ait-1	QRLV	11/5/98	3.5 miles[2]	4.3	88.4	78.2	97.0
ait-2	QRLV	9/15/99	3.5 miles[2]	4.3	92.2	81.5	101.5
QRLV	QRLV	3/22/01	3.5 miles[2]	4.3	80.3	73.3	87.2
Athena	Castor 120	9/29/01	3.5 miles[2]	7.75	101.4	90.8	115.9
FT–04–1	Polaris A–3 STARS	2/23/06	4.1 miles[3]	4.5	92.3	86.0	109.0
FTG–02	Polaris A–3 STARS	9/01/06	4.1 miles[3]	4.5	90.1	83.1	105.6
FTG–03a	Polaris A–3 STARS	9/28/07	4.5 miles[4]	4.5	91.4	84.2	107.3
FTX–03	Polaris A–3 STARS	7/18/08	4.5 miles[4]	4.5	89.6	83.0	108.3
Potentially Launched in Future							
	Taurus II				[5]<101.4		
	Minotaur I			4.5	[5]90+		
	C–4 Trident I			6.1			
	Castor I			2.6			
	SR19/SR773			4.3			
	SR19/SR19			4.3			
	Castor IVB			3.3			
	Patriot			1.3			
	THAAD			1.25			

[1] Motor sound pressures from solid fueled motors are directly correlated to motor diameter.
[2] Traditionally used Steller sea lion seasonal haulout; use has declined significantly in recent times.
[3] Alternate Steller sea lion haulout, a tidally exposed small rock located midway between the traditional haulout and the northeastern most cape of Ugak Island.
[4] Second alternate Steller sea lion haulout located on the northeastern most cape of Ugak Island.
[5] Estimated.

Another component of the AAC's launches includes security overflights. In the days preceding the launch, these occur approximately 3 times per day based on the long-term average. Flights associated with the launch will not approach occupied pinniped haulouts on Ugak Island by closer than 0.25 mile (0.4 km), and will maintain a vertical distance of 1,000 ft (305 m) from the haulouts when within 0.5 miles (0.8 km), unless indications of human presence or activity warrant closer inspection of the area to assure that national security interests are protected in accordance with law. Over the operational history of these flights, aircraft have been operated within the 0.25 mile limit on two occasions; both involved direct overflight of the Steller sea lion haulout spit, which was unoccupied each time the incursions occurred.

Description of Marine Mammals in the Area of the Specified Activity

AAC's current MMPA regulations (71 FR 4297), which are set to expire February 28, 2011, require aerial surveys be conducted before and after each launch to monitor for presence and abundance of marine mammals within the designated 6 mile action area. In compliance with these conditions, the AAC has completed these surveys since 2006. Aerial survey data indicate that Steller sea lions, harbor seals, gray whales (*Eschrichtius robustus*), humpback whales (*Megaptera novaeangliae*), and sea otters (*Enhydra lutris*) occur within the action area. Although potentially present, cetaceans within the action area are not expected to be taken during the specified activities. Airborne noise is generally reflected at the sea surface outside of a 26° cone extending downward from the ascending rocket (Richardson *et al.* 1995); therefore, little sound energy passes into the sea across the air-water boundary. Submerged animals would have to be directly underneath the rocket to hear it, and given the hypersonic velocity of launch vehicles in the atmosphere, the duration of sounds reaching any cetacean would be discountable. In addition, all spent rocket motors will fall into the open ocean over deep water. Given the very short time a cetacean is at the surface, direct impact from spent motors can be discounted as can any noise related impacts. Based on these reasons, NMFS does not anticipate take of cetaceans incidental to the specified activity; hence, they will not be discussed further. Sea otters are managed by the U.S. Fish and Wildlife Service; therefore no take of sea otters is included in the proposed regulations. As such, this species is not discussed further in this proposed rule.

Steller Sea Lion

Steller sea lions are designated into two stocks by NMFS. Those west of 144° longitude, which includes the KLC area, are listed as endangered under the ESA. Historically, mature and sub-adult males have used a spit on the northwestern side of Ugak Island as a post-breeding haulout. This spit is located 3.5 miles from the launch pad complex (see figure 4 and 5 in the application). The historic occupancy period ranges from June to September (post breeding), with peak reported numbers in the hundreds (Sease 1997; ENRI 1995–1998). However, use has declined in recent times in keeping with general declines seen in the species as a whole. The spit is designated a long-term trend count site by NMFS and has been surveyed once yearly, with June as the target, since the 1990s. Counts since 2000 have generally been zero (*e.g.,* NMFS, 2009; Fritz and Stinchcomb, 2005), which is in line with the counts from all other long-term trend count sites in the Kodiak Archipelago over the same time period. All of these other long-term trend sites are far removed from the 6 mile radius anticipated impact area up range from KLC (i.e. areas opposite to the flight path), in areas not exposed to launch noise. Hence, Steller sea lion abundance has declined throughout the region, not just the area affected by launches, and the losses are likely not a result of or connected with the launches or use of KLC.

Data from AAC's aerial surveys over the past four years also support low use of the haulout. Since 1999, five launches have occurred during the Steller sea lion season. The spit haulout has not been used by Steller sea lions during launch-monitoring surveys since 1999 (ENRI, 2000, R&M, 2007a,b, 2008); however one to several Stellar sea lions have been observed from time-to-time during recent launch surveys utilizing a supratidal rock on eastern Ugak Island (termed East Ugak Rock) as a haulout. Tables 2 and 4 in the application provide a breakdown of survey results per day. In summary, two to eight sea lions were observed per day on East Ugak Rock during surveys for the FTG–02 launch (R&M, 2006b) and one to five (per day) were observed during the FTX–03 launch (R&M, 2008). In addition, during one aerial survey that was completed outside the June-September timeframe (during the FTG–05 campaign in December 2008), a single Stellar sea lion was observed on East Ugak Rock. Eastern Ugak Rock is located farther east and to the south of the KLC than Ugak Island; therefore, one can assume launch generated sound levels here are less than those at Ugak Island.

Harbor Seals

Harbor seals are the most abundant marine mammal species found within the action area. Harbor seals are not listed as threatened or endangered under the ESA or as depleted under the MMPA. Based on AAC aerial survey counts from launch monitoring reports conducted since January 2006, approximately 97% of all harbor seals are found on the eastern shore of Ugak Island, approximately 5 miles from the launch pad complex. The eastern shore is backed by high steep cliffs that reach up to 1,000 feet above sea level. These cliffs form a visual and acoustic barrier to rocket operations, and limit effects on the species. This conclusion is based on review of sound pressure recordings made at the haulout spit found on the island's northwestern shore, which showed surf and wind-generated sound pressures at sea level were generally in the >70 dBA (SEL) range on the clearest days (Cuccarese *et al.* 1999, 2000). During inclement weather periods ambient sound pressures at sea level can exceed 100 dBA (SEL). The island's eastern shore is windward to prevailing winds and surf noise is routinely high. Harbor seals located on Ugak Island's northern shore are not as protected from launch noise, and therefore may be harassed incidental to AAC's specified activity. However, harbor seal abundance on the northern shores is limited due to the lack of suitable habitat (*i.e.,* few beaches). During 30 aerial surveys conducted by AAC during six rocket launches from 2006–2008, no seals were observed on North Ugak Island on 19 occasions. On surveys when seals were present, average abundance was 25 with a single day count of 125 individuals.

Because physical access to Ugak Island harbor seal haulouts is difficult and dangerous, the only abundance and behavior data of these seals have been derived from aerial surveys conducted by AAC. Harbor seals generally breed and molt where they haulout, so it is assumed that both of these activities take place on Ugak Island, and young seals have routinely been seen there during launch-related aerial surveys. Pupping in Alaska takes place generally in the May-June time frame; molting occurs generally from June to October. Both periods contain peaks in haulout attendance. Total counts on Ugak Island have increased steadily since the 1990s

from several hundred (ENRI 1995–1998) up to a peak of about 1,500 today (R&M 2007a, 2007b, 2008, 2009).

Potential Effects on Marine Mammals

As discussed above, launch operations are a major source of noise on Kodiak Island and can reach Steller sea lion and harbor seal haulouts and rookeries on Ugak Island. Marine mammals produce sounds in various contexts and use sound for various biological functions including, but not limited to (1) Social interactions; (2) foraging; (3) orientation; and (4) predator detection. Interference with producing or receiving these sounds may result in adverse impacts. Audible distance, or received levels (RLs) will depend on the nature of the sound source, ambient noise conditions, and the sensitivity of the receptor to the sound (Richardson *et al.,* 1995). Type and significance of marine mammal reactions to noise are likely to be dependent on a variety of factors including, but not limited to, the behavioral state (*e.g.,* resting, socializing, *etc.*) of the animal at the time it receives the stimulus, frequency of the sound, distance from the source, and the level of the sound relative to ambient conditions (Southall *et al.,* 2007). In general, marine mammal impacts from loud noise can be characterized as auditory and non-auditory.

Potential Auditory Impacts

Auditory impacts consist of injurious (*e.g.,* ruptured ear drums, permanent threshold shift [PTS]) or non-injurious (*e.g.,* temporary threshold shift [TTS]) effects. There are no empirical data for onset of PTS in any marine mammal; therefore, PTS-onset must be estimated from TTS-onset measurements and from the rate of TTS growth with increasing exposure levels above the level eliciting TTS-onset. PTS is presumed to be likely if the hearing threshold is reduced by ≥ 40 dB (*i.e.,* 40 dB of TTS).

Given the distance from the pad area to Ugak Island and the measured sound levels from the Castor 120 (101.4 dB), for the loudest space vehicle used at the KLC, pinniped auditory injury is not anticipated. To further justify that the potential for PTS does not exist, we examined Auditory Brainstem Response (ABR) testing on 18 seals during rocket launches at Vandenberg Air Force Base. Rocket launches at VAFB create sonic booms over pinniped haulouts; therefore, noise from these launches are much louder than what would be audible at haulouts on Ugak Island (sonic booms are not audible from Ugak Island). These experiments are described in detail in NMFS' 2009 EA on the *Issuance of Regulations to Take Marine Mammals by Harassment Incidental to Space Vehicle and Test Flight Activities from Vandenberg Air Force Base, California.* In summary, ABR testing on harbor seals was conducted after one Delta IV launch in 2006. During this launch the digital audio tape (DAT) recorder was located at the VAFB Boathouse (near where the harbor seal hearing tests were performed). The DAT measured the unweighted SEL at 131.3 dB, the C-weighted SEL at 127.5 dB, and the A-weighted SEL at 111.3 dB. The Lmax was measured at 102.6 dB (Thorson *et al.,* 2007). Harbor seal ABR results concluded that there was no evidence that the launch noise from the Delta IV launch, which has an associated sonic boom, caused a loss in harbor seal hearing acuity. Therefore, PTS is not a concern for pinnipeds exposed to launch noise from the KLC as noise levels at this location are below those experienced during the Delta IV launch, and sonic booms are not audible on Ugak Island.

Regarding TTS, although hearing sensitivity was not apparently affected during the ABR testing, that is not to say that TTS did not occur, as seals were tested approximately 2 hours after launch, not immediately following the launch. However, if TTS did occur, hearing was fully recovered within 2 hours. In conclusion, NMFS has preliminarily determined PTS would not occur in pinnipeds on Ugak Island and TTS, although unlikely, may occur. If pinnipeds on Ugak Island experience TTS, full-hearing recovery is expected shortly after exposure.

Potential Behavioral Impacts

To comply with their current regulations, AAC attempted to collect video footage of pinnipeds during launches; however, weather, technical, and accessibility issues prevented video from being obtained. Therefore, no immediate responses of pinnipeds to AAC launch noise have been documented. However, as discussed above, VAFB researchers have been investigating the short and long-term effects of space vehicle launch noise and sonic booms on pinnipeds. As described in NMFS' 2009 EA, the percentage of seals that left the haul-out increased as noise level increased up to approximately 100 decibels (dB) A-weighted SEL, after which almost all seals leave, although recent data have shown that an increasing percentage of seals have remained on shore. Using time-lapse video photography, VAFB discovered that during four launch events, the seals that reacted but remained on the haulout were all adults. VAFB theorized that adult seals may have habituated to launch stimuli more so than less-experienced younger seals; hence the less-severe reactions.

VAFB researchers also found that the louder the launch noise, the longer it took for seals to begin returning to the haul-out site and for the numbers to return to pre-launch levels. In two past Athena IKONOS launches with A-weighted SELs of 107.3 and 107.8 dB at the closest haul out site, seals began to haul-out again approximately 16 to 55 minutes post-launch (Thorson *et al.,* 1999a; 1999b). During several Titan II launches, where A-weighted sound exposure levels ranged from 86.7 to 95.7 dBA, seals began to return to that haulout site within 2 to 8 minutes post-launch (Thorson and Francine, 1997; Thorson *et al.,* 2000). Based on VAFB observational data and the loudest measured sound pressure level recorded on Ugak Island (approximately 101.4 dBA), NMFS anticipates that if seals and sea lions are disturbed, they may begin to return to haulout sites on Ugak Island within 2 to 55 minutes of the launch disturbance.

The behavioral data record for Steller sea lions is small throughout the North Pacific range and typically is focused on reproductive behaviors. In general, studies have shown that responses of pinnipeds on beaches to acoustic disturbance arising from rocket and target missile launches are highly variable. This variability may be due to many factors, including species, age class, and time of year. Porter (1997) observed Steller sea lions fleeing into the water for a wide variety of reasons such as helicopter overflights, bird flybys, and the presence of nearby humans. He also noted sea lion stampedes into the water that could not be correlated with any observed stimulus. There is also evidence that both time of day and air temperature alter the probability of entry into the water (animals are more likely to enter the water when already overheated) (Bowles, 2000). Steller sea lions have been seen to mill about just offshore with their heads up in a heightened state of watchfulness (Porter, 1997) and remain close to the haulout until they sense it is safe to go back ashore (Lockheed Martin Environmental Services, 1999).

The infrequent (approximately nine times per year) and brief (no more than 1 minute as heard from Ugak Island) nature of these sounds that would result from a rocket launch is not expected to alter the population dynamics of Steller sea lions or harbor seals which utilize

Ugak Island as a haulout site. Current harbor seal numbers on Ugak Island total around 1,500 (R&M 2009), which is an increase of about 1,100 since the 1990s (ENRI 1995–1998); therefore, population dynamics of harbor seals have also not been negatively impacted from past launches originating from KLC. Steller sea lion numbers have decreased on Ugak Island; however, this decline mimics that seen at all other long-term trend sites in the Kodiak Archipelago. AAC has only launched no more than two rockets per year during the Steller sea lion season, annually; and thus, it is highly unlikely that AAC launches are the cause of this phenomenon, which is more likely related to overall population decline or prey resource availability.

If launches occur during the harbor seal pupping period and harbor seals have also chosen to pup on the north beach, it is possible that harbor seal pups could be injured or killed as a result of the adults flushing in response to the rocket noise, or the mother/pup bond could be permanently broken. However, NMFS does not expect harbor seal pup injury and mortality to occur to a great degree. 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 Renouff, 1985; Cottrell *et al.,* 2002; Burns *et al.,* 2005). NMFS recognizes the critical bonding time needed between a harbor seal mother and her pup to ensure pup survival and maximize pup health. Harbor seals pups are weened from their mother within approximately 4 weeks; however, the most critical bonding time is immediately (minutes) after birth. Lawson and Renouf (1987) conducted an in-depth study to investigate harbor seal mother/pup bonds in response to natural and anthropogenic disturbance. In summary, they found that a mutual bond is developed within 5 minutes of birth, and both the mother and pup play a role in maintaining contact with each other. The study showed a bilateral bond, both on land and in the water, and that mothers would often wait for or return to a pup if it did not follow her. Pups would follow or not move away from their mother as she approached. Most notably, mothers demonstrated overt attention to their pups while in the water and during times of disturbance on the nursery. Increased involvement by the mothers in keeping the pairs together during disturbances became obvious as they would wait for, or return to, their young if the pups fell behind.

In additional to incidental harassment, harbor seal pups have been the subject of numerous research studies resulting in direct, intentional harassment. Research activities often include capture and handling of very young pups and separating pups from their mothers for short periods of time. Scientists report they have disturbed seals during capture, then left the area within approximately 1 hour. Seals return to the haulout site within minutes of the scientists leaving the beach (J. Harvey to M. DeAngelis, pers. comm., Jan. 12), further demonstrating harbor seal pup resilience to disturbance. Given that pups are precocious at birth, bonds between mothers and pups are known to form within minutes of birth, and other characteristics of mother/pup bonding described above, NMFS has preliminarily determined that Level A harassment or mortality may not occur due to the pups precociousness and the early bond formed between mothers and pups; however, it cannot be discounted. Therefore, NMFS is proposing to authorize Level A harassment and mortality for harbor seal pups. Steller sea lion pup injury or mortality is not a concern as no pupping for this species occurs within the action area.

Finally, KLC conducts approximately three security overflights per day in the days preceding a launch. Several studies of both harbor seals and Steller sea lions cited in Richardson *et al.* (2005), suggest that these animals respond significantly less to overflights of both planes and helicopters that occur above 305 m (0.2 mi). NMFS does not anticipate harassment from overflights to occur as they generally would remain at least 0.25 miles from a haulout; however, if pilot or crew notice overt responses from pinnipeds (*e.g.,* flushing) to aircraft, this would be noted and reported to NMFS in the flight report. Observations made of any animals displaced by a security overflight are reported to the environmental monitoring team for inclusion in their report of monitoring results.

Anticipated Effects on Habitat

Solid fuel rocket boosters would fall into the ocean away from any known or potential haulouts. All sonic booms that reach the earth's surface would be expected to occur over open ocean beyond the outer continental shelf. Airborne launch sounds would mostly reflect or refract from the water surface and, except for sounds within a cone of approximately 26 degrees directly below the launch vehicle, would not penetrate into the water column. The sounds that would penetrate would not persist in the water for more than a few seconds. Overall, rocket launch activities from KLC would not be expected to cause any impacts to habitats used by marine mammals, including pinniped haulouts, or to their food sources.

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 taking for certain subsistence uses.

To minimize impacts on pinnipeds at haulout sites, the AAC has proposed, as part of their specified activities, the following mitigation measures: (1) Security overflights immediately associated with the launch would not approach occupied pinniped haulouts on Ugak Island by closer than 0.25 mile (0.4 km), and would maintain a vertical distance of 1,000 ft (305 m) from the haulouts when within 0.5 miles (0.8 km), unless indications of human presence or activity warrant closer inspection of the area to assure that national security interests are protected in accordance with law; (2) AAC would avoid launches during the harbor seal pupping season (May 15–June 30), unless constrained by factors including, but not limited to, human safety and national security; and (3) if launch monitoring or quarterly aerial surveys indicate that the distribution, size, or productivity of the potentially affected pinniped populations has been affected due to the specified activity, the launch procedures and the monitoring methods would be reviewed, in cooperation with NMFS, and, if necessary, appropriate changes may be made through modifications to a given LOA, prior to conducting the next launch of the same vehicle under that LOA.

NMFS has carefully evaluated the applicant's proposed mitigation measures and considered a range of other measures in the context of ensuring that NMFS prescribes the means of 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 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, including consideration of personnel safety, and practicality of implementation. The proposed mitigation measures take scientific studies (Richardson *et al.,* 2005) of overflight effects on pinnipeds into consideration. By avoiding launches during the harbor seal pupping season, AAC would subsequently be avoiding all Level A harassment and mortality. Lastly, the adaptive nature of the proposed mitigation measures allow for adjustments to be made if launch monitoring or quarterly aerial surveys indicate that impacts to the distribution, size, or productivity of pinniped populations are occurring.

Based on our evaluation of the applicant's proposed measures, as well as other measures considered by NMFS or recommended by the public in the prior rulemaking, NMFS has preliminarily determined that the proposed mitigation measures provide the means of effecting the least practicable adverse impacts on marine mammals species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

Proposed Monitoring and Reporting

In order to issue an ITA for an activity, Section 101(a)(5)(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 ITAs must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present.

AAC proposes to purchase and place one remote live streaming video system overlooking one of the harbor seal haulouts on the eastern side of Ugak Island for the first five launches conducted under these regulations to verify the assumption that seals on the eastern side of the island are not affected by launches. Although animals on the northern shore are more likely to be affected by the action, this area is predominantly a rocky reef tidal area where seals haulout opportunistically, either singly or in small numbers on exposed rocks. There is more confidence seals will be visible and able to be monitored on the eastern side of the island. After five launches, AAC and NMFS will reassess the efficiency of the camera system and possibly move it to another location (*e.g.,* the traditional Steller sea lion haulout).

The selected haulout would be viewed either in real time or via "tape" delay for six days using the following schedule where day length permits. The six-day schedule would be roughly centered on the day of launch, with launch day being day three of the monitoring schedule. The video stream would be viewed by professional biologists for 4 hours each day with monitoring centered on the time of launch on launch day, and on low tide on the other days. Detailed information on when monitoring would occur around a launch is provided in AAC's application. Data collected from the live stream video would include number of animals observed, by age and sex class when possible, behavior (*e.g.,* resting), animal response to launches, and re-occupation time if disturbed.

The video system was developed, tested, and first put into service in Alaska, and has proven itself over many years of operation both in Alaska and around the world. The video system is all weather proven and autonomous, drawing energy from a combination of wind and solar generators. It features a camera that includes a lens that can be focused (zoom and pan) on command and provides live-streaming video that can be made available through internet access to interested researchers in real time.

AAC would also carry out quarterly aerial surveys to determine long-term trend counts of the Steller sea lion and harbor seals within the action area. Surveys would be flown midday and centered around low tide for optimal seal counts. The aircraft would survey from a distance appropriate to count seals or sea lions, but far enough away to minimize harassment. Data collected would include number of seals or sea lions per haulout, by age class when possible, and if any disturbance behavior is noted from aircraft presence.

In addition to visual monitoring, whenever a new class of rocket is flown from the KLC, a real time sound pressure record would be obtained for documentation purposes and correlated with the behavioral response record. Two sound pressure monitors would be used: One would be placed at the established sound pressure recording location known as Narrow Cape and the other as close as practical to the remote video system.

Estimated Take by Incidental Harassment

Except with respect to certain activities not pertinent here, the MMPA defines "harassment" as:

> any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

As described above, Steller sea lions hauled out on Ugak Island may become alert or flush into the water in response to launch noise. Sound exposure levels from the loudest launch may reach approximately 101.4 dBA at the traditional Steller sea lion haulout. Based on this recorded level and the fact that audible launch noise would be very short in duration, sea lions are not expected to incur PTS, and the chance of TTS is unlikely. No injury or mortality of Stellar sea lions is anticipated, nor would any be authorized. Therefore, NMFS proposes to authorize Steller sea lion take, by Level B harassment only, incidental to launches from KLC.

Harbor seals of all age classes hauled out on the northern side of Ugak Island would likely react in a similar manner as Steller sea lions (and may become alert or flush into the water) to launches from KLC. Therefore, harbor seals may be taken by Level B harassment incidental to rocket launch noise. However, during the pupping season (May 15–June 30), pups may also be injured, killed, or separated from their mother during a flushing event. Therefore, AAC has requested, and NMFS proposes, to authorize Level A harassment and mortality of harbor seal pups.

As discussed above, security overflights associated with a launch would not closely approach or circle any sea lion or seal haulout site. Therefore, incidental take from this activity is not anticipated. Should the pilot or crew on the plane observe pinnipeds reacting to their presence, the plane would increase altitude and note the number of animals reacting to the plane. These data would be included in AAC's final marine mammal report.

AAC estimates that up to 45 launches may occur from KLC over the course of the 5-year period covered by the proposed rulemaking. Annually, AAC estimates an average of nine launches would occur. Most of these vehicles are expected to be of the Minotaur I through

V class, including civil versions of the Castor 120 known as the Athena and Taurus I or smaller target vehicles. AAC estimates that no more than one launch would occur over a 4-week period, and it is likely the frequency of launches would be less than this estimate.

Based on aerial survey data, AAC estimates a maximum of ten Steller sea lions could be present during launches occurring during the Steller sea lion season (the maximum number of animals sighted during a survey has been eight). Any sea lions present during the launches would be adult or juvenile males; therefore, no reproductive processes or pupping would be affected by the specified activities. Assuming that all nine launches (the average number of launches predicted by AAC) occur during the Steller sea lion season, that all nine launches involve the Castor 120 (the loudest vehicle expected to be flown from KLC over the period to be covered by the proposed regulations), and that there is no habituation to rocket motor effects with experience, then up to 90 takes by harassment could occur per year (ten animals/launch × nine launches). However, it is more reasonable to assume that a maximum of four launches per year could occur during the 2-month Steller sea lion season, and that no more than eight Stellers would be present at any given time (the maximum number recorded). Therefore, NMFS is proposing to authorize the take, by Level B harassment, of 32 Steller sea lions per year (eight animals × four launches).

The total number of harbor seals present on Ugak Island ranges up to about 1,500, most of which are found on the island's eastern shore where they are sheltered from launch effects by the 1,000-foot tall cliffs that stand between their haulouts and KLC. Relatively few harbor seals use haulouts on the northern side of the island across from KLC due to the lack of suitable beaches. No seals were observed on northern haulouts, which consist primarily of isolated rocks, during 19 of 30 marine mammal surveys flown by AAC from 2006–2008. When present, the majority of counts on northern haulouts were of fewer than 25 individuals; however, a one-time high count of about 125 animals on these rocks has been made. Using the conservative and rare high number of 125 as being a representative figure, AAC estimates that up to 125 individuals might be taken per launch operation. Therefore, AAC has requested, and NMFS proposes to authorize 1,125 harbor seal (125 seals/launch × nine launches/year) takes during launch operations.

The actual number of pups taken by Level A harassment or mortality is difficult to quantify, as age class was not identified during AAC's previous monitoring efforts (age class distinction would occur under the proposed monitoring and reporting requirements). Given that seals do not use the northern haulouts in large numbers (as compared to the protected eastern haulouts), the number of pups on the area of the island exposed to launch noise is likely low. Actual numbers will likely be smaller given the low and variable use of the area by harbor seals. NMFS consulted with Ms. Kate Wynne, a marine mammal specialist with the Alaska Sea Grant Marine Advisory Program, who has previously flown aerial surveys within the action area. Her data, from the early 1990s, indicate that pup counts on the northern side of Ugak Island averaged approximately 17. Although this data is not recent, it is the best available. NMFS does not anticipate that all pups on a haulout would be injured or killed during a launch and, in fact, many may not be taken by Level A harassment or mortality. However, in the unlikely event injury or mortality occurs, NMFS proposes to authorize 17 harbor seal pup takes by Level A harassment or mortality, annually, incidental to AAC's activities.

Previous Activities and Monitoring

As discussed above, under AAC's current regulations (valid February 27, 2006 through February 28, 2011) and annual LOAs, AAC has been conducting marine mammal monitoring within the action area before and after launch events to satisfy the monitoring requirements set forth in MMPA authorizations. The objective of monitoring Steller sea lions and Pacific harbor seals is to detect any indications of pinniped disturbance, injury, or mortality resulting from KLC rocket launches at the Ugak Island haulout site. Monitoring requirements included:
(1) Conducting fixed-wing aerial surveys at least one day prior to, immediately after, and three days post any launches taking place from June 15 through September 30, weather permitting;
(2) installing a remote custom-designed, closed-circuit, weatherproof, time-lapse video camera system at the base of the traditional Steller sea lion haulout before any launch occurring from June 15 through September 30; and
(3) making an attempt to place a video camera with zoom lens on the accessible western end of the north-facing shore to record harbor seal behavior on the middle or eastern end of the shore, or on the rocks offshore (recall that the eastern side of Ugak Island—where the majority of seals are—is completely inaccessible to pedestrian or boat traffic due to the high cliffs and violent surf).

The regulations also contained noise monitoring requirements; however, these data are discussed in the *Specified Activity* section above. AAC complied with the noise monitoring conditions contained within the regulations and annual LOAs.

Since 2006, AAC has conducted five launches from the KLC. AAC did not exceed the number of launches allocated in their regulations during the Steller sea lion or harbor seal pupping season in any given year. The dates and types of launches and types of monitoring conducted are provided in Table 2. Only one launch has occurred during the harbor seal pupping season. No launches occurred in 2009 and none have occurred in 2010 to date. Results of the acoustic monitoring are described in the *Specified Activities* section above and are not reiterated here.

TABLE 2—DATES AND TYPES OF LAUNCHES FROM THE KLC UNDER CURRENT REGULATIONS AND TYPE OF MONITORING CONDUCTED

Date	Launch designator	Aerial monitoring (Number of days)	Video monitoring	Acoustic monitoring
9/1/2006	FTG–02	Yes (6)	Yes	Yes.
5/25/2007	FTX–03	Yes (3)	No [1]	Yes.[3]
9/28/2007	FTG–03a	Yes (5)	Yes	Yes.
7/18/2008	FTX–03	Yes (5)	Yes [2]	Yes.
12/1/2008	FTX–05	Yes (5)	No	Yes.[3]

[1] Foul weather prevented accessing Ugak Island.
[2] Video camera batteries failed prior to launch so no data during launch is available.
[3] Only one noise monitor was deployed at Narrow Cape (approximately 0.9 mi from the launch site). Ugak Island was inaccessible.

During the September 2006 launch, aerial surveys found that Steller sea lions did not use the traditional haulout site on the spit at the north end of Ugak Island; however, one to four Steller sea lions used a supralittoral rock on the east side of Ugak Island (East Ugak Rock). On pre-launch aerial surveys, two to four sea lions were hauled out in that location. On post-launch aerial surveys, one to two sea lions were hauled out. Daily harbor seals counts within the primary study area ranged from 495 seals on August 28th to 961 seals on September 1st.

The traditional Steller sea lion haulout was not occupied during the pre-launch monitoring period during the 2006 launch. Therefore, an alternative video monitoring site overlooking East Ugak Rock was chosen on the northeast side of Ugak Island. On September 1, the two sea lions on the haulout exhibited no reaction indicating disturbance during the launch. The launch occurred at 09:22. From 07:24 to 09:44, the two sea lions laid resting on the haulout. At 09:44, they sat up and interacted for 1 min 12 seconds, then laid and rested until monitoring ceased at 13:29.

In 2007, AAC launched two vehicles; an FTX–03 launch occurred on May 25, 2007, and an FTX–03a launch occurred on September 28, 2007. For the May launch, foul weather (low ceiling, heavy fog) hampered or completely prevented monitoring efforts except for aerial surveys; three aerial surveys were completed. Steller sea lions were not observed at the traditional haulout or East Ugak Rock during the aerial surveys. Daily harbor seal counts ranged from 136 seals on May 23rd to 402 seals on May 27th. For the September launch, one aerial survey was completed before the launch, and four surveys were completed post-launch. Steller sea lions were not present at the traditional haulout or on East Ugak Rock. Daily harbor seal counts within the primary study area ranged from zero to 748 seals with peak counts two days following the launch. Video monitoring at the harbor seal haulout did not detect any seals. However, glare from the low angle sun in the morning and low magnification made it difficult to see all the detail on the video recording.

In 2008, AAC launched two vehicles; an FTX–03 launch occurred on July 18th and an FTX–05 launch occurred on December 1st. For the July, FTX–03 launch, one aerial survey was completed before the launch and four surveys were completed post-launch. Foul weather hampered or completely prevented all but one of the aerial surveys during the FTG–05 launch in December; that survey was completed on December 7 after the launch. Steller sea lions did not occupy the traditional haulout on the spit at the north end of Ugak Island during either of the two launches in 2008; however, small numbers (one to five) of sea lions occupied East Ugak Rock during the aerial surveys conducted for both launches. Daily totals within the primary study area during the FTX–03 launch ranged from 610 to 1,534 seals. During the single aerial survey completed for FTG–05, 971 harbor seals were counted in the primary study area. Based on the attendance pattern gathered from the FTX–03 launch (which had complete surveys), seal numbers were at pre-launch levels within 5 hours after the launch.

A video camera recorded sea lions at East Ugak Rock on July 17–18, 2008 during the FTX–03 launch campaign. The video recorder ran for approximately 14 hours before running out of power about 2 hours before the rocket launch. Therefore, the instantaneous response of sea lions to the launch was not recorded. On July 17, the day before the rocket launch, zero to three sea lions were recorded on the rock and the same number were recorded before the launch on July 18. Three sea lions were on the rock when the recorder quit. Three sea lions also were present on the same rock 3 h 17 min later (1 h 25 min after the launch), when the video camera was retrieved. Thus, the attendance of sea lions observed at East Ugak Rock suggests that if there was disturbance, it was short-lived. During the FTG–05 launch in December, video equipment could not be installed at Ugak Island because of heavy fog the day before the launch.

As anticipated, foul weather proved it difficult to access Ugak Island to deploy equipment. However, AAC was able to collect Steller sea lion reactions to one launch; no reactions were observed. Although attempted, AAC was unsuccessful at monitoring harbor seal reactions to the launch. Despite lack of direct monitoring during the launch, pinniped counts acquired during aerial surveys post-launch suggest that, if animals are reacting, it is short-lived and not having an impact on the population. Because AAC fulfilled the mitigation and monitoring requirements to the best of their ability, NMFS has determined that AAC complied with the mitigation and monitoring requirements set forth in regulations and annual LOAs. In addition, NMFS has determined that the impacts on marine mammals from the activity fell within the nature and scope of those anticipated and authorized in the previous authorization (supporting the analysis in the current authorization).

For the proposed monitoring measures, NMFS has shifted its focus from direct Steller sea lion to harbor seal monitoring. AAC will monitor harbor seal reactions to rocket launches during the launch itself via a type of camera system currently used by the Alaska Sea Life Center to monitor haulouts and rookeries. The camera will be placed at a harbor seal pupping location on Ugak Island to better assess the likelihood that harbor seal pups may be abandoned, injured, or killed as a direct result of a rocket launch disturbance. The camera system will be installed and operating if the AAC conducts a launch during the harbor seal pupping season. Unlike the previous system, this camera system does not need to be retrieved to acquire data and battery power is not problematic. Therefore, AAC can place it at a harbor seal haul-out during good weather no matter the number of days before a launch and does not have to be concerned with retrieving it. These factors will likely eliminate the previous issues with video monitoring designed to detect pinniped reactions at the time of the launch. In addition, the camera system will have a zoom lens for better viewing quality.

Negligible Impact and Small Numbers Analysis and Determination

NMFS has defined "negligible impact" in 50 CFR 216.103 as " * * * an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival." In making a negligible impact determination, NMFS considers (and should explicitly address whenever possible) the following:
(1) Number of anticipated mortalities;
(2) number and nature of anticipated injuries; (3) number, nature, intensity, and duration of Level B harassment;
(4) is the nature of the anticipated takes such that we would expect it to actually impact rates of recruitment or survival;
(5) context in which the takes occur; and (6) species or stock status.

In the past few years, AAC has conducted only zero to two launches on an annual basis. Regardless, NMFS has analyzed the specified activity to include disturbance events of up to nine launches per year as they anticipate the capability to carry out more efficient mission turn-around time over the duration of the proposed regulations. Mortalities and injuries are only authorized for harbor seal pups, and these are not expected due to small and

variable harbor seal populations using the northern haul-out sites, as well as the nature of pups and the early bonds formed between pups and mothers. Level B harassment of Steller sea lions is possible due to rocket launch noise, but is considered unlikely based on projected sound levels and the short duration of the noise. Rates of seal or sea lion recruitment or survival are not expected to be impacted due to the limited number of mortalities or injuries to harbor seal pups. Due to the fact that no sonic booms are audible from Ugak Island, NMFS does not anticipate the potential for PTS to occur and TTS is unlikely, but possible. These assumptions are justified from ABR data collected at and around VAFB from similar launch activities. Further, based on aerial survey data, the harbor seal population on this island is increasing. Given harbor seals are considered a species that is easily disturbed, their resilience to launch effects suggests impacts from launches are short-term and negligible. The amount of take the AAC has requested, and NMFS proposes to authorize, is considered small (less than one percent of Stellers and less than three percent of harbor seals) relative to the estimated stock populations of 41,197 Steller sea lions in the Western U.S. and 44,453 harbor seals in the Gulf of Alaska.

Mitigation measures to reduce noise from launches once in the air are virtually impossible; however, the noise generated on the launch pad during ignition moves through a deep trench (called a flame trench or flame bucket) that diverts the noise/exhaust toward the northwest (away from Ugak Island). The primary method of minimizing impacts to pinnipeds from launch noise is to minimize the number of launches when possible during sensitive times.

In addition, improved monitoring would better enable AAC and NMFS to determine if impacts from rocket launches are having short-term and long-term impacts on the present day pinniped populations on Ugak Island. The camera system would be able to detect immediate impacts from launch exposure, including the number of pinnipeds flushing at the haulout site, while quarterly aerial surveys would aid in determining long-term trends of pinniped abundance. Currently, NMFS conservatively anticipates a small number of pups may be injured or killed during a launch. However, there is no empirical data to prove or disprove this as no video monitoring of seals during the launch has been successful (the one time a video system was placed near the haulout, no seals were observed). As discussed previously, the population of harbor seals on Ugak Island has increased steadily from several hundred in the 1990s (ENRI 1995–1998) to a peak of about 1,500 today (R&M 2007a, 2007b, 2008, 2009). Therefore, NMFS does not believe there would be any long-term impact on the health of the population if pup mortality is occurring from launches. The proposed monitoring measures contained within this notice are specifically designed to, among other things, determine if pup injury or mortality is occurring due to rocket launches from AAC.

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, NMFS preliminarily finds that space vehicle and missile launches at the KLC will result in the incidental take of small numbers of marine mammals, but that the total taking will have a negligible impact on the affected species or stocks.

Impact on Availability of Affected Species for Taking for Subsistence Uses

There are no relevant subsistence uses of marine mammals implicated by this action. Therefore, NMFS has determined that the total taking of affected species or stocks would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence uses.

Endangered Species Act (ESA)

There is one marine mammal species under NMFS' jurisdiction that is listed as endangered under the ESA with confirmed or possible occurrence in the action area: The Steller sea lion. In the 2003 Biological Opinion, NMFS determined that the proposed actions would not result in jeopardy to the affected species or result in adverse modification of critical habitat. In 2005, AAC, on behalf of the FAA, consulted with NMFS, under Section 7 of the ESA, on the impacts of space vehicle and rocket launches on Steller sea lions. NMFS also consulted internally under the ESA on its proposed issuance of AAC's 2006 MMPA regulations and subsequent LOAs. NMFS will also consult internally on the issuance of the proposed regulations under section 101(a)(5)(A) of the MMPA for this activity, which would be effective from February 2011 through February 2016. Consultation will be concluded prior to a determination on the issuance of regulations and subsequent LOAs.

National Environmental Policy Act (NEPA)

In 1996, the FAA prepared an EA, and subsequently issued a Finding of No Significant Impact (FONSI), for AAC's proposal to construct and operate a launch site at Narrow Cape on Kodiak Island, Alaska. Since 1998, AAC has provided monitoring reports related to noise and marine mammal impacts associated with ongoing rocket launches from KLC. After reviewing the new information contained in the monitoring reports, and considering the MMC's comments that impacts to harbor seals should be more comprehensively addressed, NMFS decided that a more current environmental analysis was necessary. In 2005, NMFS prepared an EA and associated FONSI on the Promulgation of Regulations Authorizing Take of Marine Mammals Incidental to Rocket Launches at Kodiak Launch Complex, Alaska, and the Issuance of Subsequent Letters of Authorization. NMFS found that the promulgation of a 5-year rulemaking in 2006, and issuance of subsequent LOAs would not significantly impact the quality of the human environment and therefore issued a FONSI. Accordingly, preparation of an Environmental Impact Statement or Supplemental Environmental Impact Statement for this action was not necessary. NMFS has determined that because the action has not changed significantly from that analyzed in previous NEPA documents, further analysis under NEPA is not necessary for issuance of regulations and subsequent LOAs extending into 2016.

Classification

OMB has determined that this proposed rule is not significant for purposes of Executive Order 12866.

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. A description of this rule and its purpose are found in the preamble to this proposed rule, and are not repeated here. The provisions of the rule will apply directly only to AAC. The AAC is a public corporation of the State of Alaska involved in space vehicles and guided missiles, and it employs approximately 45 people. SBA's regulations implementing the RFA have no "small" size standards for public administration entities that administer

and oversee government programs and activities that are not performed by private establishments. Accordingly, no small entity will be affected by these proposed rules.

The AAC may use a small number of contractors to provide services related to the proposed reporting requirements. However, none of the authorizations or requirements imposed by this action will result in any of AAC's contractors expending any resources in order to be in compliance with these proposed regulations. Thus, the rule would have no effect, directly or indirectly, on these small entities.

Because AAC is the only entity that would be directly affected by this proposed regulation and because the effects of this regulation would impose no costs on any of the contractors—whether they are large or small entities—there will be no significant economic impact on a substantial number of small entities. Accordingly, no regulatory flexibility analysis is necessary, 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. This proposed rule contains a collection-of-information requirement subject to the provisions of the PRA. This collection has been approved previously by OMB under section 3504(b) of the PRA issued under OMB control number 0648–0151, which includes applications for LOAs and reports.

List of Subjects in 50 CFR Part 217

Exports, Fish, Imports, Indians, Labeling, Marine mammals, Penalties, Reporting and record-keeping requirements, Seafood, Transportation.

Dated: December 17, 2010.

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 TAKE OF MARINE MAMMALS INCIDENTAL TO SPECIFIED ACTIVITIES

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

Authority: 16 U.S.C. 1361 *et seq.*

2. Subpart H is added to read as follows:

Subpart H—Taking of Marine Mammals Incidental to Space Vehicle and Missile Launches at Kodiak Launch Complex, Alaska

Sec.

217.70 Specified activity and specified geographical region.
217.71 Effective dates.
217.72 Permissible methods of taking.
217.73 Prohibitions.
217.74 Mitigation.
217.75 Requirements for monitoring and reporting.
217.76 Letter of Authorization.
217.77 Renewal of a Letter of Authorization.
217.78 Modifications to a Letter of Authorization.

Subpart H—Taking of Marine Mammals Incidental to Space Vehicle and Missile Launches at Kodiak Launch Complex, Alaska

§ 217.70 Specified activity and specified geographical region.

(a) Regulations in this subpart apply only to the incidental taking of marine mammals specified in paragraph (b) of this section by U.S. citizens engaged in space vehicle and missile launch activities at the Kodiak Launch Complex on Kodiak Island, Alaska.

(b) The incidental take of marine mammals under the activity identified in paragraph (a) of this section is limited to 32 juvenile and adult Steller sea lions (*Eumetopius jubatus*), 1,125 Pacific harbor seals (*Phoca vitulina*) of all ages, and 17 harbor seal pups.

§ 217.71 Effective dates.

Regulations in this subpart are effective from March 1, 2011, through February 28, 2016.

§ 217.72 Permissible methods of taking.

(a) Under a Letter of Authorization issued pursuant to § 216.106 of this chapter, the Alaska Aerospace Corporation and its contractors may incidentally, but not intentionally, take Steller sea lions and Pacific harbor seals by Level B harassment and harbor seal pups by Level A harassment or mortality in the course of conducting space vehicle and missile launch activities within the area described in § 217.70(a), provided all terms, conditions, and requirements of these regulations and such Letter of Authorization are complied with.

(b) The activities identified in § 217.70(a) must be conducted in a manner that minimizes, to the greatest extent practicable, adverse impacts on marine mammals and their habitat.

§ 217.73 Prohibitions.

The following activities are prohibited:

(a) The taking of a marine mammal that is other than unintentional.

(b) The violation of, or failure to comply with, the terms, conditions, and requirements of this subpart or a Letter of Authorization issued under § 216.106 of this chapter.

(c) The incidental taking of any marine mammal of a species not specified, or in a manner not authorized, in this subpart.

§ 217.74 Mitigation.

(a) The activity identified in § 217.70(a) must be conducted in a manner that minimizes, to the greatest extent practicable, adverse impacts on marine mammals and their habitats. When conducting operations identified in § 217.70(a), the mitigation measures contained in the Letter of Authorization issued under § 216.106 of this chapter and § 217.76 must be implemented. These mitigation measures include (but are not limited to):

(1) Security overflights associated with a launch will not approach occupied pinniped haulouts on Ugak Island by closer than 0.25 mile (0.4 km), and will maintain a vertical distance of 1000 ft (305 m) from the haulouts when within 0.5 miles (0.8 km), unless indications of human presence or activity warrant closer inspection of the area to assure that national security interests are protected in accordance with law;

(2) For missile and rocket launches, holders of Letters of Authorization must avoid launches during the harbor seal pupping season of May 15 through June 30, except when launches are necessary for the following purposes: human safety, national security, space vehicle launch trajectory necessary to meet mission objectives, or other purposes related to missile or rocket launches.

(3) All flights associated with the marine mammal abundance quarterly surveys must maintain a minimum altitude of 500 ft (152 m) and remain 0.25 miles from recognized seal haulouts.

(4) If launch monitoring or quarterly aerial surveys indicate that the distribution, size, or productivity of the potentially affected pinniped populations has been affected due to the specified activity, the launch procedures and the monitoring methods will be reviewed, in cooperation with NMFS, and, if necessary, appropriate changes may be made through modifications to a given LOA, prior to conducting the next launch of the same vehicle under that LOA.

(5) Additional mitigation measures as contained in a Letter of Authorization.

(b) [Reserved]

§ 217.75 Requirements for monitoring and reporting.

(a) Holders of Letters of Authorization issued pursuant to § 216.106 of this chapter and § 217.76 for activities described in § 217.70(a) are required to cooperate with NMFS, and any other Federal, state, or local agency with authority to monitor the impacts of the activity on marine mammals. Unless specified otherwise in the Letter of Authorization, the Holder of the Letter of Authorization must notify the Administrator, Alaska Region, NMFS, by letter, email or telephone, prior to each launch. If the authorized activity identified in § 217.70(a) is thought to have resulted in the take of marine mammals not identified in § 217.70(b), then the Holder of the Letter of Authorization must notify the Director, Office of Protected Resources, NMFS, or designee, by telephone (301–713–2289), within 48 hours of the discovery of the take.

(b) Holders of Letters of Authorization must designate qualified protected species observers, approved in advance by NMFS, as specified in the Letter of Authorization, to:

(1) Deploy for AAC a remote camera system designed to detect pinniped responses to rocket launches for at least the first five launches conducted under these regulations. AAC will conduct visual monitoring for at least 2 hours before, during, and after launch;

(2) Ensure a remote camera system will be in place and operating in a location which allows visual monitoring of a rookery during the launch, if a launch during the harbor seal pupping season cannot be avoided;.

(3) Relocate the camera system to another haulout to be chosen in cooperation with NMFS after the first five launches;

(4) Review and log pinniped presence, behavior, and re-occupation time data from the visual footage obtained from the remote camera system and report results to NMFS within 90 days post launch;

(5) Obtain, whenever a new class of rocket is flown from the Kodiak Launch Complex, a real time sound pressure record for documentation purposes and to correlate with the behavioral response record. Two sound pressure monitors shall be used: one shall be placed at the established sound pressure recording location known as Narrow Cape, and the other as close as practical to the remote video system.

(6) Conduct quarterly aerial surveys, ideally during mid-day coinciding with low tide, to obtain data on pinniped presence, abundance, and behavior within the action area to determine long-term trends in pinniped haulout use. Results of these quarterly surveys will be reported once as part of the year-end summary report that will accompany the request for a new LOA.

(c) Holders of Letters of Authorization must conduct additional monitoring as required under an annual Letter of Authorization.

(d) Holders of Letters of Authorization must submit a report to the Alaska Region Administrator, NMFS, within 90 days after each launch. This report must contain the following information:

(1) Date(s) and time(s) of the launch;

(2) Location of camera system and acoustic recorders (if used);

(3) Design of the monitoring program and a description of how data is stored and analyzed; and

(4) Results of the monitoring program, including, but not necessarily limited to:

(i) Numbers of pinnipeds, by species and age class (if possible), present on the haul-out prior to commencement of the launch;

(ii) Numbers of pinnipeds, by species and age class (if possible), that may have been harassed, including the number that entered the water as a result of launch noise;

(iii) The length of time pinnipeds remained off the haulout during post-launch monitoring;

(iv) Number of harbor seal pups that may have been injured or killed as a result of the launch; and

(v) Other behavioral modifications by pinnipeds that were likely the result of launch noise.

(5) Results of sound pressure level monitoring will be reported in flat weighted, A-weighted, and peak measurements.

(e) An annual report must be submitted at the time of request for a renewal of the Letter of Authorization; it will include results of the aerial quarterly trend counts of pinnipeds at Ugak Island.

(f) A final report must be submitted at least 90 days prior to expiration of these regulations if new regulations are sought or 180 days after expiration of regulations. This report will:

(1) Summarize the activities undertaken and the results reported in all previous reports;

(2) Assess the impacts of launch activities on pinnipeds within the action area, including potential for pup injury and mortality; and

(3) Assess the cumulative impacts on pinnipeds and other marine mammals from multiple rocket launches.

§ 217.76 Letter of Authorization.

(a) A Letter of Authorization, unless suspended or revoked, will be valid for a period of time specified in the Letter of Authorization, but a Letter of Authorization may not be valid beyond the effective period of the regulations.

(b) A Letter of Authorization with a period of validity less than the effective period of the regulations in this subpart may be renewed subject to renewal conditions in this section.

(c) A Letter of Authorization will set forth:

(1) The number of marine mammals, by species and age class, authorized to be taken;

(2) Permissible methods of incidental taking;

(3) Specified geographical region;

(4) Means of effecting the least practicable adverse impact on the species of marine mammals authorized for taking and its habitat; and

(5) Requirements for monitoring and reporting incidental takes.

(d) Issuance of a Letter of Authorization will be based on a determination that the total taking by the activity as a whole will have no more than a negligible impact on the affected species or stocks of marine mammal(s).

(e) Notice of issuance or denial of a Letter of Authorization will be published in the **Federal Register** within 30 days of a determination.

§ 217.77 Renewal of a Letter of Authorization.

(a) A Letter of Authorization issued under § 216.106 of this chapter and § 217.76 for the activity identified in § 217.70(a) will be renewed annually upon:

(1) Notification to NMFS that the activity described in the application for a Letter of Authorization submitted under § 217.76 will be undertaken and that there will not be a substantial modification to the described activity, mitigation, or monitoring undertaken during the upcoming season;

(2) Timely receipt of and acceptance by NMFS of the monitoring reports required under § 217.75;

(3) A determination by NMFS that the mitigation, monitoring, and reporting measures required under §§ 217.74 and 217.75 and the Letter of Authorization were undertaken and will be undertaken during the upcoming period of validity of a renewed Letter of Authorization; and

(4) A determination that the number of marine mammals taken by the

activity will have no more than a negligible impact on the affected species or stocks of marine mammal(s), and that the level of taking will be consistent with the findings made for the total taking allowable under these regulations.

(b) If a request for a renewal of a Letter of Authorization issued under §§ 216.106 and 216.128 of this chapter indicates that a substantial modification to the described work, mitigation, or monitoring undertaken during the upcoming season will occur, NMFS will provide the public a period of 30 days to review and comment on the request. Review and comment on renewals of Letters of Authorization are restricted to:

(1) New cited information and data indicating that the determinations made in this document are in need of reconsideration; and

(2) Proposed changes to the mitigation and monitoring requirements contained in these regulations or in the current Letter of Authorization.

(c) A notice of issuance or denial of a renewal of a Letter of Authorization will be published in the **Federal Register** within 30 days of a determination.

§ 217.78 Modifications to a Letter of Authorization.

(a) Except as provided in paragraph (b) of this section, no substantive modification (including withdrawal or suspension) to a Letter of Authorization issued pursuant to the provisions of this subpart shall be made by NMFS until after notification and an opportunity for public comment has been provided. A renewal of a Letter of Authorization under § 217.77 without modification is not considered a substantive modification.

(b) If the Assistant Administrator determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in § 217.70(b), a Letter of Authorization may be substantively modified without prior notification and an opportunity for public comment. Notification will be published in the **Federal Register** within 30 days subsequent to the action.

[FR Doc. 2010–32343 Filed 12–22–10; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register
Vol. 75, No. 246
Thursday, December 23, 2010

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

[Doc. No. AMS–TM–10–0074; TM–10–01]

Solicitation of Applications for the Federal-State Marketing Improvement Program (FSMIP)

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice.

SUMMARY: The Agricultural Marketing Service (AMS) announces a solicitation of applications for competitive grant funds for fiscal year (FY) 2011, subject to final appropriation action by Congress, which would enable States to explore new market opportunities for U.S. food and agricultural products and to encourage research and innovation aimed at improving the efficiency and performance of the U.S. marketing system. Eligible applicants include State departments of agriculture, State agricultural experiment stations, and other appropriate State Agencies. Applicants are encouraged to involve industry groups, academia, community-based organizations, and other stakeholders in developing proposals and conducting projects. In accordance with the Paperwork Reduction Act of 1995, the information collection requirements have been previously approved by OMB under 0581–0240, Federal-State Marketing Improvement Program (FSMIP).

Historically, Congress has appropriated funding for this program. This notice is being issued prior to passage of a FY 2011 Appropriations Act, which may or may not provide an appropriation for this program, to allow applicants sufficient time to leverage financing, submit applications, and give AMS time to process applications within the current fiscal year.

DATES: Proposals will be accepted through February 17, 2011.

ADDRESSES: Submit proposals and other required documents to: FSMIP Staff Officer, Transportation and Marketing Programs, Agricultural Marketing Service (AMS), U.S. Department of Agriculture, 1800 M Street, NW., Room 3002–South Tower, Washington, DC 20036; telephone (202) 694–4002; e-mail *janise.zygmont@ams.usda.gov.*

FOR FURTHER INFORMATION CONTACT: Janise Zygmont, FSMIP Staff Officer; telephone (202) 694–4002; fax (202) 694–5950; e-mail *janise.zygmont@ams.usda.gov.*

SUPPLEMENTARY INFORMATION: FSMIP is authorized under Section 204(b) of the Agricultural Marketing Act of 1946 (7 U.S.C. 1621–1627). FSMIP provides matching grants on a competitive basis to enable States to explore new market opportunities for U.S. food and agricultural products and to encourage research and innovation aimed at improving the efficiency and performance of the U.S. marketing system. Eligible applicants include State departments of agriculture, State agricultural experiment stations, and other appropriate State Agencies. Other organizations interested in participating in this program should contact their State Department of Agriculture's Marketing Division. State agencies specifically named under the authorizing legislation should assume the lead role in FSMIP projects, and use cooperative or contractual linkages with other agencies, universities, institutions, and producer, industry or community-based organizations as appropriate. Multi-State projects are encouraged. In such projects, one State assumes the coordinating role, using appropriate cooperative arrangements with the other State agencies and entities involved in the project.

Proposals must be accompanied by completed Standard Forms (SF) 424 and 424A. AMS will not approve the use of FSMIP funds for advertising or, with limited exceptions, for the purchase of equipment. Detailed program guidelines may be obtained from the contact listed above, and are available at the FSMIP Web site: *http://www.ams.usda.gov/FSMIP.*

Background

FSMIP funds a wide range of applied research projects that address barriers, challenges, and opportunities in marketing, transportation, and distribution of U.S. food and agricultural products domestically and internationally.

Eligible agricultural categories include livestock, livestock products, food and feed crops, fish and shellfish, horticulture, viticulture, apiary, and forest products and processed or manufactured products derived from such commodities. Reflecting the growing diversity of U.S. agriculture, in recent years, FSMIP has funded projects dealing with nutraceuticals, bioenergy, compost and products made from agricultural residue.

Proposals may deal with barriers, challenges, or opportunities manifesting at any stage of the marketing chain including direct, wholesale, and retail. Proposals may involve small, medium, or large scale agricultural entities but should potentially benefit multiple producers or agribusinesses. Proprietary proposals that benefit one business or individual will not be considered.

Proposals that address issues of importance at the State, Multi-State or national level are appropriate for FSMIP. FSMIP also seeks unique proposals on a smaller scale that may serve as pilot projects or case studies useful as a model for other States. Of particular interest are proposals that reflect a collaborative approach among the States, academia, the farm sector and other appropriate entities and stakeholders. FSMIP's enabling legislation authorizes projects to:

- Determine the best methods for processing, preparing for market, packing, handling, transporting, storing, distributing, and marketing agricultural products.
- Determine the costs of marketing agricultural products in their various forms and through various channels.
- Assist in the development of more efficient marketing methods, practices, and facilities to bring about more efficient and orderly marketing, and reduce the price spread between the producer and the consumer.
- Develop and improve standards of quality, condition, quantity, grade, and packaging in order to encourage uniformity and consistency in commercial practices.
- Eliminate artificial barriers to the free movement of agricultural products in commercial channels.
- Foster new/expanded domestic/foreign markets and new/expanded uses of agricultural products.

• Collect and disseminate marketing information to anticipate and meet consumer requirements, maintain farm income, and balance production and utilization.

All proposals which fall within the FSMIP guidelines will be considered. FSMIP encourages States to submit proposals that address the following objectives:

• Creating wealth in rural communities through the development of local and regional food systems and value-added agriculture.

• Developing direct marketing opportunities for producers, or producer groups.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995, the FSMIP information collection requirements were previously approved by the Office of Management and Budget (OMB) and were assigned OMB control number 0581–0240.

AMS is committed to compliance with the Government Paperwork Elimination Act (GPEA), which requires Government agencies in general to provide the public with the option of submitted information or transacting business electronically to the maximum extent possible.

How To Submit Proposals and Applications

Applicants have the option of submitting FSMIP applications electronically through the Federal grants Web site, instead of mailing hard copy documents. Applicants considering the electronic application option are strongly urged to familiarize themselves with the Federal grants Web site well before the application deadline and to begin the application process before the deadline. Additional details about the FSMIP application process for all applicants are available at the FSMIP Web site: *http://www.ams.usda.gov/FSMIP.*

FSMIP is listed in the "Catalog of Federal Domestic Assistance" under number 10.156 and subject agencies must adhere to Title VI of the Civil Rights Act of 1964, which bars discrimination in all federally assisted programs.

Authority: 7 U.S.C. 1621–1627.

Dated: December 16, 2010.

David R. Shipman,

Acting Administrator, Agricultural Marketing Service.

[FR Doc. 2010–32263 Filed 12–22–10; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

Agency Information Collection Activities: Proposed Collection; Comment Request–Supplemental Nutrition Assistance Program (SNAP), Store Applications, Forms FNS–252, 252–E, 252–R, 252–2, and 252–C

AGENCY: Food and Nutrition Service (FNS), USDA.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice invites the general public and other public agencies to comment on this proposed information collection. This collection is a revision of a currently approved collection in the Supplemental Nutrition Assistance Program and concerns Retail Store Applications (Forms FNS–252; FNS–252–E; and FNS–252–R).

DATES: Written comments must be received on or before February 22, 2011 to be assured of consideration.

ADDRESSES: Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments may be sent to: Ronald Ward, Food and Nutrition Service, U.S. Department of Agriculture, 3101 Park Center Drive, Room 426, Alexandria, VA 22302. Comments may also be submitted via fax to the attention of Ronald Ward at (703) 305–1863 or via e-mail to: *BRDHQ–WEB@fns.usda.gov.* Comments will also be accepted through the Federal eRulemaking Portal. Go to *http://www.regulations.gov,* and follow the online instructions for submitting comments electronically.

All written comments will be open for public inspection at the office of the Food and Nutrition Service during regular business hours (8:30 a.m. to 5 p.m. Monday through Friday) at 3101 Park Center Drive, Room 426, Alexandria, Virginia 22302.

All responses to this notice will be summarized and included in the request for Office of Management and Budget approval. All comments will be a matter of public record.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of this information collection should be directed to Ronald Ward at *BRDHQ–WEB@fns.usda.gov.*

SUPPLEMENTARY INFORMATION:

Title: Supplemental Nutrition Assistance Program (SNAP)—Store Applications.

Form Number: FNS–252, 252–E, 252–R, 252–2, and 252–C.

OMB Number: 0584–0008 and 0584–0553.

Expiration Date: July 31, 2011.

Type of Request: Revision of a currently approved collection of information.

Abstract: Section 9(a) of the Food and Nutrition Act of 2008, as amended, (the Act) (7 U.S.C. 2018(a)) requires that FNS determine the eligibility of retail food stores and certain food service organizations to accept SNAP benefits and to monitor them for compliance and continued eligibility.

Part of FNS' responsibility is to accept applications from retail food stores that wish to participate in SNAP, review the applications in order to determine whether or not applicants meet eligibility requirements, and make determinations whether to grant or deny authorization to accept SNAP benefits. There are currently four application forms designed for that purpose approved under the Office of Management and Budget (OMB) No. 0584–0008—the Supplemental Nutrition Assistance Program Application for Stores, Form FNS–252 and FNS–252–E (paper and online version, respectively); the Meal Service Application, Form FNS–252–2; and the Corporate Supplemental Application, Form FNS–252–C used for individual (chain) stores under a corporation.FNS is also responsible for reviewing retail food store applications at least once every five years to ensure that each firm is under the same ownership and continues to meet eligibility guidelines. In order to accomplish this regulatory requirement, FNS collects information from retail food stores using the Supplemental Nutrition Assistance Program Application for Stores—Reauthorization, Form FNS–252–R. This information collection is approved under OMB No. 0584–0553. In our previous submission to OMB, FNS received approval to merge this information collection with OMB No. 0584–0008, which FNS intends to do at this time.

FNS is also enhancing Forms FNS–252 and FNS–252–E in order to (1) Clarify questions 16 and 17 regarding sales information; (2) expand the inventory stock examples provided in question 18; (3) re-word or re-phrase written instructions and on-line help screens; and (4) visually enhance the application by making design and formatting changes. The proposed revisions do not increase the hourly burden estimate on respondents.

FNS also intends to revise Form FNS–252–R. The purposes of the revisions are to (1) Clarify questions 5 and 6; (2) add "Yes/No" boxes in question 8; (3) expand the inventory stock examples provided in question 5; (4) revise the certification statement in the general instruction section to re-phrase and clarify information requested; and (5) add two additional questions: the number of check-out registers, and the option for retailers to provide an email address. In our previous submission to OMB, we estimated the hourly burden to be 7 minutes. We estimate the new hourly burden estimate to increase by 10 seconds, and the new burden to be, on average, 7.10 minutes, on average.

Affected Public: Business for Profit; Retail food stores.

Estimated Number of Respondents: The total estimated number of respondents is 90,532.

Estimated Number of Responses per Respondent: Respondents complete either 1 application form at initial authorization or 1 reauthorization application, as appropriate, for a total of 1 response each.

Estimated Total Annual Responses: 68,893.80.

Estimated Time per Response: 10.59 minutes (0.18317 hours). The estimated time response varies from 1 minute to 11 minutes depending on respondent group, as shown in the table below.

Table A—Reporting Estimate of Hour Burden

SUMMARY OF BURDEN—#0584–0008

Affected public	(a) Description of collection activity	(b) Form Number	(c) Number respondents	(d) Number esponses per respondent	(e) Total annual responses (cxd)	(f) Hours per response	(g) Total burden (exf)
Reporting							
Retailers	Applications Received	252	15,299.83	1.00	15,299.83	0.18370	2,810.58
	Applications Received	252–E	20,281.17	1.00	20,281.17	0.16700	3,386.96
	E–Authentication	252–E	20,281.17	1.00	20,281.17	0.13360	2,709.56
	Applications Received	252–2	968	1.00	968.00	0.18370	177.82
	Applications Received	252–C	6,961	1.00	6,960.80	0.08350	581.23
	Store Visits	.....	25,384	1.00	25,384.00	0.01670	423.91
	Reauthorization	252–R	21,638	1.00	21,638.00	0.11690	2,529.48
	Total Reporting Burden	.....	90,531.80	0.76099	68,893.80	0.18317	12,619.54
			Number of respondents	Estimate annual responses per respondent	Estimate total annual responses	Estimate hours per response	Estimate total annual burden for this ICR
SUMMARY OF BURDEN FOR THIS COLLECTION			90,532	0.76099	68,893.80	0.18317	12,619.54

Dated: December 16, 2010.

Julia Paradis,

Administrator, Food and Nutrition Service.

[FR Doc. 2010–32291 Filed 12–22–10; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Forest Service

Northern New Mexico Resource Advisory Committee Meeting

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Northern New Mexico Resource Advisory Committee (NNMRAC) will meet in Albuquerque, New Mexico. The committee is meeting as authorized under the Secure Rural Schools and Community Self-Determination Act of 2000 (Pub. L. 110–343) and in compliance with the Federal Advisory Committee Act (5 U.S.C. Appendix 2 §§ 1–15, October 6, 1972, as amended 1976, 1980 and 1982). The purpose of the meeting is to elect a chairperson, review meeting process, review NNMRAC guidelines, proposal presentations by proponents (5 minutes), questions from committee members to proponents (3 minutes), review and ranking of project proposals by Category Groups, recommendation for funding of projects to Designated Federal Official, request for budget for administration of NNMRAC, provide for public comment.

DATES: The meeting will be held on January 13, 2011 beginning at 10 a.m. and ending at 5 p.m. and on January 14, 2011 beginning at 8 a.m. and ending at 5 p.m.

ADDRESSES: The meeting will be held at the Albuquerque District Office of the Bureau of Land Management at 435 Montano Road NE. in the conference room. Written comments should be sent to Ignacio Peralta, Carson National Forest, 208 Cruz Alta Road, Taos, NM 87571. Comments may also be sent via e-mail to *iperalta@fs.fed.us* or via facsimile to 575–758–6213.

All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at Carson National Forest, 208 Cruz Alta Road Taos, NM. Visitors are encouraged to call ahead to 575–758–6344 to facilitate entry into the building.

FOR FURTHER INFORMATION CONTACT: RAC Coordinator USDA, Carson National Forest: Ignacio Peralta, 575–758–6344, 208 Cruz Alta Rd., Taos, NM 87571. *E-mail: iperalta@fs.fed.us.*

RAC Coordinator, USDA, Santa Fe National Forest: Ruben Montes, 505–438–5356, 11 Forest Lane, Santa Fe, NM 87508. *E-mail: rmontes@fs.fed.us.*

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The meeting is open to the public. The following business will be conducted: (1) Election of NNMRAC Chairperson. (2) Review meeting process. (3) Review NNMRAC guidelines. (4) Proposal presentations by proponents, 5 minutes. (5) Questions from NNMRAC members to proponents, 3 minutes. (6) Review and ranking of project proposals by Category Groups. (7) Recommendation for funding of project to Designated Federal Official. (8) Request for budget for administration of NNMRAC. (9) Public comment.

Persons who wish to bring related matters to the attention of the Committee may file written statements with the Committee staff before or after the meeting.

Dated: December 16, 2010.

Kendall Clark,

Forest Supervisor, Carson National Forest.

[FR Doc. 2010–32353 Filed 12–22–10; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Forest Service

Notice of New Fee Site; Federal Lands Recreation Enhancement Act, (Title VIII, Pub. L. 108–447)

AGENCY: Rio Grande National Forest, USDA Forest Service.

ACTION: Notice of New Fee Site—Fitton Guard Station, Off Cow Camp Cabin.

SUMMARY: The Rio Grande National Forest is proposing to charge a $25.00 fee for the overnight rental of Fitton Guard Station and Off Cow Camp Cabin. These cabins have not been available for recreation use prior to this date. Rentals of other cabins on the Rio Grande National Forest have shown that people appreciate and enjoy the availability of historic rental cabins. Funds from the rental will be used for the continued operation and maintenance of rental cabins on the Rio Grande National Forest. This fee is only proposed and will be determined upon further analysis and public comment.

DATES: Send any comments about these fee proposals by June 15, 2011 so comments can be compiled and analyzed. Fitton Guard Station and Off Cow Camp Cabin will become available for recreation rental summer of 2011.

ADDRESSES: Dan S. Dallas, Forest Supervisor, Rio Grande National Forest, 18803 W. Highway 160, Monte Vista, CO 8114403.

FOR FURTHER INFORMATION CONTACT: Steve Brigham, Natural Resource Specialist or Ronnie Day, Visitor Information Specialist at 719 657–3321.

SUPPLEMENTARY INFORMATION: The Federal Recreation Lands Enhancement Act (Title VII, Pub. L. 108–447) directed the Secretary of Agriculture to publish a six month advance notice in the **Federal Register** whenever new recreation fee areas are established.

This new fee will be reviewed by the Colorado Recreation Resource Advisory Committee prior to a final decision and implementation.

The Rio Grande National Forest currently has eight other cabin rentals. These rentals are often fully booked throughout their rental season. A business analysis of both Fitton Guard Station and Off Cow Camp Cabin has shown that people desire having this sort of recreation experience on the Rio Grande National Forest. A market analysis indicates that the $25.00 per night fee is both reasonable and acceptable for this sort of unique recreation experience.

People wanting to rent either the Fitton Guard Station or Off Cow Camp Cabin will need to do so through the National Recreation Reservation Service, at *http://www.reserveusa.com* or by calling 1–877–444–6777. The National Recreation Reservation Service charges a $9 fee for reservations.

Dated: December 13, 2010.

Dan S. Dallas,

Rio Grande National Forest Supervisor.

[FR Doc. 2010–32304 Filed 12–22–10; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Rural Housing Service

Notice of Request for Extension of a Currently Approved Information Collection

AGENCY: Rural Housing Service, USDA.

ACTION: Proposed collection; comments requested.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Rural Housing Service's (RHS's) intention to request an extension for a currently approved information collection in support of 7 CFR part 3560, Direct Multi-Family Housing Loans and Grants.

DATES: Comments on this notice must be received by February 22, 2011 to be assured of consideration.

FOR FURTHER INFORMATION CONTACT: Janet Stouder, Deputy Director, Multi-Family Housing Portfolio Management Division, Rural Housing Service, U.S. Department of Agriculture, Room 1245, South Building, Stop 0782, 1400 Independence Avenue, SW., Washington, DC 20250–0782, telephone (202) 720–9728.

SUPPLEMENTARY INFORMATION:

Title: 7 CFR 3560 Direct Multi-Family Housing Loans and Grants.

OMB Number: 0575–0189.

Expiration Date of Approval: March 31, 2011.

Type of Request: Extension of a currently approved information collection.

Abstract: The information collected is used by the Agency to manage, plan, evaluate, and account for Government resources. The reports are required to ensure the proper and judicious use of public funds.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 48 minutes per response.

Respondents: Individuals, corporations, associations, trusts, Indian tribes, public or private non profit organizations, which may include faith-based, consumer cooperative, or partnership.

Estimated Number of Respondents: 500,000.

Estimated Number of Responses per Respondent: 4.54.

Estimated Number of Responses: 2,270,328.

Estimated Total Annual Burden on Respondents: 1,091,785 hours.

Copies of this information collection can be obtained from Jeanne Jacobs, Regulations and Paperwork Management Branch, at (202) 692–0040.

Comments:

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of RHS, including whether the information will have practical utility; (b) the accuracy of RHS estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. Comments may be sent to Jeanne Jacobs, Regulations and Paperwork Management Branch, U.S. Department of Agriculture, Rural Development, STOP 0742, 1400 Independence Ave., SW., Washington, DC 20250. All

responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Dated: December 15, 2010.

Tammye Trevino,

Administrator, Rural Housing Service.

[FR Doc. 2010–32182 Filed 12–22–10; 8:45 am]

BILLING CODE 3410–XV–P

DEPARTMENT OF AGRICULTURE

Rural Housing Service

Multi-Family Housing Program 2011 Industry Forums—Open Teleconference and/or Web Conference Meetings

AGENCY: Rural Housing Service, USDA.

ACTION: Notice.

SUMMARY: This Notice announces a series of teleconference and/or Web conference meetings regarding the USDA Multi-Family Housing Program. The teleconference and/or Web conference meetings will be scheduled on a quarterly basis, but may be held monthly at the Agency's discretion. Teleconference and/or Web conference meetings are scheduled to occur during the months of January, April, July, and October of 2011. This Notice also outlines suggested discussion topics for the meetings and is intended to notify the general public of their opportunity to participate in the teleconference and/or Web conference meetings.

DATES: The dates and times for the teleconference and/or Web conference meetings will be announced via e-mail to parties registered as described below.

FOR FURTHER INFORMATION CONTACT: Any member of the public wishing to register for the meetings and obtain the call-in number, access code, Web link and other information for any of the public teleconference and/or Web conference meetings may contact Sandra Mercier, Financial and Loan Analyst, Multifamily Housing Operations and Asset Management Division, telephone: (202) 720–1617, fax: (202) 720–0302, or e-mail: *Sandra.mercier@wdc.usda.gov.* Those who request registration less than 15 calendar days prior to the date of a teleconference may not receive notice of that teleconference, but will receive notices of future teleconferences. The Agency expects to accommodate each participant's preferred form of participation by telephone or via web link. However, if it appears that existing capabilities may prevent the Agency from accommodating all requests for one form of participation, each participant will be notified and encouraged to consider an alternative form of participation.

SUPPLEMENTARY INFORMATION: The objectives of this series of informational teleconferences are as follows:

- Enhance the effectiveness of the Multi-Family Housing Program.
- Enhance RHS' awareness of issues that impact the Multi-Family Housing Program.
- Increase transparency and accountability in the Multi-Family Housing Program.

Topics to be discussed could include but will not be limited to the following:

- Updates on USDA Multi-Family Housing Program activities.
- Feedback from participants on the Multi-Family Notice of Funds Availability processes.
- Comments on Section 514/516 and Section 515 transaction processes.
- Comments on particular servicing-related activities of interest at that time.

Dated: December 15, 2010.

Tammye Treviño,

Administrator, Rural Housing Service.

[FR Doc. 2010–32238 Filed 12–22–10; 8:45 am]

BILLING CODE 3410–XV–P

DEPARTMENT OF COMMERCE

U.S. Census Bureau

Proposed Information Collection; Comment Request; Survey of Income and Program Participation (SIPP) Wave 10 of the 2008 Panel

AGENCY: U.S. Census Bureau, Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

DATES: To ensure consideration, written comments must be submitted on or before February 22, 2011.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *DHynek@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Patrick J. Benton, Census Bureau, Room HQ–6H045, Washington, DC 20233–8400, (301) 763–4618.

SUPPLEMENTARY INFORMATION:

I. Abstract

The Census Bureau conducts the SIPP, which is a household-based survey designed as a continuous series of national panels. New panels are introduced every few years with each panel having durations of one to six years. Respondents are interviewed at 4-month intervals or "waves" over the life of the panel. The survey is molded around a central "core" of labor force and income questions that remain fixed throughout the life of the panel. The core is supplemented with questions designed to address specific needs, such as obtaining information on household members' participation in government programs as well as prior labor force patterns of household members. These supplemental questions are included with the core and are referred to as "topical modules."

The SIPP represents a source of information for a wide variety of topics and allows information for separate topics to be integrated to form a single, unified database so that the interaction between tax, transfer, and other government and private policies can be examined. Government domestic-policy formulators depend heavily upon the SIPP information concerning the distribution of income received directly as money or indirectly as in-kind benefits and the effect of tax and transfer programs on this distribution. They also need improved and expanded data on the income and general economic and financial situation of the U.S. population. The SIPP has provided these kinds of data on a continuing basis since 1983 permitting levels of economic well-being and changes in these levels to be measured over time.

The 2008 panel is currently scheduled for approximately 6 years and will include 17 waves of interviewing beginning in September 2008. Approximately 65,300 households were selected for the 2008 panel, of which 42,032 households were interviewed. We estimate that each household contains 2.1 people, yielding 88,267 person-level interviews in Wave 1 and subsequent waves. Interviews take 30 minutes on average. Three waves will occur in the 2008 SIPP Panel during FY 2011. The total annual burden for 2008 Panel SIPP interviews would be 132,400 hours in FY 2011.

The topical modules for the 2008 Panel Wave 10 collect information about:

• Assets and Liabilities.

• Real Estate, Dependent Care, and Vehicles.

• 6 Asset Sections (Interest Earning Accounts, Stocks and Mutual Funds, Mortgages, Value of Business, Rental Property, and Other Assets).

• Medical Expenses and Utilization of Health Care (Adults and Children).

• Work Related Expenses and Child Support Paid.

• Child Well-Being.

Wave 10 interviews will be conducted from September 1, 2011 through December 31, 2011.

A 10-minute re-interview of 3,100 people is conducted at each wave to ensure the accuracy of responses. Reinterviews require an additional 1,553 burden hours in FY 2011.

II. Method of Collection

The SIPP is designed as a continuing series of national panels of interviewed households that are introduced every few years with each panel having durations of one to six years. All household members 15 years old or over are interviewed using regular proxy-respondent rules. During the 2008 panel, respondents are interviewed a total of 17 times (17 waves) at 4-month intervals making the SIPP a longitudinal survey. Sample people (all household members present at the time of the first interview) who move within the country and reasonably close to a SIPP primary sampling unit will be followed and interviewed at their new address. Individuals 15 years old or over who enter the household after Wave 1 will be interviewed; however, if these individuals move, they are not followed unless they happen to move along with a Wave 1 sample individual.

III. Data

OMB Control Number: 0607–0944.

Form Number: SIPP/CAPI Automated Instrument.

Type of Review: Regular submission.

Affected Public: Individuals or Households.

Estimated Number of Respondents: 88,267 people per wave.

Estimated Time per Response: 30 minutes per person on average.

Estimated Total Annual Burden Hours: 133,953.[1]

Estimated Total Annual Cost: The only cost to respondents is their time.

Respondent's Obligation: Voluntary.

Legal Authority: Title 13, United States Code 182.

[1] (88,267 × .5 hr × 3 waves + 3,100 × .167 hr × 3 waves).

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: December 20, 2010.

Glenna Mickelson,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2010–32284 Filed 12–22–10; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–832]

Pure Magnesium From the People's Republic of China: Final Results of the 2008–2009 Antidumping Duty Administrative Review of the Antidumping Duty Order

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On June 18, 2010, the Department of Commerce ("Department") published in the **Federal Register** the preliminary results in the 2008–2009 antidumping duty administrative review of pure magnesium from the People's Republic of China ("PRC").[1] The period of review ("POR") is May 1, 2008, through April 30, 2009. We initiated an administrative review of the antidumping order on pure magnesium from the PRC with respect to Tianjin Magnesium International Co., Ltd. ("TMI"), Tianjin Xianghaiqi Resources Import & Export Trade Co., Ltd. ("TXR"), and Pan Asia Magnesium Co., Ltd. ("Pan Asia"). Because neither TXR nor Pan Asia responded to the Department's antidumping duty questionnaire, we determined that they were not entitled to a separate rate in the *Preliminary Results* and included them in the PRC-Wide Entity.[2] We determined that TMI, the only responsive respondent in this proceeding, made sales in the United States at prices below normal value ("NV"). We invited interested parties to comment on our *Preliminary Results.* Based on our analysis of the comments received, we made changes to the margin calculations for TMI. The final dumping margin for this review is listed in the "Final Results Margins" section below.

DATES: *Effective Date:* December 23, 2010.

FOR FURTHER INFORMATION CONTACT: Laurel LaCivita, Sergio Balbontin, or Eve Wang, AD/CVD Operations, Office 8, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–4243, (202) 482–6478, and (202) 482–6231, respectively.

Background

On June 18, 2010, the Department published its *Preliminary Results* of the antidumping duty administrative review of pure magnesium from the PRC.[3]

On July 8, 2010, U.S. Magnesium LLC ("Petitioner") and TMI submitted publicly available surrogate value data to value TMI's factors of production. On July 19, 2010, both Petitioner and TMI submitted rebuttal comments concerning valuation of factors of production.

On July 14, 2010, the Department released additional data related to its reconsideration of its valuation of the labor wage rate in this review in light of a decision in *Dorbest Ltd.* v. *United States,* 604 F.3d 1363 (Fed. Cir. 2010), and afforded interested parties an opportunity to comment on the narrow issue of the new labor wage data.[4] In addition, when it appeared that TMI did not understand that it had the opportunity to provide rebuttal information concerning the new wage data, the Department granted TMI another opportunity to comment and provide rebuttal factual comments.[5] On

[1] *See Pure Magnesium from the People's Republic of China: Preliminary Results of the 2008–2009 Antidumping Duty Administrative Review,* 75 FR 34689 (June 18, 2010) ("*Preliminary Results*").

[2] *See Preliminary Results,* at 75 FR at 34692.

[3] *Id.*

[4] *See* Memorandum to the File, "Wage Data," dated of July 14, 2010.

[5] *See* Memorandum to the File, "Treatment of Alleged New Information in U.S. Magnesium's Case Brief," dated of August 23, 2010.

July 15, 2010, the Department noted an error in the currency-conversion calculation of the hourly wage-rate data for El Salvador and released corrected data to the parties.[6]

We received case briefs from Petitioner and TMI on July 29, 2010, and Petitioner's rebuttal briefs on August 3, 2010. We rejected TMI's rebuttal brief because the brief was untimely filed.[7] On August 9, 2010, TMI alleged that Petitioner's case brief contained new factual information and requested the Department to reject it. On August 23, 2010, the Department declined to reject the information because it determined that the information at issue did not constitute new factual information within the meaning of 19 CFR 351.301(c)(3).[8] Following the time period for case and rebuttal briefs, the Department noted that it inadvertently omitted the underlying data used in making its preliminary determination of the surrogate value for truck freight, and it afforded parties opportunities to comment on and rebut the data concerning truck freight.[9]

On August 5, 2010, the Department requested all interested parties to provide comments on the Department's recent determination in the 2008–2009 administrative review of the antidumping duty order on frozen warmwater shrimp from the Socialist Republic of Vietnam that the wage rate reported by the International Labor Organization for Honduras was inaccurate.[10] In response, Petitioner filed its comments on August 16, 2010, and TMI provided comments on August 26, 2010. On August 30, 2010, Petitioner submitted rebuttal comments concerning wage rate.

The Department held a hearing on September 1, 2010.[11] On October 7, 2010, the Department extended the deadline for the final results of review to December 15, 2010.[12]

On November 10, 2010, the Department re-opened the record to place additional industry-specific wage-rate information on the record for consideration in the final results, afforded parties an opportunity to provide rebuttal factual information, and requested parties to comment on the industry-specific wage-rate data placed on the record by the Department. On November 15, 2010, TMI submitted factual information on wage rate. On November 19, 2010, TMI submitted comments on the Department's industry-specific wage-rate data. Petitioner filed rebuttal comments to TMI's November 19, 2010, wage rate comments on November 24, 2010.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs filed by parties in this review are addressed in the Memorandum from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Ronald K. Lorentzen, Deputy Assistant Secretary for Import Administration, "Pure Magnesium from the People's Republic of China: Issues and Decision Memorandum for the Final Results of the 2008–2009 Administrative Review," dated December 15, 2010 ("Issues and Decision Memorandum"), which is hereby adopted by this notice. A list of the issues that parties raised and to which we responded in the Issues and Decision Memorandum follows as an appendix to this notice. The Issues and Decision Memorandum is a public document and is on file in the Central Records Unit ("CRU"), Main Commerce Building, Room 7046, and is also accessible on the Web at *http://ia.ita.doc.gov/frn*. The paper copy and electronic version of the Issues and Decision Memorandum are identical in content.

Verification

As provided in section 782(i) of the Tariff Act of 1930, as amended ("the Act"), we verified the information submitted by TMI for use in our final results of review.[13] We used standard verification procedures, including examination of relevant accounting and production records, as well as original source documents provided by TMI.

Period of Review

The POR is May 1, 2008, through April 30, 2009.

Scope of the Order

Merchandise covered by the order is pure magnesium regardless of chemistry, form or size, unless expressly excluded from the scope of the order. Pure magnesium is a metal or alloy containing by weight primarily the element magnesium and produced by decomposing raw materials into magnesium metal. Pure primary magnesium is used primarily as a chemical in the aluminum alloying, desulfurization, and chemical reduction industries. In addition, pure magnesium is used as an input in producing magnesium alloy. Pure magnesium encompasses products (including, but not limited to, butt ends, stubs, crowns and crystals) with the following primary magnesium contents:

(1) Products that contain at least 99.95% primary magnesium, by weight (generally referred to as "ultra pure" magnesium);

(2) Products that contain less than 99.95% but not less than 99.8% primary magnesium, by weight (generally referred to as "pure" magnesium); and

(3) Products that contain 50% or greater, but less than 99.8% primary magnesium, by weight, and that do not conform to ASTM specifications for alloy magnesium (generally referred to as "off-specification pure" magnesium).

"Off-specification pure" magnesium is pure primary magnesium containing magnesium scrap, secondary magnesium, oxidized magnesium or impurities (whether or not intentionally added) that cause the primary magnesium content to fall below 99.8% by weight. It generally does not contain, individually or in combination, 1.5% or more, by weight, of the following alloying elements: aluminum, manganese, zinc, silicon, thorium, zirconium and rare earths.

Excluded from the scope of the order are alloy primary magnesium (that meets specifications for alloy magnesium), primary magnesium anodes, granular primary magnesium (including turnings, chips and powder) having a maximum physical dimension (*i.e.,* length or diameter) of one inch or less, secondary magnesium (which has pure primary magnesium content of less than 50% by weight), and remelted magnesium whose pure primary magnesium content is less than 50% by weight.

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[6] *See* Memorandum to the File, "Wage Rate Calculation—Error in Currency Conversion of the Hourly Wage Rate for El Salvador," dated of July 15, 2010.

[7] *See* Memorandum to the File, "Administrative Review of Pure Magnesium from the People's Republic of China ('PRC'): Return of Untimely Submission of TMI's August 5, 2010 Rebuttal Brief," dated of August 23, 2010.

[8] *See* Memorandum to the File, "Treatment of Alleged New Information in U.S. Magnesium's Case Brief," dated August 23, 2010.

[9] *Id.* at 3; *see* Memorandum to the File, "Telephone Conversation Concerning Deadlines for the Submission of New Factual Information," dated of August 24, 2010.

[10] *See* Memorandum to the File, "Honduras Data on Labor Wage Rate," dated August 5, 2010.

[11] Petitioner and TMI requested a hearing for issues raised in the case and rebuttal briefs on June 18, 2010, and July 14, 2010, respectively.

[12] *See Pure Magnesium from the People's Republic of China; Extension of Time for the Final Results of the Antidumping Duty Administrative Review,* 75 FR 63440 (October 15, 2010).

[13] *See* Memorandum to the File, "Antidumping Duty Administrative Review of Pure Magnesium from the People's Republic of China: Verification of the Sales and Factors of Production ('FOP') of Tianjin Magnesium Industries," dated of June 7, 2010, on the record of this review CRU, Room 7046 of the main Department building.

Pure magnesium products covered by the order are currently classifiable under Harmonized Tariff Schedule of the United States ("HTSUS") subheadings 8104.11.00, 8104.19.00, 8104.20.00, 8104.30.00, 8104.90.00, 3824.90.11, 3824.90.19 and 9817.00.90. Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope is dispositive.

Use of Facts Available and Adverse Facts Available ("AFA")

Section 776(a) of the Act provides that the Department shall apply "facts otherwise available" if (1) necessary information is not on the record, or (2) an interested party or any other person (A) withholds information that has been requested, (B) fails to provide information within the deadlines established, or in the form and manner requested by the Department, subject to subsections (c)(1) and (e) of section 782 of the Act, (C) significantly impedes a proceeding, or (D) provides information that cannot be verified as provided by section 782(i) of the Act.

Where the Department determines that a response to a request for information does not comply with the request, section 782(d) of the Act provides that the Department will so inform the party submitting the response and will, to the extent practicable, provide that party the opportunity to remedy or explain the deficiency. If the party fails to remedy the deficiency within the applicable time limits and subject to section 782(e) of the Act, the Department may disregard all or part of the original and subsequent responses, as appropriate.

Section 782(e) of the Act provides that the Department "shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all applicable requirements established by the administering authority" if the information is timely, can be verified, is not so incomplete that it cannot be used, and if the interested party acted to the best of its ability in providing the information. Where all of these conditions are met, the statute requires the Department to use the information supplied if it can do so without undue difficulties.

Section 776(b) of the Act further provides that the Department may use an adverse inference in applying the facts otherwise available when a party has failed to cooperate by not acting to the best of its ability to comply with a request for information. Such an adverse inference may include reliance on information derived from the petition, the final determination, a previous administrative review, or other information placed on the record.

Application of Total AFA to the PRC–Wide Entity

Because TXR and Pan Asia did not respond to the Department's antidumping duty questionnaire, we preliminarily determined that these companies withheld information requested by the Department in accordance with sections 776(a)(2)(A) and (B) of the Act.[14] Furthermore, by not providing the requested information, these companies significantly impeded the proceeding in accordance with section 776(a)(2)(C) of the Act.

Because there is no information on the record demonstrating TXR's or Pan Asia's eligibility for a separate rate in accordance with section 776(a) of the Act, the Department has treated these companies as part of the PRC-Wide Entity. Further, because these parties did not respond to the Department's antidumping questionnaire and are part of the PRC-Wide Entity, the Department is basing the dumping margin of the PRC-Wide Entity on the facts otherwise available on the record. No other party provided any additional information regarding the PRC-Wide Entity. Furthermore, the PRC-Wide Entity's refusal to provide the requested information constitutes circumstances under which it is reasonable to conclude that less than full cooperation has been shown.[15] Hence, pursuant to section 776(b) of the Act, the Department has determined that, when selecting from among the facts otherwise available, an adverse inference is warranted with respect to the PRC-Wide Entity.

Selection of AFA Rates

In deciding which facts to use as AFA, section 776(b) of the Act and 19 CFR 351.308(c)(1) provide that the Department may rely on information derived from (1) the petition, (2) a final determination in the investigation, (3) any previous review or determination, or (4) any information placed on the record. The Department's practice is to select an AFA rate that is sufficiently adverse "as to effectuate the purpose of the facts available rule to induce respondents to provide the Department with complete and accurate information in a timely manner" and that ensures "that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.[16] Specifically, the Department's practice in reviews, in selecting a rate as total AFA, is to use the highest rate on the record of the proceeding which, to the extent practicable, can be corroborated (assuming the rate is based on secondary information).[17] The Court of International Trade ("CIT") and the CAFC have affirmed decisions to select the highest margin from any prior segment of the proceeding as the AFA rate on numerous occasions.[18] Therefore, as AFA, the Department has assigned the PRC-Wide Entity a dumping margin of 111.73 percent. This margin is the highest calculated rate for a respondent on the record of any segment of the proceeding.[19]

Corroboration of Secondary Information

Section 776(c) of the Act provides that, when the Department relies on

[14] *See Preliminary Results,* 75 FR at 34697.

[15] *See Nippon Steel Corporation* v. *United States, 337 F.3d 1373, 1383 (Fed. Cir. 2003),* where the Court of Appeals for the Federal Circuit ("CAFC") provided an explanation of the "failure to act to the best of its ability" standard noting that the Department need not show intentional conduct existed on the part of the respondent, but merely that a "failure to cooperate to the best of a respondent's ability" existed (*i.e.,* information was not provided "under circumstances in which it is reasonable to conclude that less than full cooperation has been shown").

[16] *See Notice of Final Determination of Sales at Less than Fair Value: Static Random Access Memory Semiconductors From Taiwan,* 63 FR 8909, 8911(February 23, 1998); *see also Brake Rotors From the People's Republic of China: Final Results and Partial Rescission of the Seventh Administrative Review; Final Results of the Eleventh New Shipper Review,* 70 FR 69937, 69939 (November 18, 2005) and the *Statement of Administrative Action accompany the Uruguay Round Agreement Act,* H.R. Rep. No. 316, 103d Cong., 2d Sess. 870 ("*SAA*").

[17] *See Glycine from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review,* 74 FR 15930, 15934 (April 8, 2009), unchanged in *Glycine From the People's Republic of China: Final Results of Antidumping Duty Administrative Review,* 74 FR 41121 (August 14, 2009); *see also Fujian Lianfu Forestry Co., Ltd.* v. *United States,* 638 F. Supp. 2d 1325, 1336 (CIT August 10, 2009) ("Commerce may, of course, begin its total AFA selection process by defaulting to the highest rate in any segment of the proceeding, but that selection must then be corroborated, to the extent practicable.").

[18] *See, e.g., NSK Ltd.* v. *United States,* 346 F. Supp. 2d 1312, 1335 (Ct. Int'l Trade 2004) (affirming a 73. 55 percent total AFA rate, the highest available dumping margin from a different respondent in the investigation); Kompass Food Trading International v. United States, 24 CIT 678, 683–84 (2000) (affirming a 51. 16 percent total AFA rate, the highest available dumping margin from a different, fully cooperative respondent); and *Shanghai Taoen International Trading Co., Ltd.* v. *United States,* 360 F. Supp. 2d 1339, 1348 (Ct. Int'l Trade 2005) (affirming a 223. 01 percent total AFA rate, the highest available dumping margin from a different respondent in a previous administrative review).

[19] *See Pure Magnesium from the People's Republic of China: Final Results of Antidumping Duty Administrative* Review, 73 FR 76336 (December 16, 2008) ("*Pure Magnesium 06–07Final Results*").

secondary information rather than on information obtained in the course of an investigation or review, it shall, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal. Secondary information is defined as information derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under section 751 concerning the subject merchandise.[20] Corroborate means that the Department will satisfy itself that the secondary information to be used has probative value.[21] To corroborate secondary information, the Department will, to the extent practicable, examine the reliability and relevance of the information to be used.[22] Independent sources used to corroborate such evidence may include, for example, published price lists, official import statistics and customs data, and information obtained from interested parties during the particular investigation.[23]

As discussed above, the 111.73 percent AFA margin is the highest rate on the record of any segment of this antidumping duty order. This rate was calculated for a cooperative respondent in the 2006–2007 administrative review of this order. This rate was recently applied to a separate rate company as well as the PRC-Wide Entity in the immediately preceding administrative review. No party has provided information related to the PRC-Wide Entity. During the 2006–2007 administrative review, this margin was calculated using data from a cooperative respondent. The Federal Circuit has held that the Department "is permitted to use a 'common sense inference that the highest prior margin is most probative evidence of current margins because, if it were not so, the importer, knowing of the rule, would have produced current information showing the margin to be less.'" [24] The Federal Circuit has held that "{t}he presumption that a prior dumping margin imposed against an exporter in an earlier administrative review continues to be valid if the exporter fails to cooperate in a subsequent administrative review." [25] Here, the PRC-Wide Entity failed to cooperate or demonstrate that the margin applied is no longer valid.

The Department continues to find that the 111.73 percent margin is probative, as it is both reliable and relevant.[26] The rate is reliable as it was calculated for a cooperative mandatory respondent in a prior segment of this proceeding. The rate is relevant because, as discussed above, no party overcame the court-affirmed presumption that a rate applied to an exporter remains valid unless that exporter demonstrates that facts exist to rebut that presumption.

Where circumstances indicate that the selected margin is not appropriate as AFA, the Department will disregard the margin and determine an appropriate margin. For example, in *Fresh Cut Flowers from Mexico: Final Results of Antidumping Administrative Review,* 61 FR 6812 (February 22, 1996), the Department disregarded the highest margin in that case as adverse best information available (the predecessor to facts available) because the margin was based on another company's uncharacteristic business expense resulting in an unusually high margin. Similarly, the Department does not apply a margin that has been discredited.[27] None of these unusual circumstances are present in this proceeding.

Accordingly, we determine that the highest rate determined in any segment of this administrative proceeding (*i.e.,* 111.73 percent) is corroborated (*i.e.,* it has probative value) within the meaning of section 776 (c) of the Act.

Changes Since the Preliminary Results

Based on an analysis of the comments received, the Department has made certain changes in TMI's margin calculation. For the final results, the Department has made the following changes:

- We based our determination of the surrogate financial ratios on the financial statements of Madras Aluminum Company Ltd. ("MALCO") rather than Sudal Industries Ltd. *See* Comment 2 of the accompanying Issues and Decision Memorandum.
- Consistent with our current practice, we revised the surrogate value for direct labor, indirect labor and packing labor to account for industry-specific wage rates. Additionally, for these final results we made corrections to the industry-specific labor calculation that we originally released to the parties on November 10, 2010. *See* Comment 8 of the accompanying Issues and Decision Memorandum.
- We revised the calculation of the surrogate value for dolomite to reflect the average of the value for dolomite reflected in the April 1, 2008–March 31, 2009 financial statements of Madras Cements Ltd., Tata Sponge Iron Ltd., Sagar Cements Limited, and Bhushan Steel Limited. *See* Comment 9 of the accompanying Issues and Decision Memorandum.
- We revised our calculation of brokerage and handling to divide the brokerage and handling costs reported in *Doing Business 2010—India* by the publicly available value for the average maximum cargo load per container of 21,727 kgs. *See* Comment 12 of the accompanying Issues and Decision Memorandum.
- We revised our calculation of the surrogate value for the inputs of magnesium metal waste and magnesium waste to use the categories of 8104.20 and 8104.11, respectively. *See* Comment 13 of the accompanying Issues and Decision Memorandum.
- We revised the surrogate value for plastic bags, steel bands, and plastic bands. *See* Comment 14 of the accompanying Issues and Decision Memorandum.

Final Results Margin

The weighted-average dumping margins for the final results are as follows:

Exporter	Weighted-average margin (percentage)
Tianjin Magnesium International Co. Ltd	0.73
PRC-Wide Entity **	111.73

** Pan Asia and TXR are part of this PRC-Wide Entity.

Assessment Rates

Pursuant to section 751(a)(2)(A) of the Act and 19 CFR 351.212(b), the

[20] *See SAA.*

[21] *See id.*

[22] *See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan: Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews,* 61 FR 57391, 57392 (November 6, 1996), unchanged in *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan; Final Results of Antidumping Duty Administrative Reviews and Termination in Part,* 62 FR 11825 (March 13, 1997).

[23] *See Notice of Preliminary Determination of Sales at Less Than Fair Value: High and Ultra-High Voltage Ceramic Station Post Insulators from Japan,* 68 FR 35627, 35629 (June 16, 2003), unchanged in *Notice of Final Determination of Sales at Less Than Fair Value: High and Ultra High Voltage Ceramic Station Post Insulators from Japan,* 68 FR 62560 (November 5, 2003); and *Notice of Final Determination of Sales at Less Than Fair Value: Live Swine From Canada,* 70 FR 12181, 12183–84 (March 11, 2005).

[24] *KYD, Inc.* v. *United States,* 607 F.3d 760 (Fed. Cir. 2010) (quoting *Rhome Poulenc, Inc.* v. *United States,* 899 F.2d 1185, 1190 (Fed. Cir. 1990)).

[25] *Id.*

[26] *See Preliminary Results,* at 75 FR at 34697.

[27] *See D & L Supply Co.* v. *United States,* 113 F.3d 1220, 1221 (Fed. Cir. 1997) (the Department will not use a margin that has been judicially invalidated).

Department will determine, and U.S. Customs and Border Protection ("CBP") shall assess, antidumping duties on all appropriate entries of subject merchandise in accordance with the final results of this review. For assessment purposes, we calculated importer (or customer)-specific assessment rates for merchandise subject to this review. Where appropriate, we calculated an *ad valorem* rate for each importer (or customer) by dividing the total dumping margins for reviewed sales to that party by the total entered values associated with those transactions. For duty-assessment rates calculated on this basis, we will direct CBP to assess the resulting *ad valorem* rate against the entered customs values for the subject merchandise. Where appropriate, we calculated a per-unit rate for each importer (or customer) by dividing the total dumping margins for reviewed sales to that party by the total sales quantity associated with those transactions. For duty-assessment rates calculated on this basis, we will direct CBP to assess the resulting per-unit rate against the entered quantity of the subject merchandise. Where an importer (or customer)-specific assessment rate is *de minimis* (*i.e.,* less than 0.50 percent), the Department will instruct CBP to assess that importer (or customer's) entries of subject merchandise without regard to antidumping duties, in accordance with 19 CFR 351.106(c)(2). The Department intends to issue assessment instructions to CBP 15 days after the date of publication of these final results of review.

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this administrative review for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided for by section 751(a)(2)(C) of the Act: (1) For TMI, the cash deposit rate will be the rate listed above; (2) for previously investigated or reviewed PRC and non-PRC exporters not listed above that have separate rates, the cash deposit rate will continue to be the exporter-specific rate published for the most recent period; (3) for all PRC exporters of subject merchandise which have not been found to be entitled to a separate rate, the cash deposit rate will be the PRC-wide rate of 111.73 percent; and (4) for all non-PRC exporters of subject merchandise which have not received their own rate, the cash deposit rate will be the rate applicable to the PRC exporter that supplied that non-PRC exporter. The deposit requirements shall remain in effect until further notice.

Notification to Importers

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of the antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification to Interested Parties

This notice also serves as a reminder to parties subject to administrative protective orders ("APOs") of their responsibility concerning the return or destruction of proprietary information disclosed under the APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

Disclosure

We will disclose the calculations performed within five days of the date of publication of this notice to parties in this proceeding in accordance with 19 CFR 351.224(b).

We are issuing and publishing the final results and notice in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: December 15, 2010.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration.

Appendix I

Comment 1: Whether the Department Should Apply Total AFA to TMI
Comment 2: Selection of Surrogate Financial Statements
Comment 3: Whether the Department Should Calculate the Surrogate Value for Labor Using Multiple Surrogate Countries or a Single Country, India
Comment 4: Whether the Department Should Expand the List of Economically Comparable Countries
Comment 5: Whether the Department's Wage Data Memorandum Contained Data Errors
Comment 6: Whether To Use ILO Wage Data Contemporaneous With the POR Rather Than Using Pre-POR Data and Adjusting for Inflation as Reported in the Wage Rate Memorandum
Comment 7: Whether the Department Should Exclude Indian Data from the Wage Rate Calculation
Comment 8: Whether the Countries Used to Determine the Wage Rate in this Case Are "Significant Producers of Comparable Merchandise"
Comment 9: Valuation of Dolomite
Comment 10: Valuation of Flux
Comment 11: The Source of the Surrogate Value for Foreign Inland Freight
Comment 12: The Surrogate Value for Brokerage and Handling
Comment 13: The Appropriate HTS Classification for Magnesium Waste/Scrap ("MGS") and Magnesium Metal Waste/Scrap ("ALLOYS")
Comment 14: The Per-Unit Basis for Plastic Bags, Steel Bands, and Plastic Bands

[FR Doc. 2010–32329 Filed 12–22–10; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–552–801]

Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Extension of Time Limit for the Final Results of the Sixth Antidumping Duty Administrative and New Shipper Reviews

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: *Effective Date:* December 23, 2010.

FOR FURTHER INFORMATION CONTACT: Emeka Chukwudebe or Javier Barrientos, AD/CVD Operations, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone (202) 482–0219 or (202) 482–2243, respectively.

Background

On September 15, 2010, the Department of Commerce ("Department") published in the **Federal Register** the *Preliminary Results* of the sixth administrative and new shipper reviews of certain frozen fish fillets from the Socialist Republic of Vietnam covering the period August 1, 2008, through July 31, 2009.[1] Subsequent to the publication of the *Preliminary Results,* the Department extended the

[1] *See Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Notice of Preliminary Results and Partial Rescission of the Sixth Antidumping Duty Administrative Review and Sixth New Shipper Review,* 75 FR 56062 (September 15, 2010) ("*Preliminary Results*").

deadlines for submission of surrogate values, rebuttal comments and case briefs.[2] The final results are currently due no later than January 13, 2011.

Extension of Time Limit for the Final Results

Section 751(a)(3)(A) of the Tariff Act of 1930, as amended ("Act"), requires that the Department issue the final results of an administrative review within 120 days after the date on which the preliminary results are published. If it is not practicable to complete the review within that time period, section 751(a)(3)(A) of the Act allows the Department to extend the deadline for the final results to a maximum of 180 days after the date on which the preliminary results are published.

Due to the voluminous surrogate value data on the record and the additional time provided to parties to review and submit rebuttal comments and case briefs, the Department finds that it is not practicable to review the surrogate value data and analyze the case brief comments within the scheduled time limit. Therefore, in accordance with section 751(a)(3)(A) of the Act, the Department is fully extending the time for the completion of the final results of these reviews to March 14, 2011.

We are issuing and publishing this notice in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: December 17, 2010.

Gary Taverman,

Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2010–32339 Filed 12–22–10; 8:45 am]

BILLING CODE 3510–DS–P

[2] *See* Letter from Alex Villanueva, Program Manager, Office 9, to Interested Parties: Extending Surrogate Value Submission & Briefing Schedule for 6th New Shipper and 6th Antidumping Administrative Reviews of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam (September 21, 2010). *See also,* Letter from Alex Villanueva, Program Manager, Office 9, to Interested Parties: Extending Surrogate Value Submission for 6th New Shipper and 6th Antidumping Administrative Reviews of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam (October 13, 2010). *See also* Memorandum For: All Interested Parties, from Emeka Chukwudebe, Case Analyst, Import Administration, dated October 22, 2010. *See also* Memorandum For: All Interested Parties, from Javier Barrientos, Case Analyst, Import Administration, dated November 22, 2010.

DEPARTMENT OF COMMERCE

International Trade Administration

Correction to Proposed Methodology for Respondent Selection in Antidumping Proceedings; Request for Comment

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

FOR FURTHER INFORMATION CONTACT: Shauna Biby, Senior Import Policy Analyst, Office of Policy, Import Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–4267.

Correction and Clarification

On December 16, 2010, the Department of Commerce published in the Federal Register the following notice: *Proposed Methodology for Respondent Selection in Antidumping Proceedings; Request for Comment,* 75 FR 78678 (Dec. 16, 2010) (*Respondent Selection Notice*). After the publication of the *Respondent Selection Notice,* we identified an inadvertent error in this notice. Specifically, we inadvertently listed the deadline to file comments as both 30 days and 45 days following publication. The correct deadline for filing comments is 45 days after publication (*i.e.,* January 30, 2011). Because this date falls on a weekend, the deadline for filing comments is January 31, 2011.

Dated: December 17, 2010.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration.

[FR Doc. 2010–32342 Filed 12–22–10; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA107

New England Fishery Management Council; Public Meeting

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

ACTION: Notice; public meeting.

SUMMARY: The New England Fishery Management Council's (Council) Herring Committee will meet to consider actions affecting New England fisheries in the exclusive economic zone (EEZ).

DATES: The meeting will be held on Thursday, January 20, 2011 at 9 a.m.

ADDRESSES: The meeting will be held at the Clarion Hotel, 1230 Congress Street, Portland, ME 04102; telephone: (207) 774–5611; fax: (207) 871–0510.

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Paul J. Howard, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION: The items of discussion in the committee's agenda are as follows:

1. The Herring Committee will continue development of catch monitoring alternatives for inclusion in Amendment 5 to the Atlantic Herring Fishery Management Plan (FMP); alternatives include management measures to: Adjust the fishery management program (administrative provisions, carrier vessels, transfers at sea, notification requirements, quota monitoring, reporting, and permit provisions); address at-sea monitoring, observer coverage levels, address maximized retention, and maximize sampling and address net slippage; address portside sampling, portside sampling program design, and measures to verify self-reported landings.

2. The Committee will also continue development of management measures and alternatives to address river herring bycatch for consideration in Amendment 5; alternatives may include identification of river herring hotpots and management alternatives to apply to those hotspots (sampling, monitoring, avoidance, protection).

3. They will review/discuss available information regarding the development of management measures spawning fish in Amendment 5, develop Committee recommendations.

4. They will develop recommendations for Council consideration regarding all of the management alternatives for inclusion in Amendment 5 Draft EIS (catch monitoring program, measures to address river herring bycatch, access to groundfish closed areas, protection of spawning fish).

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management

Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Paul J. Howard (*see* **ADDRESSES**) at least 5 days prior to the meeting date.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: December 17, 2010.

Tracey L. Thompson,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2010–32216 Filed 12–22–10; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA108

South Atlantic Fishery Management Council; Public Meetings

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

ACTION: Notice of public hearing and scoping meeting series.

SUMMARY: The South Atlantic Fishery Management Council (Council) will hold a series of public hearings regarding Regulatory Amendment 9 to the Snapper Grouper Fishery Management Plan (FMP) for the South Atlantic Region, a Comprehensive Annual Catch Limit (ACL) Amendment, and its Comprehensive Ecosystem-Based Amendment 2. The Council will also conduct scoping meetings regarding Amendments 21, 22, and 24 to the Snapper Grouper FMP and Amendment 5 to the Golden Crab Fishery Management Plan for the South Atlantic Region. *See* **SUPPLEMENTARY INFORMATION**.

DATES: The series of 6 public hearings and scoping meetings will be held January 24, 2011 through February 3, 2011. All scoping meetings will be open from 3 p.m. until 7 p.m. Council staff will be available for informal discussions and to answer questions. Members of the public will have an opportunity to go on record at any time during the meeting hours to record their comments on the public hearing topics and scoping issues for Council consideration. Local Council representatives will attend the meetings and take public comment. Written comments will be accepted from January 12, 2011 until 5 p.m. on February 14, 2011.

See **SUPPLEMENTARY INFORMATION**.

ADDRESSES: Written comments should be sent to Bob Mahood, Executive Director, South Atlantic Fishery Management Council, 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405, or via e-mail to: *SGRegAmend9PH@safmc.net* for Regulatory Amendment 9 to the Snapper Grouper FMP; *CompACLAmendPH@safmc.net* for the Comprehensive ACL Amendment; *CEBA2PH@safmc.net* for Comprehensive Ecosystem-Based Amendment 2; *SGAmend21Scoping@safmc.net* for Amendment 21 to the Snapper Grouper FMP; *SGAmend22Scoping@safmc.net* for Amendment 22 to the Snapper Grouper FMP; *SGAmend24Scoping@safmc.net* for Amendment 24 to the Snapper Grouper FMP; and *GCAmend5Scoping@safmc.net* for Amendment 5 to the Golden Crab FMP.

FOR FURTHER INFORMATION CONTACT: Iverson, South Atlantic Fishery Management Council, 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405; *telephone:* (843) 571–4366; *fax:* (843) 769–4520; *e-mail address: kim.iverson@safmc.net*.

SUPPLEMENTARY INFORMATION: As part of the meeting schedule, public hearings will be held on Regulatory Amendment 9 to the Snapper Grouper FMP. The regulatory amendment includes alternatives for commercial trip limits for greater amberjack, vermilion snapper, black sea bass and gag. The amendment also includes management options for split season quotas and spawning season closures for black sea bass. A public hearing will also be held on the Comprehensive ACL Amendment. The amendment establishes ACLs and Accountability Measures for species managed by the Council that are not currently listed as undergoing overfishing as required by the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). This includes species in the Snapper Grouper management complex as well as dolphin, wahoo, and golden crab. Public hearings will also be conducted for the Comprehensive Ecosystem-Based 2 that includes regulatory actions relative to the management of octocorals, and non-regulatory actions that update existing Essential Fish Habitat (EFH) information. The amendment also addresses modifying the management of South Carolina's Special Management Zones (SMZs), amending the sea turtle release gear requirements for the snapper grouper fishery, and designating new EFH and Habitat Areas of Particular Concern (HAPC) areas for snapper grouper species, coral, and sargassum.

The public scoping meetings will address overlapping fisheries issues for the South Atlantic region. Items under consideration for public scoping include Amendment 21 to the Snapper Grouper FMP. This amendment addresses the possible use of catch share programs for snapper grouper species currently under management through quotas (except for snowy grouper), effort and participation reduction, and endorsement actions. The amendment will include options for the use of Individual Transferable Quotas (ITQs), cooperatives, regional and state by state quota analysis, and other components.

The Council will also hold scoping meetings on Amendment 22 to the Snapper Grouper FMP addressing options for long-term management measures for red snapper as the stock begins to rebuild; Amendment 24 to the Snapper Grouper FMP to end overfishing and rebuild the red grouper stock, according the mandates of the Magnuson-Stevens Act; and Amendment 5 to the Golden Crab FMP with options to implement catch shares for the commercial golden crab fishery in the South Atlantic Region.

Public Hearing and Scoping Meeting Schedule

1. January 24, 2011—Hilton New Bern/Riverfront, 100 Middle Street, New Bern, NC 28560, *telephone:* 1–252–638–3585;

2. January 26, 2011—Crowne Plaza Charleston Airport, 4831 Tanger Outlet Boulevard, North Charleston, SC 29418, *telephone:* 843–744–4422;

3. January 27, 2011—Mighty Eighth Air Force Museum, 175 Bourne Avenue, Pooler, GA 31322, *telephone:* 912–748–8888;

4. January 31, 2011—Jacksonville Marriott Hotel, 4670 Salisbury Road, Jacksonville, FL 32256, *telephone:* 904–296–2222;

5. February 1, 2011—International Palms Resort, 1300 N. Atlantic Avenue, Cocoa Beach, FL 32931, *telephone:* 321–783–2271;

6. February 3, 2011—Key Largo Grande Resort, 97000 Overseas Highway, Key Largo, FL 33037, *telephone:* 305–852–5553.

Written comments will be received from January 12, 2011 until 5 p.m. on February 14, 2011.

Copies of the public hearing and scoping documents are available by

contacting Kim Iverson, Public Information Officer, South Atlantic Fishery Management Council, 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405; *telephone:* (843) 571–4366 or toll free at (866) SAFMC–10. Copies will also be available online at *http://www.safmc.net* as they become available.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to the Council office (*see* **ADDRESSES**) 3 days prior to the start of each meeting.

Dated: December 17, 2010.

Tracey L. Thompson,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2010–32217 Filed 12–22–10; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA106

New England Fishery Management Council; Public Meeting

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

ACTION: Notice; public meeting.

SUMMARY: The New England Fishery Management Council's (Council) Groundfish Committee will meet to consider actions affecting New England fisheries in the exclusive economic zone (EEZ).

DATES: The meeting will be held on Wednesday, January 19, 2011 at 9 a.m.

ADDRESSES: The meeting will be held at the Clarion Hotel, 1230 Congress Street, Portland, ME 04102; *telephone:* (207) 774–5611; *fax:* (207) 871–0510.

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Paul J. Howard, Executive Director, New England Fishery Management Council; *telephone:* (978) 465–0492.

SUPPLEMENTARY INFORMATION: The items of discussion in the committee's agenda are as follows:

The Multispecies (Groundfish) Oversight Committee will begin development of Framework 47 to the Northeast Multispecies Fishery Management Plan (FMP). Framework 47 will consider changes to the haddock bycatch cap in the herring fishery. The Committee will work on the development of an amendment to the FMP that will address issues related to state-sponsored permit banks. The Committee will also discuss the initiation of an amendment to the FMP to consider allocative effects, excessive control of fishing privileges, and fleet diversity objectives for the multispecies fishery. Other business may also be discussed.

The Committee's recommendations will be delivered to the full Council at its meeting in Portsmouth, NH on January 25–27, 2011.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Paul J. Howard (*see* **ADDRESSES**) at least 5 days prior to the meeting date.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: December 17, 2010.

Tracey L. Thompson,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2010–32215 Filed 12–22–10; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF DEFENSE

Department of the Army

Availability for Exclusive, Non-Exclusive, or Partially-Exclusive Licensing of Inventions Concerning an Inactivated Dengue Virus Vaccine and a Method and Kit for Detection of Dengue Virus

AGENCY: Department of the Army, DoD.

ACTION: Notice.

SUMMARY: Announcement is made of the availability for licensing of the invention set forth in U.S. Patent 6,254,873 which issued July 3, 2001, entitled "Inactivated Dengue Virus Vaccine," and U.S. Patent 6,190,859, entitled "Method and Kit for Detection of Dengue Virus," issued February 20, 2001. The United States Government, as represented by the Secretary of the Army, has rights to this invention.

ADDRESSES: Commander, U.S. Army Medical Research and Materiel Command, ATTN: Command Judge Advocate, MCMR–JA, 504 Scott Street, Fort Detrick, Frederick, MD 21702–5012.

FOR FURTHER INFORMATION CONTACT: For patent issues, Ms. Elizabeth Arwine, Patent Attorney, (301) 619–7808. For licensing issues, Dr. Paul Mele, Office of Research and Technology Applications (ORTA), (301) 619–6664, both at telefax (301) 619–5034.

SUPPLEMENTARY INFORMATION: The invention relates to an inactivated dengue virus vaccine to immunize and protect humans against dengue fever. The vaccine is based on dengue viruses which have been propagated to high titers in suitable cells, purified and inactivated under conditions which destroy infectivity but preserve immunogenicity, a high level of which is demonstrated in animal models. Uses of the inactivated dengue virus for detecting antibodies to dengue and kits therefore are also described.

Brenda S. Bowen,

Army Federal Register Liaison Officer.

[FR Doc. 2010–32235 Filed 12–22–10; 8:45 am]

BILLING CODE 3710–08–P

DEPARTMENT OF DEFENSE

Department of the Army

Notice of Intent To Prepare a Programmatic Environmental Impact Statement (PEIS) for Land Acquisition, South Texas Training Center (STTC), in McMullen County, TX

AGENCY: National Guard Bureau, Department of the Army, DoD.

ACTION: Notice of intent.

SUMMARY: The Department of the Army intends to prepare a PEIS to analyze the environmental and socioeconomic impacts associated with the proposed land acquisition and use of approximately 22,232 acres for implementation of an RPMP and mission activities in south Texas. The proposed land area, currently in private ownership, would become the STTC. This action will support the training requirements of the TXARNG units located in central and south Texas. The PEIS will analyze alternatives that are deemed feasible to meet the purpose and need for this Proposed Action.

FOR FURTHER INFORMATION CONTACT: Captain Jeff Basa at (512) 782–7924 or by e-mail at *txarng.landpurchase@ng.army.mil.*

SUPPLEMENTARY INFORMATION: The Army has identified the need for land acquisition and use of approximately 22,232 acres of land to enhance realistic training conditions. No adequate maneuver training land is currently available within a suitable travel time for the three TXARNG Battalions stationed in south Texas. The Army proposes land acquisition of approximately 22,232 acres for additional maneuver training land to meet the training needs of the TXARNG. This additional land will enhance training and will allow Soldiers to train to more realistic standards in preparation for operational deployment at a site located closer to their home communities. The Army Training Division, National Guard Bureau, is the action proponent; the land would be owned by the Army and licensed to the TXARNG.

The TXARNG PEIS will analyze the environmental and socioeconomic impacts of land acquisition to establish the STTC. The land acquisition alternative is located adjacent to and northeast of the existing U.S. Navy-owned Dixie Range in McMullen County. A PEIS is proposed for this analysis to address the implementation of the RPMP, which would consist of a number of construction phases to be implemented over an extended timeframe (estimated 15 to 20 years). This PEIS would analyze the general development of a cantonment area, training areas, and infrastructure support. Separate environmental analyses may be required at a later date, as necessary, for development not covered within this PEIS. The Army No Action Alternative will evaluate the impacts of taking no action to acquire additional training land. Resources and issues that will be evaluated in the PEIS include changes in land use from private hunting lands to military training lands; potential impacts to biological, cultural, and water resources; changes in transportation and traffic in the region. At this point, we do not anticipate any significant impacts. Additional concerns raised during the initial public involvement process will also be addressed in the PEIS.

The Notice of Intent can be viewed at *http://www.agd.state.tx.us. Scoping and Public Comment:* Federally recognized tribes, federal, state, and local agencies, and the public are invited to participate in the scoping process for the preparation of the PEIS. The scoping process will include one public scoping meeting, which is an opportunity for the public to receive information about the proposed action and alternatives and to assist the Army in identifying potential environmental impacts and key issues of concern to be analyzed in the PEIS. The meeting will be held in McMullen County, Texas. Notification of the time and location for the scoping meeting will be announced in local media sources. To ensure scoping comments are fully considered in the preparation of the PEIS, comments and suggestions should be received within the 30-day scoping period. The public will also be invited to review and comment on the Draft PEIS when it is available for review. Notification letters will be mailed to Native American tribes, federal, state, and local agencies regarding the scoping process and Draft PEIS availability. A public meeting will take place during the comment period on the Draft PEIS and the public will be invited to share their views and concerns. Comments from the public will be considered before any decision is made regarding implementing the proposed action.

Dated: December 13, 2010.

Hershell E. Wolfe,

Acting Deputy Assistant Secretary of the Army (Environment, Safety, and Occupational Health).

[FR Doc. 2010–32176 Filed 12–22–10; 8:45 am]

BILLING CODE 3710–08–P

DEPARTMENT OF DEFENSE

Department of the Army

Preparation of the PEIS for Modernization of Training Infrastructure at Pōhakuloa Training Area, HI

AGENCY: Department of the Army, DoD.

ACTION: Notice of intent.

SUMMARY: The United States Army Pacific (USARPAC) and United States Army Garrison, Hawai'i (USAG–HI) intend to prepare a Programmatic Environmental Impact Statement (PEIS) for modernizing training ranges, training support infrastructure (roads and utilities), and training support facilities in the cantonment area at Pōhakuloa Training Area (PTA) to meet better the readiness needs of military units in Hawai'i. The PEIS will evaluate PTA's long-term vision for modernizing training ranges, training support infrastructure, and the cantonment area to improve a current shortfall in collective (group) live-fire training capabilities for units stationed in Hawai'i. The PEIS also includes an analysis for constructing and operating an Infantry Platoon Battle Area (IPBA) that would include an Infantry Platoon Battle Course (IPBC), Live-fire Shoothouse, and Military Operations on Urban Terrain (MOUT) facility. The IPBC would augment the existing non-standard IPBC (located at Range 10 on PTA), which is undersized and cannot be modernized in its current footprint. The Range 10 IPBC would continue to be used for non-standard collective live-fire training exercises.

Many of the training ranges and infrastructure at PTA do not meet current doctrinal training and standard range design requirements. Many of the range assets at PTA also do not have sufficient throughput capacity to meet collective live-fire training requirements.

Alternatives analyzed in the PEIS will consider modernizing the training ranges, training support infrastructure, and the cantonment area at PTA, and a No Action alternative. Under the No Action alternative, the Army would continue utilizing current training lands and facilities as efficiently as possible.

The PEIS will also present a range of alternatives for the IPBA at either the Western Range Area of PTA, Charlie's Circle, or along the southwest side of Range 20, or to not build and operate the IPBA at all.

The primary environmental issues to be analyzed in the PEIS include (but are not limited to) air quality, traffic, biological resources, cultural resources, public services and utilities, wildfires, and hazardous materials and waste. There could be significant impacts to cultural resources, air quality, and risk from igniting wildfires. Also, we anticipate that some federally-listed threatened or endangered plants would be affected. Predicted environmental impacts associated with implementing the initial range project of constructing and operating the IPBA will be analyzed to include an increase in vehicle traffic, air quality impacts, and live-fire activities at currently underutilized range locations at PTA. The proposed action may increase the risk of igniting wildfires or may result in a loss of cultural resources. The Army will identify mitigation measures that could be implemented to reduce or eliminate adverse impacts to the environmental resources.

ADDRESSES: Written comments may be addressed to PTA PEIS, P.O. Box 514, Honolulu, HI 96809; facsimiles may be sent to (808) 545–6808; e-mail may be addressed to *PTAPEIS@bah.com.*

FOR FURTHER INFORMATION CONTACT: USAG–HI Public Affairs by phone at (808) 656–3152 during normal business hours Monday through Friday 9 a.m. to 5 p.m. HST.

SUPPLEMENTARY INFORMATION: The proposed action considers modernizing the training ranges, training support infrastructure, and the cantonment area at PTA. The Army's proposed action is supportive of Training Circular 25–8 Training Ranges (TC 25–8), the National Security Strategy (NSS, 2010) and the Quadrennial Defense Review (QDR 2010); these strategic documents have been incorporated into the Army's decision making process. The purpose of the proposed action (modernization) is to reduce a shortfall in collective live-fire training capability in Hawai'i and improve the infrastructure that supports the training capability.

An IPBC is used to train and test infantry platoons, either mounted or dismounted, on the skills necessary to conduct tactical movement techniques and detect, identify, engage, and defeat stationary and moving infantry and armor targets in a tactical array. A standard IPBC is approximately 500 meter (m) wide at the initial engagement entry point and 1,500m wide at the final engagement point and 4,000m long. The Army plans to construct an IPBC that would be 1,000m wide at the initial engagement entry point to add flexibility for unit commanders to train against additional objectives supporting combat scenarios experienced in the contemporary combat environment.

A Live-fire Shoothouse and MOUT facility would be sited in the immediate vicinity of the IPBC. The Shoothouse would provide Army unit leaders with a facility to train and evaluate the unit during a live-fire exercise. Soldiers would fire small arms weapons at targets within the facility. The range would include associated range operations and control facilities, an operations/storage building, latrine, and after-action review (AAR) facility. The primary facility of the Shoothouse would be a two-story building approximately 4,700 square feet, with stairways and a roof.

The MOUT facility would include the construction or placement of approximately 24 modular structures to replicate small villages for units to complete training tasks in an urban/semi-urban operating environment. There is no standard design for a MOUT facility. The MOUT facility footprint at PTA would be approximately 800 feet by 800 feet or 640,000 square feet.

Predicted environmental impacts associated with the modernization of PTA may include actions that have both positive (beneficial) and adverse impacts to the environmental resources at PTA.

Each proposed IPBA live-fire alternative location under consideration is either in or directly adjacent to the existing impact area at PTA.

Based on public scoping and factors discussed above, the Army will refine its range of reasonable alternatives to the extent possible to accommodate mission requirements. In reaching this decision, the Army will assess and consider public concerns.

Scoping and Public Comment: All interested members of the public, including Federally recognized Indian Tribes, Native Hawai'ian groups, and Federal, state, and local agencies are invited to participate in the scoping process for the preparation of this PEIS. Written comments identifying environmental issues, concerns and opportunities to be analyzed in the PEIS will be accepted for 45 days following publication of the Notice of Intent in the **Federal Register.** Scoping meetings will be held on the Island of Hawai'i. Notification of the times and locations for the scoping meetings will be published in local newspapers.

Dated: December 16, 2010.

Hershell E. Wolfe,

Acting Deputy Assistant Secretary of the Army (Environment, Safety, and Occupational Health).

[FR Doc. 2010–32177 Filed 12–22–10; 8:45 am]

BILLING CODE 3710–08–P

DEPARTMENT OF DEFENSE

Department of the Navy

Notice of Availability of Government-Owned Inventions; Available for Licensing

AGENCY: Department of the Navy, DoD.

ACTION: Notice.

SUMMARY: The inventions listed below are assigned to the United States Government as represented by the Secretary of the Navy and are made available for licensing by the Department of the Navy.

Navy Case No. 83951—Apparatus and System for Data Surveillance; Navy Case No. 84021—System and Method for Improved Patient Status Monitoring; Navy Case No. 97188—Software Architecture for Access Control Based on Hierarchical Characteristics; Navy Case No. 97189—System of Access Control Based on Hierarchical Characteristics; Navy Case No. 97556—Preparation of SERS Substrates on Silica-Coated Magnetic Microspheres; Navy Case No. 98163—Algorithm for minimum antenna size; Navy Case No. 98184—MEMS–Based Multi-Channel Fabry-Perot Interferometer System with Increased Tuning Range and Resolution; Navy Case No. 98330—System and Method for Geodesic Data Mining; Navy Case No. 98408—Method for Determining Collision Risk for Collision Avoidance Systems; Navy Case No. 98582—Electrolytic Fluid Antenna; Navy Case No. 98666—Plasmonic Transistor; Navy Case No. 98721—Static Wireless Data-Glove Apparatus for Gesture Processing and Recognition and Information-Coding and Input Method; Navy Case No. 98722—Host-Centric Method for Automatic Collision Avoidance Decisions; Navy Case No. 98745—Method of Fabricating A Micro-Electro-Mechanical Apparatus for Generating Power Responsive to Mechanical Vibration; Navy Case No. 98763—Hydrostatic Actuated Flood Plug; Navy Case No. 99735—Apparatus for Generating Power Responsive to Mechanical Vibration; Navy Case No. 99740—Tunable Resonant Frequency MEMS Kinetic Energy Harvester; Navy Case No. 99741—Improved Electro-Magnetic Kinetic Energy Harvesting Device Using Increased Magnetic Edge Area; Navy Case No. 99846—Method for Fusing Overhead Imagery with Automatic Vessel Reporting Systems; Navy Case No. 99933—Improved Electrolytic Fluid Antenna; Navy Case No. 100162—Method for Detecting and Mapping Fires Using Features Extracted from Overhead Imagery; Navy Case No. 100190—Device for Maximizing Packing Density with Cylindrical Objects in Cylindrical Cavities; Navy Case No. 100225—Plasmonic Logic Device; Navy Case No. 100249—Shipboard Winch with Guide Vanes; Navy Case No. 100474—A System and Method for Learning Visual Recognition through Reusable Symbolic Pattern Matching; Navy Case No. 100345—Stand-Off Charging for Batteries; Navy Case No. 100447—Conformal Faraday Effect Antenna; Navy Case No. 100340—Shipboard Antenna Virtual Tuning System and Method; Navy Case No. 100545—Method for Maximizing Packing Density with Cylindrical Objects in Cylindrical Cavities; Navy Case No. 100678—Battery Tray Holder with Electrical Conductor for Holding Cylindrical Battery Cells; Navy Case No. 100311—System for Amplifying Flow-Induced Vibration Energy Using Boundary Layer and Wake Flow Control; Navy Case No. 100341—Simplified System Status Advisor

Providing Uniform Cross-Platform Status Information; Navy Case No. 100809—Time Domain Inertial Sensor; Navy Case No. 100849—Structural Design of a Mechanical Gyro with Increased Sensitivity and Reduced Quadature Error; Navy Case No. 100869—Micro-Resonator with Reduced Acceleration Sensitivity and Phase Noise Using Time Domain Switch.

FOR FURTHER INFORMATION CONTACT: Brian Suh, Office of Research and Technology Applications, Space and Naval Warfare Systems Center Pacific, Code 72120, 53560 Hull St, Bldg A33 Room 2305, San Diego, CA 92152–5001, telephone 619–553–5118, e-mail: *brian.suh@navy.mil.*

Authority: 35 U.S.C. 207, 37 CFR part 404.

Dated: December 17, 2010.

D.J. Werner,

Lieutenant Commander, Office of the Judge Advocate General, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. 2010–32298 Filed 12–22–10; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

ACTION: Comment request.

SUMMARY: The Department of Education (the Department), 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 and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the reporting burden on the public and helps the public understand the Department's information collection requirements and provide the requested data in the desired format. The Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before February 22, 2011.

ADDRESSES: Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov* or mailed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Please note that written comments received in response to this notice will be considered public records.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35) requires that Federal agencies provide interested parties an early opportunity to comment on information collection requests. The Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, publishes this notice containing proposed information collection requests at the beginning of the Departmental review of the information collection. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: December 17, 2010.

Darrin A. King,

Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management.

Office of the Secretary

Type of Review: Extension.

Title of Collection: EDGAR Recordkeeping and Reporting Requirements.

OMB Control Number: 1894–0009.

Agency Form Number(s): N/A.

Frequency of Responses: As needed/required.

Affected Public: Businesses or other for-profit; State, Local, or Tribal Government, State Education Agencies or Local Education Agencies.

Total Estimated Number of Annual Responses: 9,174.

Total Estimated Number of Annual Burden Hours: 36,714.

Abstract: The Education Department General Administrative Regulations (EDGAR) contain several requirements that grantees maintain certain types of records related to their grants and to report or submit certain information to the Department. Part 74 of EDGAR applies to Institutions of Higher Education, nonprofit organizations, and hospitals. Additionally, under 34 CFR 75.261, all types of grantees including State Educational Agencies, Local Educational Agencies, and Federally Recognized Indian Tribal Governments may follow the regulations in 34 CFR 74.25(e)(2) regarding extension of a project period. Section 74.25(e)(2) allows grantees to initiate a one-time extension of their projects' expiration date of up to 12 months without prior approval from the Department of Education. These grantee requirements are necessary for the effective administration and monitoring of grant projects.

Requests for copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov,* by selecting the "Browse Pending Collections" link and by clicking on link number 4467. When you access the information collection, click on "Download Attachments" to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection and OMB Control Number when making your request.

Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 2010–32229 Filed 12–22–10; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

National Advisory Committee on Institutional Quality and Integrity (NACIQI) Meeting

AGENCY: National Advisory Committee on Institutional Quality and Integrity, Office of Postsecondary Education, Department of Education.

ACTION: Notice of the February 3–4, 2011, open meeting of the National Advisory Committee on Institutional Quality and Integrity (NACIQI), procedures for submitting third-party written comments, and procedures for making third-party oral comments at the meeting.

SUMMARY: This notice sets forth the schedule and agenda of the upcoming open meeting of the NACIQI. It also informs members of the public how to submit third-party written comments and how to submit third-party oral comment requests. The notice of this meeting is required under section 10(a)(2) of the Federal Advisory Committee Act (FACA) and section 114(d)(1)(B) of the Higher Education Act of 1965, as amended (HEA), and as

background, summarizes the functions of the NACIQI.

Meeting Date and Place: The NACIQI meeting will be held on February 3–4, 2011, from 8:30 a.m. to approximately 5:30 p.m., at the Holiday Inn and Suites, Ballrooms A–C, 625 First Street, Alexandria, VA 22314. For further information about the meeting location or for hotel reservations, contact the hotel at 703–548–6300.

Agenda: The agenda for the meeting will include presentations to inform the NACIQI generally regarding the accreditation of institutions of higher education, the certification and eligibility of such institutions for purposes of the Federal student aid programs authorized under Title IV of the HEA, the relationship between the two, and regarding State licensing responsibilities with respect to such institutions.

As background, the current system of accreditation/recognition draws upon a variety of participants, definitions, and processes. Taken together, these elements reflect commonalities and divergences among the concepts of "quality assurance," "continuous improvement," and "compliance," as well as tension between gatekeeping for the institutional eligibility for student aid and accreditation as a broader quality assurance and quality improvement process. There are also disparities between compliance with regulation and accreditation via peer review, as well as varying roles and interests of Federal and State entities, professional/trade/membership organizations, and the public.

The NACIQI will hear from a variety of speakers concerning the above topics, in order to consider the broad question of what is working (and not working) in the current system of recognition, accreditation, and student aid eligibility.

All oral presentations and written materials submitted will inform the NACIQI as it develops a set of recommendations to the Secretary for the reauthorization of the HEA.

NACIQI'S Statutory Authority and Functions: The NACIQI was established under Section 114 of the HEA. It advises the Secretary of Education about:

- The establishment and enforcement of the Criteria for Recognition of accrediting agencies or associations under Subpart 2, Part H, Title IV, of the HEA.
- The recognition of specific accrediting agencies or associations, or a specific State approval agency.
- The preparation and publication of the list of nationally recognized accrediting agencies and associations.
- The eligibility and certification process for institutions of higher education under Title IV, HEA.
- The relationship between: (1) Accreditation of institutions of higher education and the certification and eligibility of those institutions and (2) State licensing responsibilities with respect to those institutions.
- Any other advisory functions relating to accreditation and institutional eligibility that the Secretary may prescribe.

Instructions for Submitting a Third-Party Written Comment for the February 2011 NACIQI Meeting: Submit your written comments by e-mail on or before January 16, 2011, to *aslrecordsmanager@ed.gov*. Enter the subject line as "Written Comments to NACIQI Regarding Reauthorization of the HEA, concerning [insert specific topic or statutory citation here]." Also, in the body of your written comments, please insert a subject heading above each subject area addressed.

Instructions for Making a Third-Party Oral Comment at the February 2011 NACIQI Meeting: There are two methods the public may use to make a third-party oral comment concerning the reauthorization of the HEA during the February 3–4, 2011, meeting.

First Method: Submit a written request via e-mail in advance of the meeting to make a third-party oral presentation. A total of 30 minutes of the meeting will be allotted for commenters who have submitted an advance request. Depending on the number of requests received, commenters will be selected on a first-come, first-served basis and if selected, each commenter will be provided three to five minutes to speak. Each request must be received on or before January 16, 2011, and must be sent to *aslrecordsmanager@ed.gov* with the subject line listed as "Request to Provide Oral Comments to NACIQI Regarding Reauthorization of the HEA concerning [insert specific topic or statutory citation here]." Your request (no more than three pages) must include:

1. The name, title, affiliation, mailing address, e-mail address, telephone and facsimile numbers, and Web site (if any) of the person/group requesting to speak; and

2. A brief summary of the principal points to be made during the oral presentation, as well as the statutory citation related to the points to be covered.

Only individuals whose requests are made in accordance with these instructions will become eligible for an opportunity to speak under this method. Please do not send material directly to the NACIQI members.

Second Method: Sign up on February 4, 2011, to make oral comments that day expressing your views regarding reauthorization. The sign-up form will request the name, title, affiliation, mailing address, e-mail address, telephone and facsimile numbers, and Web site (if any). A total of 30 minutes of the meeting will be allotted for commenters who sign up the day of the meeting.

Individuals or groups that sign up on the day of the meeting will be selected on a first-come, first-served basis, based on when the completed sign-up sheet is received and time-stamped. If selected, each commenter will be provided from three to five minutes, depending on the number of requests received. If a person or group requests to make oral comments in advance, they may not also sign-up to make oral comments the day of the meeting. The Chair will confine oral commenters to the topic of reauthorization.

Members of the public will be eligible to make third-party oral comments only in accordance with these instructions. Their comments will become part of the official record and will be considered by the NACIQI in its deliberations.

Access to Records of the Meeting: The Department will post the official report of the meeting on the NACIQI Web site shortly after the meeting. Pursuant to the FACA, the public may also inspect the materials at 1990 K Street, NW., Washington, DC, by e-mailing *aslrecordsmanager@ed.gov* or by calling (202) 219–7067 to schedule an appointment.

Electronic Access to this Document: You may view this document, as well as all other Department of Education documents published in the **Federal Register**, in text or Adobe Portable Document Format (PDF), or on the Internet at the following site: *http://www.ed.gov/legislation/fedregister*. To use PDF, you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–866–512–1800 or, in the Washington, DC area at (202)512–0000.

Reasonable Accommodations: Individuals who will need accommodations for a disability in order to attend the February 3–4, 2011 meeting (*i.e.,* interpreter services, assistive listening devices, and/or materials in alternative format) should contact Department staff by telephone at (202) 219–7067; or, e-mail at *aslrecordsmanager@ed.gov*, no later than January 17, 2010. We will attempt

to meet requests after this date, but cannot guarantee the availability of the requested accommodation. The meeting site is accessible.

FOR FURTHER INFORMATION CONTACT: Melissa Lewis, Executive Director, NACIQI, U.S. Department of Education, Room 8060, 1990 K Street, NW., Washington, DC 20006, telephone: (202) 219–7009; e-mail: *Melissa.Lewis@ed.gov*. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service at 1–800–877–8339, between 8 a.m. and 8 p.m., Eastern Standard Time, Monday through Friday.

Note: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/index.html*.

Eduardo M. Ochoa,

Assistant Secretary for Postsecondary Education.

[FR Doc. 2010–32262 Filed 12–22–10; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

National Advisory Committee on Institutional Quality and Integrity: Notice of Members

AGENCY: National Advisory Committee on Institutional Quality and Integrity: Notice of Members, Department of Education.

What is the purpose of this notice?

The purpose of this notice is to list the members of the National Advisory Committee on Institutional Quality and Integrity (NACIQI). This notice is required under Section 114(e)(1) of the Higher Education Act of 1965, as amended (HEA).

What is the role of NACIQI?

The NACIQI is established under Section 114 of the HEA, and is composed of 18 members appointed—

(A) On the basis of the individuals' experience, integrity, impartiality, and good judgment;

(B) From among individuals who are representatives of, or knowledgeable concerning, education and training beyond secondary education, representing all sectors and types of institutions of higher education; and

(C) On the basis of the individuals' technical qualifications, professional standing, and demonstrated knowledge in the fields of accreditation and administration of higher education.

The NACIQI meets at least twice a year and provides recommendations to the Secretary of Education pertaining to:

- The establishment and enforcement of the standards of accrediting agencies or associations under subpart 2 of part H of Title IV, HEA.
- The recognition of specific accrediting agencies or associations.
- The preparation and publication of the list of nationally recognized accrediting agencies and associations.
- The eligibility and certification process for institutions of higher education under Title IV of the HEA.
- The relationship between (1) accreditation of institutions of higher education and the certification and eligibility of such institutions, and (2) State licensing responsibilities with respect to such institutions.
- Any other advisory functions relating to accreditation and institutional eligibility that the Secretary may prescribe by regulation.

What are the terms of office for the committee members?

The term of office of each member is six years, except that the terms of office for the initial members of the Committee shall be three years for members appointed by the Secretary; four years for members appointed by the Speaker of the House of Representatives; and six years for members appointed by the President Pro Tempore of the Senate. Any member appointed to fill a vacancy occurring prior to the expiration of the term for which the member's predecessor was appointed is appointed for the remainder of the term.

Who are the current members of the committee?

The current members of the NACIQI are:

Members appointed by Secretary of Education Arne Duncan with Terms Expiring September 30, 2013:

- Dr. Earl Lewis, Provost and Executive Vice President for Academic Affairs, Emory University, Georgia.
- Dr. Susan D. Phillips, Provost and Vice President for Academic Affairs, The State University of New York, the University at Albany, New York.
- Mr. Beter-Aron Shimeles, student member, Bay Area Fellow for Peer Health Exchange, Occidental College, California.
- Ms. Jamienne Studley, President and Chief Executive Officer (CEO), Public Advocates, Inc., California.
- Mr. Frank Wu, Chancellor and Dean, University of California, Hastings College of the Law, California.
- Dr. Federico Zaragoza, Vice Chancellor of Economic and Workforce Development, Alamo Community College District, Texas.

Members appointed by Speaker of the House of Representatives Nancy Pelosi, with Terms Expiring September 30, 2014:

- Dr. Benjamin Allen, President, University of Northern Iowa, Iowa.
- Dr. Arthur Keiser, Chancellor, Keiser University, Florida.
- Dr. William E. Kirwan, Chancellor, University System of Maryland, Maryland.
- Dr. William Pepicello, President, University of Phoenix, Arizona.
- Mr. Arthur J. Rothkopf, President Emeritus, Lafayette College, District of Columbia.
- Dr. Carolyn Williams, President, Bronx Community College, New York.

Members appointed by President Pro Tempore of the Senate Daniel Inouye, with Terms Expiring September 30, 2016:

- Mr. Bruce Cole, President and CEO, American Revolution Center, District of Columbia.
- Ms. Anne Neal, President, American Council of Trustees and Alumni, District of Columbia.
- Mr. Daniel Klaich, Chancellor, Nevada System of Higher Education, Nevada.
- Dr. Wilfred McClay, Suntrust Bank Chair of Excellence in Humanities, University of Tennessee at Chattanooga, Tennessee.
- The Honorable Cameron C. Staples, State Representative, House of Representatives, Connecticut.
- Dr. Larry N. Vanderhoef, Chancellor Emeritus, University of California Davis, California.

How can I get additional information?

If you have any specific questions about the NACIQI, please contact Melissa Lewis, Executive Director, NACIQI, telephone (202) 219–7009, fax (202) 219–7005, e-mail: *Melissa.Lewis@ed.gov,* between 9 a.m. and 5 p.m., Monday through Friday.

Electronic Access To This Document

You may view this document, as well as all other Department of Education documents published in the **Federal Register**, in text or Adobe Portable Document Format (PDF), on the internet at the following site: *http://www/ed/gov/news/fedregister*. To use PDF, you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free at 1–888–293–1800; or in the Washington, DC at (202) 512–1500.

Note: The official version of this document is the document published in the **Federal**

Register. Free internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www/gpoaccess.gov/nara/index.html.*

Eduardo M. Ochoa,

Assistant Secretary For Postsecondary Education.

[FR Doc. 2010–32351 Filed 12–22–10; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings No. 1

December 9, 2010.

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP11–1601–000.

Applicants: Alliance Pipeline L.P.

Description: Alliance Pipeline L.P. submits tariff filing per 154.204: Non-Renewal Charge Filing to be effective 1/1/2011.

Filed Date: 12/07/2010.

Accession Number: 20101207–5145.

Comment Date: 5 p.m. Eastern Time on Monday, December 20, 2010.

Docket Numbers: RP11–1602–000.

Applicants: Northwest Pipeline GP.

Description: Northwest Pipeline GP submits tariff filing per 154.204: Northwest Pipeline GP—Miscellaneous Filing to be effective 2/1/2011.

Filed Date: 12/07/2010.

Accession Number: 20101207–5203.

Comment Date: 5 p.m. Eastern Time on Monday, December 20, 2010.

Docket Numbers: RP11–1603–000.

Applicants: Natural Gas Pipeline Company of America LLC.

Description: Natural Gas Pipeline Company of America LLC submits tariff filing per 154.204: Negotiated Rate Filing to be effective 12/1/2010.

Filed Date: 12/08/2010.

Accession Number: 20101208–5037.

Comment Date: 5 p.m. Eastern Time on Monday, December 20, 2010.

Docket Numbers: RP11–1604–000.

Applicants: KO Transmission Company.

Description: KO Transmission Company submits tariff filing per 154.203: Compliance Filing in Docket RP10–1231 to be effective 11/1/2010.

Filed Date: 12/08/2010.

Accession Number: 20101208–5055.

Comment Date: 5 p.m. Eastern Time on Monday, December 20, 2010.

Docket Numbers: RP11–1605–000.

Applicants: Algonquin Gas Transmission, LLC.

Description: Algonquin Gas Transmission, LLC submits tariff filing per 154.204: OFO Provision to be effective 12/22/2010.

Filed Date: 12/08/2010.

Accession Number: 20101208–5156.

Comment Date: 5 p.m. Eastern Time on Wednesday, December 15, 2010.

Docket Numbers: RP11–1606–000.

Applicants: Colorado Interstate Gas Company.

Description: Colorado Interstate Gas Company submits tariff filing per 154.204: Removal of Negotiated Rate Transaction (Western #33268) to be effective 1/10/2011.

Filed Date: 12/08/2010.

Accession Number: 20101208–5159.

Comment Date: 5 p.m. Eastern Time on Monday, December 20, 2010.

Docket Numbers: RP11–1607–000.

Applicants: Rockies Express Pipeline LLC.

Description: Rockies Express Pipeline LLC submits tariff filing per 154.204: Negotiated Rate 2010–12–8 Nobel Americas to be effective 12/9/2010.

Filed Date: 12/08/2010.

Accession Number: 20101208–5172.

Comment Date: 5 p.m. Eastern Time on Monday, December 20, 2010.

Docket Numbers: RP11–1608–000.

Applicants: MoGas Pipeline LLC.

Description: MoGas Pipeline LLC submits tariff filing per 154.203: Compliance Filing—Missing Data Element to be effective 8/25/2010.

Filed Date: 12/09/2010.

Accession Number: 20101209–5032.

Comment Date: 5 p.m. Eastern Time on Tuesday, December 21, 2010.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. 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. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

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 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2010–32198 Filed 12–22–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings No. 1

December 14, 2010.

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP11–1609–000.

Applicants: Granite State Gas Transmission, Inc.

Description: Granite State Gas Transmission, Inc. submits tariff filing per 154.203: Order No. 714 Compliance Filing Baseline Tariff to be effective 7/13/2010.

Filed Date: 12/09/2010.

Accession Number: 20101209–5135.

Comment Date: 5 p.m. Eastern Time on Tuesday, December 21, 2010.

Docket Numbers: RP11–1610–000.

Applicants: Northern Natural Gas Company.

Description: Northern Natural Gas Company submits tariff filing per 154.204: 20101210 Storage Account Balance Transfers to be effective 1/10/2011.

Filed Date: 12/10/2010.

Accession Number: 20101210–5168.

Comment Date: 5 p.m. Eastern Time on Wednesday, December 22, 2010.

Docket Numbers: RP11–1611–000.

Applicants: PetroLogistics Natural Gas Storage, LLC.

Description: PetroLogistics Natural Gas Storage, LLC submits tariff filing per 154.203: Compliance Filing Revising FERC Gas Tariff to Comply with Order No. 587–U to be effective 11/1/2010.

Filed Date: 12/13/2010.

Accession Number: 20101213–5110.

Comment Date: 5 p.m. Eastern Time on Monday, December 27, 2010.

Docket Numbers: CP11–48–000.

Applicants: ANR Pipeline Company.

Description: ANR Pipeline Company Abandonment of Service.

Filed Date: 12/10/2010.

Accession Number: 20101210–5238.

Comment Date: 5 p.m. Eastern Time on Monday, December 27, 2010.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. 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. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

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 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2010–32200 Filed 12–22–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings No. 1

December 16, 2010.

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP11–1613–000.

Applicants: NGO Transmission, Inc.

Description: NGO Transmission, Inc. submits tariff filing per 154.204: NGO Transmission—Negotiated Rate Filing, to be effective 1/1/2011.

Filed Date: 12/15/2010.

Accession Number: 20101215–5015.

Comment Date: 5 p.m. Eastern Time on Monday, December 27, 2010.

Docket Numbers: RP11–1614–000.

Applicants: CenterPoint Energy Gas Transmission Company.

Description: CenterPoint Energy Gas Transmission Company submits tariff filing per 154.204: Negotiated Rate—December 2010 to be effective 12/15/2010.

Filed Date: 12/15/2010.

Accession Number: 20101215–5021.

Comment Date: 5 p.m. Eastern Time on Monday, December 27, 2010.

Docket Numbers: RP11–1615–000.

Applicants: Northern Natural Gas Company.

Description: Northern Natural Gas Company submits tariff filing per 154.204: 20101215 GRE Non-conforming to be effective 1/15/2011.

Filed Date: 12/15/2010.

Accession Number: 20101215–5089.

Comment Date: 5 p.m. Eastern Time on Monday, December 27, 2010.

Docket Numbers: RP11–1616–000.

Applicants: Carolina Gas Transmission Corporation.

Description: Carolina Gas Transmission Corporation's 2010 IT Revenue Sharing Report.

Filed Date: 12/15/2010.

Accession Number: 20101215–5199.

Comment Date: 5 p.m. Eastern Time on Monday, December 27, 2010.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. 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. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

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 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed dockets(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2010–32202 Filed 12–22–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings No. 2

December 16, 2010.

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP10–1232–001.

Applicants: Iroquois Gas Transmission System, L.P.

Description: Iroquois Gas Transmission System, L.P. submits tariff filing per 154.203: NAESB filing to support index-based capacity releases on a manual basis to be effective 12/15/2010.

Filed Date: 12/15/2010.

Accession Number: 20101215–5079.

Comment Date: 5 p.m. Eastern Time on Monday, December 27, 2010.

Docket Numbers: RP11–1433–001.

Applicants: Central New York Oil And Gas, LLC.

Description: Central New York Oil And Gas, LLC submits tariff filing per 154.203: Central New York Oil And Gas Company, LLC—NAESB Compliance Filing RP11–1433 to be effective 10/7/2010.

Filed Date: 12/15/2010.

Accession Number: 20101215–5118.

Comment Date: 5 p.m. Eastern Time on Monday, December 27, 2010.

Docket Numbers: RP11–1493–001.

Applicants: Portland General Electric Company.

Description: Portland General Electric Company submits tariff filing per 154.203: RP11–1493 Compliance Filing of Portland General Electric to be effective 12/15/2010.

Filed Date: 12/15/2010.

Accession Number: 20101215–5017.

Comment Date: 5 p.m. Eastern Time on Monday, December 27, 2010.

Docket Numbers: RP11–34–001.

Applicants: WestGas InterState, Inc.

Description: WestGas InterState, Inc. submits tariff filing per 154.203: 20101215_Compliance Filing 587–U to be effective 11/1/2010.

Filed Date: 12/15/2010.

Accession Number: 20101215–5129.

Comment Date: 5 p.m. Eastern Time on Monday, December 27, 2010.

Docket Numbers: RP11–75–001.

Applicants: Arlington Storage Company, LLC.

Description: Arlington Storage Company, LLC submits tariff filing per 154.203: Arlington Storage Company, LLC—NAESB Compliance Filing to be effective 10/1/2010.

Filed Date: 12/15/2010.

Accession Number: 20101215–5086.

Comment Date: 5 p.m.Eastern Time on Monday, December 27, 2010.

Docket Numbers: RP11–79–001.

Applicants: Steuben Gas Storage Company.

Description: Steuben Gas Storage Company submits tariff filing per 154.203: Steuben Gas Storage Company—NAESB Compliance Filing to be effective 10/1/2010.

Filed Date: 12/15/2010.

Accession Number: 20101215–5090.

Comment Date: 5 p.m. Eastern Time on Monday, December 27, 2010.

Docket Numbers: RP10–660–002.

Applicants: North Baja Pipeline, LLC.

Description: North Baja Pipeline, LLC submits tariff filing per 154.203: RP10–660 Compliance to be effective 4/28/2010.

Filed Date: 12/16/2010.

Accession Number: 20101216–5034.

Comment Date: 5 p.m. Eastern Time on Tuesday, December 28, 2010.

Any person desiring to protest this filing must file in accordance with Rule 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.211). Protests to this filing 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. Such protests must be filed on or before 5 p.m. Eastern time on the specified comment date. Anyone filing a protest must serve a copy of that document on all the parties to the proceeding.

The Commission encourages electronic submission of protests in lieu of paper using the "eFiling" link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest 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 e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2010–32203 Filed 12–22–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings No. 2

December 14, 2010.

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP10–1136–001.

Applicants: Guardian Pipeline, L.L.C.

Description: Guardian Pipeline, L.L.C. submits tariff filing per 154.203: GPL Baseline Correction Filing to be effective 8/31/2010.

Filed Date: 11/30/2010.

Accession Number: 20101130–5206.

Comment Date: 5 p.m. Eastern Time on Thursday, December 16, 2010.

Docket Numbers: RP10–1004–001.

Applicants: Northern Border Pipeline Company.

Description: Northern Border Pipeline Company submits tariff filing per 154.203: RP10–1004 Compliance to be effective 7/28/2010.

Filed Date: 12/13/2010.

Accession Number: 20101213–5075.

Comment Date: 5 p.m. Eastern Time on Monday, December 27, 2010.

Docket Numbers: RP11–1592–002.

Applicants: Gulf Crossing Pipeline Company LLC.

Description: Gulf Crossing Pipeline Company LLC submits tariff filing per 154.205(b): Devon Correction RP11–1592 to be effective 12/2/2010.

Filed Date: 12/13/2010.

Accession Number: 20101213–5076.

Comment Date: 5 p.m. Eastern Time on Monday, December 27, 2010.

Docket Numbers: RP11–1592–001.

Applicants: Gulf Crossing Pipeline Company LLC.

Description: Gulf Crossing Pipeline Company LLC submits tariff filing per 154.205(b): Devon—Amendment to filing in RP11–1592–000 to be effective 12/2/2010.

Filed Date: 12/09/2010.

Accession Number: 20101209–5019.

Comment Date: 5 p.m. Eastern Time on Tuesday, December 21, 2010.

Docket Numbers: RP11–1604–001.

Applicants: KO Transmission Company.

Description: KO Transmission Company submits tariff filing per 154.203: Supplement to Compliance Filing to be effective 11/1/2010.

Filed Date: 12/09/2010.

Accession Number: 20101209–5076.

Comment Date: 5 p.m. Eastern Time on Tuesday, December 21, 2010.

Docket Numbers: RP11–59–001.

Applicants: Northwest Pipeline GP.

Description: Northwest Pipeline GP submits tariff filing per 154.203: NWP–RP11–59 Compliance Filing to be effective N/A.

Filed Date: 12/10/2010.

Accession Number: 20101210–5215.

Comment Date: 5 p.m. Eastern Time on Wednesday, December 22, 2010.

Any person desiring to protest this filing must file in accordance with Rule 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.211). Protests to this filing 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. Such protests must be filed on or before 5 p.m. Eastern time on the specified comment date. Anyone filing a protest must serve a copy of that document on all the parties to the proceeding.

The Commission encourages electronic submission of protests in lieu of paper using the "eFiling" link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest 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 e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERC OnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2010–32201 Filed 12–22–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings No 2

December 9, 2010.

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP04–274–024. RP00–157–025.

Applicants: Kern River Gas Transmission Company.

Description: Provisional Rate Refund of Kern River Gas Transmission Company.

Filed Date: 04/27/2010.

Accession Number: 20100427–5162.

Comment Date: 5 p.m. Eastern Time on Tuesday, December 14, 2010.

Docket Numbers: RP10–663–002.

Applicants: Wyoming Interstate Company, L.L.C.

Description: Wyoming Interstate Company, L.L.C. submits tariff filing per 154.203: Baseline Compliance to be effective 1/10/2011.

Filed Date: 12/08/2010.

Accession Number: 20101208–5164.

Comment Date: 5 p.m. Eastern Time on Monday, December 20, 2010.

Docket Numbers: RP11–1592–001.

Applicants: Gulf Crossing Pipeline Company LLC.

Description: Gulf Crossing Pipeline Company LLC submits tariff filing per 154.205(b): Devon—Amendment to filing in RP11–1592–000 to be effective 12/2/2010.

Filed Date: 12/09/2010.

Accession Number: 20101209–5019.

Comment Date: 5 p.m. Eastern Time on Tuesday, December 21, 2010.

Any person desiring to protest this filing must file in accordance with Rule 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.211). Protests to this filing 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. Such protests must be filed on or before 5 p.m. Eastern time on the specified comment date. Anyone filing a protest must serve a copy of that document on all the parties to the proceeding.

The Commission encourages electronic submission of protests in lieu of paper using the "eFiling" link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest 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 e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2010–32199 Filed 12–22–10; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–8994–3]

Environmental Impact Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information (202) 564–1399 or *http://www.epa.gov/compliance/nepa/.*

Weekly receipt of Environmental Impact Statements filed 12/13/2010 through 12/17/2010 pursuant to 40 CFR 1506.9.

Notice

In accordance with Section 309(a) of the Clean Air Act, EPA is required to make its comments on EISs issued by other Federal agencies public. Historically, EPA met this mandate by publishing weekly notices of availability of EPA comments, which includes a brief summary of EPA's comment letters, in the **Federal Register**. Since February 2008, EPA has included its comment letters on EISs on its Web site at: *http://www.epa.gov/compliance/nepa/eisdata.html.* Including the entire EIS comment letters on the Web site satisfies the Section 309(a) requirement to make EPA's comments on EISs available to the public. Accordingly, on March 31, 2010, EPA discontinued the publication of the notice of availability of EPA comments in the **Federal Register**.

EIS No. 20100472, Third Draft Supplement, USAF, FL, Eglin Air Force Base (AFB) and Hurlburt Field, Proposes to Implement the Military Housing Privatization Initiative (MHPI), FL, Comment Period Ends: 02/07/2011, Contact: Mike Spaits 850–882–2836.

EIS No. 20100473, Draft EIS, USACE, TX, Freeport Harbor Channel Improvement Project, Proposes to Deepen and Widen the Freeport Harbor Channel and Associated Turning Basins, Brazoria County, TX, Comment Period Ends: 02/07/2011, Contact: Janelle Stokes 409–766–3039.

EIS No. 20100474, Draft EIS, BLM, CA, East County Substation/Tule Wind/Energia Sierra Juarez Gen-Tie Projects, Construction and Operation, Right-of-Way Grants, San Diego County, CA, Comment Period Ends: 02/07/2011, Contact: Greg Thomsen, 951–697–5237.

EIS No. 20100475, Final EIS, APHIS, 00, Glyphosate-Tolerant Alfalfa Events J101 and J163: Request for Nonregulated Status, Implementation, United States, Wait Period Ends: 01/24/2011, Contact: Rebecca Stankiewicz Gabel 301–851–2300.

This document is available on the Internet at: *http://www.regulations.gov/#!documentDetail;D=APHIS-2007-0044-12532.*

EIS No. 20100476, Final EIS, USA, 00, Gulf of Mexico Range Complex (GOMEX), Proposed Action is to Support and Conduct Current and Emerging Training and RDT&E Operations, TX, MS, AL and FL, Wait Period Ends: 01/24/2011, Contact: Gloria Kupstas, 703–604–5431.

EIS No. 20100477, Draft EIS, USFS, CA, Kings River Experimental Watershed Forest Health and Research Project, Implementation, Sierra National Forest, High Sierra Ranger District, Fresno County, CA, Comment Period Ends: 02/07/2011, Contact: Judi Tapia, 559–297–0706 Ext. 4938.

EIS No. 20100478, Final EIS, FHWA, OR, Sunrise Project, Proposes to Build a New East-West Oriented, Limited-Access Highway between I–205 to Rock Creek Junction, Funding and US Army COE Section 404 Permit, Clackamas County, Oregon, Wait Period Ends: 01/24/2011, Contact: Michelle Eraut 503–587–4716.

EIS No. 20100479, Final EIS, USACE, GA, Fort McPherson Project, Disposal and Reuse, Implementation, in City Limits of Atlanta, Fulton County, GA, Wait Period Ends: 01/24/2011, Contact: Bob Ross 703–545–2465.

EIS No. 20100480, Draft Supplement, USFS, VT, Deerfield Wind Project, Updated Information, Application for a Land Use Authorization to Construct and Operate a Wind Energy Facility, Special Use Authorization Permit, Towns of Searsburg and Readsboro, Manchester Ranger District, Green Mountain National Forest, Bennington County, VT, Comment Period Ends: 02/18/2011, Contact: Bob Bayer, 802–362–2307 Ext. 218.

Amended Notices

EIS No. 20100462, Draft EIS, FWS, CA, Santa Clara Valley Habitat Plan, To Protect and Enhance Ecological Diversity and Function in the Greater Portion of Santa Clara County, Implementation, Santa Clara County, CA, Comment Period Ends: 04/15/2011, Contact: John Robles, 916–414–6731. Revision to FR Notice Published 12/17/2010: Correction to Comment Period from 01/31/2011 to 04/15/2011.

EIS No. 20100463, Draft EIS, HUD, WA, Sunset Area Community Planned Action, Proposal to Redevelopment of the Sunset Terrace Public Housing Community and Associated Neighborhood Growth and Revitalization, City of Renton, WA, Comment Period Ends: 01/31/2011, Contact: Erika Conkling, 425–430–6578. Revision to FR Notice Published 12/17/2010: Correction to Contact Phone Number.

Dated: December 20, 2010.

Robert W. Hargrove,

Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 2010–32349 Filed 12–22–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9242–5]

Proposed Consent Decree, Clean Air Act Citizen Suit

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Proposed Consent Decree; request for public comment.

SUMMARY: In accordance with section 113(g) of the Clean Air Act, as amended (“CAA” or the “Act”), 42 U.S.C. 7413(g), notice is hereby given of a proposed consent decree to address a lawsuit filed by Natural Resources Defense Council, Inc. and Coalition for a Safe Environment (collectively “Plaintiffs”) in the United States District Court for the Central District of California: *Natural Resources Defense Council, Inc., et al.* v. *Jackson,* No. CV–10–6029–MMM–AGR (C.D. CA.). On August 12, 2010, Plaintiffs filed a complaint alleging that EPA failed to perform nondiscretionary duties under section 110(k)(2) of the CAA, 42 U.S.C. 7410(k)(2) to take final action to approve or disapprove (1) the State Strategy for the 2007 State Implementation Plan (“2007 State SIP”), submitted to EPA on November 16, 2007, and (2) the 2007 Air Quality Management Plan for the South Coast Air Quality Management District (“2007 South Coast SIP”), submitted to EPA on November 28, 2007. The proposed consent decree establishes a deadline for EPA to take action.

DATES: Written comments on the proposed consent decree must be received by *January 24, 2011.*

ADDRESSES: Submit your comments, identified by Docket ID number EPA–HQ–OGC–2010–1060, online at *http://www.regulations.gov* (EPA’s preferred method); by e-mail to *oei.docket@epa.gov;* by mail to EPA Docket Center, Environmental Protection Agency, *Mailcode:* 2822T, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; or by hand delivery or courier to EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC, between 8:30 a.m. and 4:30 p.m. Monday through Friday, excluding legal holidays. Comments on a disk or CD–ROM should be formatted in Word or ASCII file, avoiding the use of special characters and any form of encryption, and may be mailed to the mailing address above.

FOR FURTHER INFORMATION CONTACT: Jan Tierney, Air and Radiation Law Office (2344A), Office of General Counsel, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; *telephone:* (202) 564–5598; fax number (202) 564–5603; *e-mail address:tierney.jan@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Additional Information About the Proposed Consent Decree

The proposed consent decree would resolve a lawsuit seeking to compel the Administrator to take final action under section 110(k) of the CAA to approve or disapprove (1) the State Strategy for the 2007 State Implementation Plan (“2007 State SIP”), submitted to EPA on November 16, 2007, and (2) the 2007 Air Quality Management Plan for the South Coast Air Quality Management District (“2007 South Coast SIP”), submitted to EPA on November 28, 2007. Specifically, the consent decree addresses only those elements of the 2007 State SIP and 2007 South Coast SIP that were submitted by the State of California in response to EPA’s designations of “nonattainment” for the South Coast Air Basin with respect to the 1997 NAAQS for ozone and PM2.5. The proposed consent decree requires that no later than September 30, 2011, EPA shall sign for publication in the **Federal Register** a notice of the Agency’s final action on the portions of the 2007 State SIP and 2007 South Coast SIP that relate to EPA’s “nonattainment” designation of the South Coast Air Basin with respect to the 1997 PM2.5 NAAQS, and thereafter send the notice to the Office of the Federal Register for review and publication.

The proposed consent decree also requires that no later than December 15, 2011, EPA shall sign for publication in the **Federal Register** a notice of the Agency’s final action on the portions of the 2007 State SIP and 2007 South Coast SIP that relate to the nonattainment designation of the South Coast Air Basin with respect to the 1997 ozone NAAQS, and thereafter send the notice to the Office of the Federal Register for review and publication. After EPA fulfills its obligations under the decree, the parties shall file a joint request to the Court to dismiss this matter with prejudice.

For a period of thirty (30) days following the date of publication of this notice, the Agency will accept written comments relating to the proposed consent decree from persons who 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 consent decree if the comments disclose facts or considerations that indicate that such consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Act. Unless EPA or the Department of Justice determines that consent to this consent decree should be withdrawn, the terms of the decree will be affirmed.

II. Additional Information About Commenting on the Proposed Consent Decree

A. How can I get a copy of the consent decree?

The official public docket for this action (identified by Docket ID No. EPA–HQ–OGC–2010–1060) contains a copy of the proposed consent decree. The official public docket is available for public viewing at the Office of Environmental Information (OEI) Docket in the EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OEI Docket is (202) 566–1752.

An electronic version of the public docket is available through *http://www.regulations.gov.* You may use *http://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 *http://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 e-mail 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 *http://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, e-mail 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 (e-mail) system is not an "anonymous access" system. If you send an e-mail comment directly to the Docket without going through *http://www.regulations.gov,* your e-mail 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 16, 2010.

Kevin W. McLean,

Acting Associate General Counsel.

[FR Doc. 2010–32268 Filed 12–22–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9242–4]

Proposed Consent Decree, Clean Air Act Citizen Suit

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed consent decree; request for public comment.

SUMMARY: In accordance with section 113(g) of the Clean Air Act, as amended ("CAA"), 42 U.S.C. 7413(g), notice is hereby given of a proposed consent decree, to address a lawsuit filed by Sierra Club in the United States District Court for the District of Columbia: *Sierra Club* v. *Jackson,* No. 10–cv–0859 (D.D.C.) Plaintiff filed a deadline suit to compel the Administrator to respond to an administrative petition seeking EPA's objection to a CAA Title V operating permit issued by the Kentucky Department of Air Quality to the Tennessee Valley Authority's Paradise Fossil Plant in Drakesboro, Kentucky. Under the terms of the proposed consent decree, EPA has agreed to respond to the petition by February 9, 2011.

DATES: Written comments on the proposed consent decree must be received by January 24, 2011.

ADDRESSES: Submit your comments, identified by Docket ID number EPA–HQ–OGC–2010–1051, online at *http://www.regulations.gov* (EPA's preferred method); by e-mail to *oei.docket@epa.gov;* by mail to EPA Docket Center, Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; or by hand delivery or courier to EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC, between 8:30 a.m. and 4:30 p.m. Monday through Friday, excluding legal holidays. Comments on a disk or CD–ROM should be formatted in Word or ASCII file, avoiding the use of special characters and any form of encryption, and may be mailed to the mailing address above.

FOR FURTHER INFORMATION CONTACT: Gautam Srinivasan, Air and Radiation Law Office (2344A), Office of General Counsel, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone: (202) 564–5647; fax number (202) 564–5603; e-mail address: *Srinivasan.gautam@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Additional Information About the Proposed Consent Decree

This proposed consent decree would resolve a lawsuit alleging that the Administrator failed to perform a nondiscretionary duty to grant or deny, within 60 days of submission, an administrative petition to object to a CAA Title V permit issued by the Kentucky Department of Air Quality to the Tennessee Valley Authority's Paradise Fossil Plant in Drakesboro, Kentucky. Under the terms of the proposed consent decree, EPA has agreed to respond to the petition by February 9, 2011. In addition, the proposed consent decree further states that EPA shall deliver notice of such action to the Office of the Federal Register for prompt publication and shall within 15 business days following signature, if EPA's response contains an objection in whole or in part, transmit the signed response to the Kentucky Department of Air Quality. The proposed consent decree states that after EPA fulfills its obligations under the decree, the case shall be dismissed with prejudice.

For a period of thirty (30) days following the date of publication of this notice, the Agency will accept written comments relating to the proposed consent decree from persons who 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 consent decree if the comments disclose facts or considerations that indicate that such consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the CAA. Unless EPA or the Department of Justice determines that consent to this consent decree should be withdrawn, the terms of the decree will be affirmed.

II. Additional Information About Commenting on the Proposed Consent Decree

A. How can I get a copy of the consent decree?

The official public docket for this action (identified by Docket ID No. EPA–HQ–OGC–2010–1051) contains a copy of the proposed consent decree. The official public docket is available for public viewing at the Office of Environmental Information (OEI) Docket in the EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OEI Docket is (202) 566–1752.

An electronic version of the public docket is available through *http://www.regulations.gov.* You may use *http://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 *http://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 e-mail 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 *http://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, e-mail 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 (e-mail) system is not an "anonymous access" system. If you send an e-mail comment directly to the Docket without going through *http://www.regulations.gov,* your e-mail 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 15, 2010.

Richard B. Ossias,

Associate General Counsel.

[FR Doc. 2010–32271 Filed 12–22–10; 8:45 am]

BILLING CODE 6560–50–P

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Sunshine Act Notice

AGENCY HOLDING THE MEETING: Equal Employment Opportunity Commission.

DATE AND TIME: Wednesday, December 29, 2010, 10 a.m. Eastern Time.

PLACE: Commission Meeting Room on the First Floor of the EEOC Office Building, 131 "M" Street, NE., Washington, DC 20507.

STATUS: The meeting will be open to the public.

MATTERS TO BE CONSIDERED:

Open Session

1. Announcement of Notation Votes, and

2. Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as amended.

Note: In accordance with the Sunshine Act, the meeting will be open to public observation of the Commission's deliberations and voting. (In addition to publishing notices on EEOC Commission meetings in the **Federal Register**, the Commission also provides a recorded announcement a full week in advance on future Commission sessions.)

Please telephone (202) 663–7100 (voice) and (202) 663–4074 (TTY) at any time for the most recent information on these meetings. The EEOC provides sign

language interpretation at Commission meetings for the hearing impaired. Requests for other reasonable accommodations may be made by using the voice and TTY numbers listed above.

CONTACT PERSON FOR MORE INFORMATION: Stephen Llewellyn, Executive Officer on (202) 663–4070.

Dated: December 21, 2010.

Stephen Llewellyn,

Executive Officer, Executive Secretariat.

[FR Doc. 2010–32529 Filed 12–21–10; 4:15 pm]

BILLING CODE 6570–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Agency Information Collection Activities: Proposed Revision of Information Collection; Comment Request

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice and request for comment.

The FDIC, as part of its continuing effort to reduce paperwork and respondent burden and as required by the Paperwork Reduction Act of 1995 (44 USC chapter 35), invites the general public and other Federal agencies to comment on proposed revisions to the survey collection instruments for its second *National Survey of Banks' Efforts to Serve the Unbanked and Underbanked,* currently approved under OMB Control No. 3064–0158, scheduled to be conducted in mid-2011. The collection is mandated by section 7 of the Federal Deposit Insurance Reform Conforming Amendments Act of 2005 ("Reform Act") (Pub. L. 109–173), which calls for the FDIC to conduct ongoing surveys on efforts by insured depository institutions to bring those individuals and families who have rarely, if ever, held a checking account, a savings account or other type of transaction or check cashing account at an insured depository institution (hereafter in this section referred to as the 'unbanked') into the conventional finance system." In addition to gathering information on the efforts of FDIC-insured depository institutions to bring unbanked individuals and families into the conventional finance system, the Bank Survey collects information on their efforts to serve underbanked populations. Underbanked populations include individuals who have an account with an insured depository but also rely on nonbank alternative financial service providers for transaction services or high cost credit products.

DATES: Comments must be submitted on or before February 22, 2011.

ADDRESSES: Interested parties are invited to submit written comments by any of the following methods. All comments should refer to the "National Survey on Banks' Efforts to Serve the Unbanked and Underbanked": *http://www.FDIC.gov/regulations/laws/federal/.*

E-mail: *comments@fdic.gov.* Please include the name and number of the collection in the subject line of the message.

Mail: Leneta Gregorie (202–898–3719), Counsel, Legal Division, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

Hand Delivery: Comments may be hand-delivered to the guard station at the rear of the 550 17th Street Building (located on F Street), on business days between 7 a.m. and 5 p.m.

FOR FURTHER INFORMATION CONTACT: Interested members of the public may obtain additional information about the collection, including a copy of the proposed collection and related instructions, without charge, by contacting Leneta Gregorie at the address identified above, or by calling (202) 898–3719. Copies of the survey instruments may also be accessed on-line, at *http://www.fdic.gov/regulations/laws/federal/index.html,* directly beneath the link to this **Federal Register** notice.

SUPPLEMENTARY INFORMATION: The *National Survey on Banks' Efforts to Serve the Unbanked and Underbanked* (Bank Survey) collection of information consists of two related survey instruments: (1) a survey of insured depository institution headquarters offices regarding business strategies for serving the unbanked and underbanked; and (2) a survey of branches of insured depository institutions regarding specific methods used to reach the underserved and specific products and services offered at each location. The estimated burden for the surveys is as follows:

1. Headquarters Survey

OMB Number: 3064–0158.

Frequency of Response: once.

Affected Public: FDIC-insured depository institutions headquarters offices.

Estimated Number of Respondents: 480.

Estimated Time per Response: 30 minutes per respondent.

Estimated Burden: 0.5 hours × 480 respondents = 240 hours.

2. Branch Office Survey

OMB Number: 3064–0158.

Frequency of Response: Once.

Affected Public: FDIC-insured depository institutions branch offices.

Estimated Number of Respondents: 1,300.

Estimated Time per Response: 30 minutes per respondent.

Estimated Burden: 0.5 hours × 1,300 respondents = 650 hours.

Total estimated burden for this collection: 240 hours + 650 hours = 890 hours.

General Description of Collection

The FDIC has a number of initiatives underway to encourage practical solutions to ensure that all consumers have reasonable access to full service banking and other financial services. The FDIC believes that insured depositories can provide a path into the financial mainstream for those who need these financial services, and that depository institutions can create an array of affordable lending services to meet the needs of all their customers. Currently a significant segment of the population relies on a mix of non-bank financial service providers for their needs. The FDIC has undertaken a series of investigations in this area, including the Bank Survey. The survey is mandated by section 7 of the Reform Act, which calls for the FDIC to conduct ongoing surveys "on efforts by insured depository institutions to bring those individuals and families who have rarely, if ever, held a checking account, a savings account or other type of transaction or check cashing account at an insured depository institution (hereafter in this section referred to as the 'unbanked') into the conventional finance system." The Reform Act specifically mandates that the FDIC consider the following factors and questions in conducting the survey:

"(A) To what extent do insured depository institutions promote financial education and financial literacy outreach?"

"(B) Which financial education efforts appear to be the most effective in bringing 'unbanked' individuals and families into the conventional finance system?"

"(C) What efforts are insured institutions making at converting 'unbanked' money order, wire transfer, and international remittance customers into conventional account holders?"

"(D) What cultural, language and identification issues as well as transaction costs appear to most prevent 'unbanked' individuals from establishing conventional accounts?"

"(E) What is a fair estimate of the size and worth of the 'unbanked' market in the United States?"

In addition to these mandated objectives, the FDIC seeks to identify and quantify the extent to which institutions serve the needs of the unbanked and underbanked; identify the characteristics of institutions that are reaching out to and serving the unbanked and underbanked; identify efforts (for example, practices, programs, alliances) of institutions to serve the unbanked and underbanked; and identify potential barriers that affect the ability of institutions to serve the unbanked and underbanked.

In its inaugural survey effort, the first of its kind to be conducted at the national level, the FDIC conducted a two-pronged survey—a sample survey of FDIC-insured depository institutions and a limited number of case studies of FDIC-insured depository institutions that were employing innovative methods to serve unbanked and underbanked populations. The results of the initial survey effort, which were released in February 2009, showed that while most banks were aware of significant unbanked and underbanked populations in their areas, more could be done to reach out to these important markets. A copy of the survey findings can be accessed at the following link: *http://www.fdic.gov/unbankedsurveys/*. In this second Bank Survey survey effort, the FDIC proposes to sample survey FDIC-insured depository institution at the headquarters and branch office level on their efforts to meet the needs of underserved populations. By so doing, the survey will provide insights into relevant headquarter strategies as well as offerings at the branch level. This approach will also enable the FDIC to analyze survey results by bank size class as well as by geographic location, including efforts of branch offices located in low to-moderate income versus other geographic areas.

Request for Comment

Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the FDIC's functions, including whether the information has practical utility; (b) the accuracy of the estimates of the burden of the information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology. The FDIC will consider all comments to determine the extent to which the proposed information collection should be modified prior to submission to OMB for review and approval. After the comment period closes, comments will be summarized or included in the FDIC's request to OMB for approval of the collection. All comments will become a matter of public record.

Dated at Washington, DC, this 20th day of December, 2010.

Federal Deposit Insurance Corporation.

Valerie J. Best,

Assistant Executive Secretary.

[FR Doc. 2010–32282 Filed 12–22–10; 8:45 am]

BILLING CODE P

FEDERAL DEPOSIT INSURANCE CORPORATION

Sunshine Act Meeting

Pursuant to the provisions of the "Government in the Sunshine Act" (5 U.S.C. 552b), notice is hereby given that at 11:10 a.m. on Tuesday, December 14, 2010, the Board of Directors of the Federal Deposit Insurance Corporation met in closed session to consider matters related to the Corporation's supervision, corporate and resolution activities.

In calling the meeting, the Board determined, on motion of Vice Chairman Martin J. Gruenberg, seconded by Director John E. Bowman (Acting Director, Office of Thrift Supervision), concurred in by Director Thomas J. Curry (Appointive), Director John G. Walsh (Acting Comptroller of the Currency), and Chairman Sheila C. Bair, that Corporation business required its consideration of the matters which were to be the subject of this meeting on less than seven days' notice to the public; that no earlier notice of the meeting was practicable; that the public interest did not require consideration of the matters in a meeting open to public observation; and that the matters could be considered in a closed meeting by authority of subsections (c)(2), (c)(4), (c)(6), (c)(8), (c)(9)(A)(ii), (c)(9)(B), and (c)(10) of the "Government in the Sunshine Act" (5 U.S.C. 552b(c)(2), (c)(4), (c)(6), (c)(8), (c)(9)(A)(ii), (c)(9)(B), and (c)(10)).

The meeting was held in the Board Room of the FDIC Building located at 550—17th Street, NW., Washington, DC.

Dated: December 14, 2010.

Federal Deposit Insurance Corporation.

Valerie J. Best,

Assistant Executive Secretary.

[FR Doc. 2010–32501 Filed 12–21–10; 4:15 pm]

BILLING CODE P

FEDERAL DEPOSIT INSURANCE CORPORATION

Update to Notice of Financial Institutions for Which the Federal Deposit Insurance Corporation Has Been Appointed Either Receiver, Liquidator, or Manager

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Update Listing of Financial Institutions in Liquidation.

SUMMARY: Notice is hereby given that the Federal Deposit Insurance Corporation (Corporation) has been appointed the sole receiver for the following financial institutions effective as of the Date Closed as indicated in the listing. This list (as updated from time to time in the **Federal Register**) may be relied upon as "of record" notice that the Corporation has been appointed receiver for purposes of the statement of policy published in the July 2, 1992 issue of the **Federal Register** (57 FR 29491). For further information concerning the identification of any institutions which have been placed in liquidation, please visit the Corporation Web site at *http://www.fdic.gov/bank/individual/failed/banklist.html* or contact the Manager of Receivership Oversight in the appropriate service center.

Dated: December 13, 2010.

Federal Deposit Insurance Corporation.

Pamela Johnson,

Regulatory Editing Specialist.

INSTITUTIONS IN LIQUIDATION

[In alphabetical order]

FDIC Ref. No.	Bank name	City	State	Date closed
10317	Earthstar Bank	Southampton	PA	12/10/2010
10318	Paramount Bank	Farmington Hills	MI	12/10/2010

[FR Doc. 2010–32205 Filed 12–22–10; 8:45 am]
BILLING CODE 6714–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Update to Notice of Financial Institutions for Which the Federal Deposit Insurance Corporation Has Been Appointed Either Receiver, Liquidator, or Manager

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Update Listing of Financial Institutions in Liquidation.

SUMMARY: Notice is hereby given that the Federal Deposit Insurance Corporation (Corporation) has been appointed the sole receiver for the following financial institutions effective as of the Date Closed as indicated in the listing. This list (as updated from time to time in the **Federal Register**) may be relied upon as "of record" notice that the Corporation has been appointed receiver for purposes of the statement of policy published in the July 2, 1992 issue of the **Federal Register** (57 FR 29491). For further information concerning the identification of any institutions which have been placed in liquidation, please visit the Corporation Web site at *http://www.fdic.gov/bank/individual/failed/banklist.html* or contact the Manager of Receivership Oversight in the appropriate service center.

Dated: November 22, 2010.

Pamela Johnson,

Regulatory Editing Specialist, Federal Deposit Insurance Corporation.

INSTITUTIONS IN LIQUIDATION

[In alphabetical order]

FDIC Ref. No.	Bank name	City	State	Date closed
10314	Allegiance Bank of North America	Bala Cynwyd	PA	11/19/2010
10315	First Banking Center	Burlington	WI	11/19/2010
10316	Gulf State Community Bank	Carrabelle	FL	11/19/2010

[FR Doc. 2010–32206 Filed 12–22–10; 8:45 am]
BILLING CODE 6714–01–P

FEDERAL FINANCIAL INSTITUTIONS EXAMINATION COUNCIL

[Docket No. AS10–12]

Appraisal Subcommittee (ASC); ASC Rules of Operation; Amended

AGENCY: Appraisal Subcommittee of the Federal Financial Institutions Examination Council.

ACTION: Notice of adoption of amended ASC Rules of Operation by vote of the ASC at its December 8, 2010 meeting. The amended ASC Rules of Operation supersede the ASC Rules of Operation as published in 56 FR 28561 (June 21, 1991), and as previously amended by 56 FR 33451 (July 22, 1991); therefore, 56 FR 28561 and 56 FR 33451 will be withdrawn, removed, and deleted upon publication of the amended ASC Rules of Operation.

SUMMARY: This notice announces the Appraisal Subcommittee (ASC) of the Federal Financial Institutions Examination Council's (FFIEC) adoption of its amended ASC Rules of Operation. The ASC Rules of Operation serve as corporate bylaws outlining the ASC's purpose, functions, authority, organization and operation.

SUPPLEMENTARY INFORMATION: Section 1102 (12 U.S.C. 3310) of Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (Title XI) established the ASC. The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the Dodd-Frank Act) amended numerous provisions in Title XI. The amended ASC Rules of Operation reflect the amendments to Title XI brought about by the Dodd-Frank Act, and describe, among other things, the organization of ASC meetings, notice requirements for meetings, quorum requirements, and certain practices regarding the disclosure of information.

DATES: *Effective Date:* Immediately.

FOR FURTHER INFORMATION CONTACT: James R. Park, Executive Director, at (202) 595–7575, or Alice M. Ritter, General Counsel, at (202) 595–7577, via Internet e-mail at *jim@asc.gov* and *alice@asc.gov,* respectively, or by U.S. Mail at Appraisal Subcommittee, 1401 H Street, NW., Suite 760, Washington, DC 20005.

* * * * *

ASC Rules of Operation

Article I

Nature and Purpose

Section 1.01. *Appraisal Subcommittee Established.*

The Appraisal Subcommittee (ASC) is established by Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (Title XI), as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act).

Section 1.02. *Definitions.*

(1) *Appraisal Subcommittee; ASC.* The terms "Appraisal Subcommittee" and "ASC" mean the Appraisal Subcommittee of the Federal Financial Institutions Examination Council.

(2) *Title XI.* The term "Title XI" means Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (Pub. L 101–73, 103 Stat. 511 (1989) 12 U.S.C. 3310, 3331–3351).

(3) *Federal financial institutions regulatory agencies.* The term "Federal financial institutions regulatory agencies" means the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, and the National Credit Union Administration.

(4) *ASC members.* The term "ASC members" means those persons designated as representatives to the Appraisal Subcommittee pursuant to:

a) section 1011 of the Federal Financial Institutions Examination Council Act of 1978 (12 U.S.C. 3310), as added by section 1102 of Title XI and amended by section 1473(s) of the Dodd-Frank Act; and

b) the Department of Housing and Urban Development pursuant to 12 U.S.C. 1708(e)(2).

(5) *Member agency.* The term "member agency" means those agencies authorized to appoint designees to the Appraisal Subcommittee described in:

a) section 1011 of the Federal Financial Institutions Examination Council Act of 1978 (12 U.S.C. 3310), as added by section 1102 of Title XI and amended by section 1473(s) of the Dodd-Frank Act; and

b) the Department of Housing and Urban Development pursuant to 12 U.S.C. 1708(e)(2).

(6) *Council.* The term "Council" means the Federal Financial Institutions Examinations Council.

(7) *Chairperson.* The term "Chairperson" means the Chairperson of

the Appraisal Subcommittee selected by the Council.

(8) *Vice Chairperson.* The term "Vice Chairperson" means the Vice Chairperson of the Appraisal Subcommittee serving as either the outgoing Chairperson, or selected by the Appraisal Subcommittee in accordance with section 3.04.a below.

(9) *Secretary.* The term "Secretary" means the Executive Director of the Appraisal Subcommittee of the Federal Financial Institutions Examination Council, or his/her designee. The Secretary may delegate the ministerial duties of Secretary to staff.

(10) *Staff.* The term "staff" means the office personnel of the Appraisal Subcommittee of the Federal Financial Institutions Examination Council.

(11) *Meeting.* The term "meeting" means the deliberations (including those conducted by conference telephone call, or by any other method) of at least four ASC members where such deliberations determine or result in the joint conduct or disposition of agency business. Meetings may be held in open session or closed session as authorized by law. (See sections 3.06 thru 3.09 below.)

(12) *Open Session.* The term "open session" means a properly noticed meeting, pursuant to section 3.07 below, of the ASC that is open to public observation. Members of the public are welcome to attend and observe, but are required to notify staff in advance in accordance with established policy.

(13) *Closed Session.* The term "closed session" means a properly noticed meeting, pursuant to section 3.07 below, of the ASC that is closed to attendance by ASC members only, and any other persons requested to be in attendance by the ASC members. The ASC may meet in closed session to discuss personnel matters, and/or to discuss Compliance Reviews prior to taking action on final Compliance Review Reports. The subject matter discussed in any closed session shall be described in the Federal Register notice of the meeting.

(14) *Briefing.* The term "briefing" typically means informal background discussions among ASC members and staff which clarify issues and expose varying views. A briefing is not a meeting, and as such, is not subject to notice or open session meeting provisions. Briefings may be called by the Chairperson, ASC members or staff. Briefings may be held by any means preferable to those attending. Summary notes shall be taken concerning matters discussed. Briefings may also include sessions with individuals from outside the agency where ASC members listen to a presentation and may elicit additional information.

(15) *Notation Vote.* The term "notation vote" means transaction of business, in accordance with section 3.13 below, by circulation of written items, when it has been determined that the business to be conducted is routine or noncontroversial.

(16) *Federally related transaction.* The term "federally related transaction" means any real estate-related financial transaction which—

(A) a Federal financial institutions regulatory agency engages in, contracts for, or regulates; and

(B) requires the services of an appraiser.

Section 1.03. *ASC Functions.*

The functions of the ASC are set forth in section 1103 of Title XI (12 U.S.C. 3332).

Section 1.04. *Authority.*

Except as otherwise provided in Title XI, all authority for carrying out the functions of the ASC shall reside in the ASC; however, from time to time, the ASC may delegate any of its authority as it deems appropriate to ASC members, officers, or employees pursuant to the ASC Delegations of Authority, or other documents, including, but not limited to, ASC regulations, Policy Statements, manuals, position descriptions, orders and certain instructions, or as otherwise authorized by law. As provided in section 1105 of Title XI (l2 U.S.C. 3334), the Chairperson of the ASC shall have authority to appoint such officers and staff as may be necessary to carry out the functions of the ASC.

Article 11

Assessments

Section 2.01. *Assessments.*

In accordance with section 1109 of Title XI (12 U.S.C. 3338), the ASC shall have the authority to receive an annual fee of not more than $40 from each State licensed or certified appraiser eligible to perform appraisals in federally related transactions. The fee may be modified up to a maximum of $80 per annum in accordance with section 1109 (a)(4)(A) of Title XI. At such time that section 1124 (a) and (e) of Title XI are implemented, thereby requiring payment of the annual registry fee by appraisal management companies, the ASC shall have the authority to receive an annual fee from each appraisal management company in accordance with section 1109 (a)(4)(B) of Title XI.

Article III

Organization and Operation of the ASC

Section 3.01. *ASC Members.*

The members of the ASC shall be those persons described in section 1102 of Title XI (12 U.S.C. 3310), and, pursuant to 12 U.S.C. 1708(e)(2), the Secretary (or designee) of the Department of Housing and Urban Development. (See section 1.02 (4)).

Section 3.02. *General Powers.*

The affairs, business and property of the ASC shall be managed by the Chairperson of the ASC pursuant to the ASC's direction and the ASC's powers shall include those set forth in section 1106 of Title XI (12 U.S.C. 3335). The Subcommittee does not have the authority to lease office space in its own name and must rely on the General Services Administration (GSA) for the procurement of office space by entering into an occupancy agreement with the GSA for space leased by the GSA.

Section 3.03. *Compensation and Expenses of ASC Members.*

Each ASC member shall serve on the ASC without compensation other than that received from their respective employing Federal agency; but each ASC member shall be entitled to an advance or reimbursement for reasonable expenses in carrying out their official duties as an ASC member. Such advance or reimbursement shall be made only upon written request accompanied by adequate documentation of such expenses.

Section 3.04. *Chairperson of the ASC.*

In accordance with section 1104(a) of Title XI (12 U.S.C. 3333(a), the Council shall elect a Chairperson of the ASC. The term of office of the Chairperson shall be for a two-year term. The Chairperson's term shall expire on March 31 every other year. The Chairperson shall carry out all duties required by Title XI and these Rules, and shall perform such other duties as from time to time may be assigned by the ASC.

Section 3.04.a *Vice Chairperson of the ASC.*

The outgoing Chairperson shall serve as the Vice Chairperson for a period of one year, with the term ending March 31. During the March meeting, the ASC shall vote upon a Vice Chairperson to serve for the next one-year term, which shall coincide with the 2nd year of the Chairperson's two-year term. It is anticipated that the Vice Chairperson could serve as the next Chairperson, if so elected by the Council. The Vice Chairperson shall assist the Chairperson as needed, and shall act on behalf of the ASC in the absence or incapacity of the Chairperson.

Section 3.05. *ASC member Vacating Position in Respective Agency.*

A person shall remain an ASC member of the ASC until that person resigns or is no longer employed by the designating agency, or until the agency

head designates a replacement. If the vacating ASC member is Chairperson of the ASC, a succeeding Chairperson shall be selected by the Council under section 1104(a) of Title XI (12 U.S.C. 3333(a)).

Section 3.06. *Organization of ASC Meetings.*

(a) The Chairperson of the ASC shall preside at ASC meetings. In his or her absence, the Vice Chairperson shall preside at such ASC meeting.

(b) The ASC shall hold its meetings in public session, but may close certain portions of its meetings related to personnel matters, or to discuss Compliance Reviews prior to taking action on final Compliance Review Reports. The subject matter discussed in any closed or executive session shall be described in the **Federal Register** notice of the meeting.

(c) The Secretary shall draft and transmit the minutes of the meeting to each ASC member. The Secretary shall be responsible for recording the minutes, including the full text of each resolution voted on by the ASC and the substance of each action voted on by the ASC as well as the vote. The Secretary will be responsible for certifying or attesting to true copies of the minutes, or other documents, stating that actions were in fact taken by the ASC. The Secretary will also be responsible for maintaining and preserving at a single place, available for inspection at reasonable times by any ASC member or any person designated by any ASC member, the complete minutes of the proceedings of the ASC.

(d) Regular meetings of the ASC shall be held in Washington, DC, at a location designated by the Chairperson, or in such other place as the ASC may designate. Special meetings shall be held in such place and at such location as designated by the calling party or parties. Regular and special meetings shall be noticed as set forth in section 3.07(a) and (b) below.

(e) Regular meetings of the ASC shall be held at least monthly, unless not practicable, at the call of the Chairperson. Special meetings shall be held as provided in section 3.07(b) below.

Section 3.07. *Notice of Meetings.*

(a) The Secretary shall send a notice of each regular meeting, whether open session or closed session, to the **Federal Register** for publication at least seven (7) days prior to the date the regular meeting is to be held, and to each ASC member by facsimile or email at least seven (7) days prior to the date of the regular meeting. Every regular meeting notice shall specify the date, time, place and subject matter of the meeting.

(b) The Chairperson or any four (4) or more ASC members may call a special meeting, in which case, notice posting date, time, place and subject matter of the special meeting shall be published in the **Federal Register** and distributed to each ASC member as soon as practicable.

(c) A waiver of any meeting notice signed by an ASC member shall be the equivalent of timely receipt by that ASC member of notice. An ASC member's attendance at any meeting shall constitute waiver of notice of that meeting unless the ASC member attends solely for the purpose of objecting to the transaction of any business because the meeting was not lawfully called or convened.

Section 3.08. *Quorum, Manner of Acting and Adjournment.*

(a) At any regular or special meeting, the presence of a majority of the ASC members shall constitute a quorum for the transaction of business. For the purpose of the preceding sentence, an alternate will count only if he/she has been so designated in writing by the head of the respective member agency. The acts voted by a majority of ASC members present at such meeting shall be the acts of the ASC. An ASC member who is present at a meeting but who abstains from voting on any matter shall be counted for purposes of determining whether a quorum is present, whether that ASC member withdraws from or remains in the meeting during such vote. A majority of the ASC members present at any meeting, whether or not there is a quorum present, may adjourn the meeting. In transacting the business of the ASC, each ASC member shall be entitled to only one vote.

(b) No item shall be voted upon by the ASC except (1) where notice that the item will be on the agenda of a regular meeting has been given pursuant to section 3.07 above, (2) where written notice that the item will be on the agenda of any meeting is delivered to each ASC member at least two (2) full business days prior to the date of such meeting, or (3) upon the unanimous consent of all ASC members.

Section 3.09. *Agenda of ASC Meetings.*

(a) The agenda for meetings shall be determined by the Chairperson in consultation with the Secretary, or where appropriate by the four (4) or more ASC members calling the meeting; provided that the Chairperson shall include any item on the agenda when he/she receives a request in writing from any single ASC member at least three (3) full business days prior to the date of the meeting.

(b) Any ASC member may request during any regular or special meeting that an item be placed on the agenda of that meeting. The item shall be placed on the agenda for discussion but only if a majority of those present approve the request.

Section 3.10. *Certain Interest of the ASC members.*

No person serving as an officer or employee of the ASC shall be deemed to have an interest adverse to the interest of the ASC solely because that person is employed by a Federal agency and assigned to the ASC. No ASC member shall be required to abstain from voting on any matter solely because the Federal agency employing that member is or will be affected. No act of the ASC shall be subject to challenge, or in any way be affected by participation of said ASC member in such vote.

Section 3.11. *Proxies.*

A member agency may designate an alternate from his or her agency to carry out the ASC member's duties. Such alternate may act in all matters as an ASC member, except that he/she may not act as the presiding officer of an ASC meeting.

Section 3.12. *Use of Conference Call Communications Equipment.*

Any or all ASC members may participate in a meeting through the use of conference call telephone or similar communications equipment, by means of which all persons participating in the meeting can simultaneously speak and hear each other. Any ASC member so participating in the meeting shall be deemed to be present for all purposes. Actions taken by the ASC at meetings where one or more ASC members participate through the use of such equipment, including the votes of each ASC member, shall be recorded in the minutes of the meeting.

Section 3.13. *Notation Vote:* Transaction of Business by Circulation of Written Items.

Any other provision of these Rules to the contrary notwithstanding, business may be conducted by the ASC by the circulation of written items to all ASC members. The Secretary, in consultation with the Chairperson: (1) Shall determine whether items qualify for this expedited voting method because they are routine or noncontroversial; and (2) shall specify a deadline for the receipt of ASC members' responses. Qualifying items may be transmitted in paper or electronic format. The Secretary shall confirm each ASC member's actual receipt of items, and the response period shall be measured from the day of actual receipt. ASC members may vote in one of three ways: approve,

disapprove or veto. The matter shall be approved or disapproved by a majority vote of the ASC members participating in the voting process, so long as the voting ASC members comprise a quorum, as generally defined in Section 3.08(a). A vote to veto will cause the matter to be placed on the agenda of the next scheduled ASC meeting, as governed by Section 3.09. The disposition of each written item circulated for vote, including the vote of each ASC member, shall be recorded in the minutes of the next meeting of the ASC following the date the notation vote closed.

Article IV

Officers and Employees

Section 4.01. *Permanent Officers and Employees.*

(a) Except as otherwise specifically directed by the ASC, its Chairperson shall have power to appoint and terminate such officers and employees as from time to time are deemed necessary to carry out the ASC's mission. Position descriptions will be written for all permanent personnel employed by the ASC. Procedures relative to the appointment, termination, and compensation practices of the ASC shall be consistent with the appointment and compensation practices of the Council, or in accord with the policies set forth in Title 5, United States Code and applicable OPM rules and regulations.

(b) The ASC may adopt from time to time such rules or regulations governing the conduct of officers and employees as it deems appropriate.

Section 4.02. *Officers and Employees Detailed From Federal Agencies.*

Any person in the employ of any Federal agency detailed to the ASC shall be considered an officer or employee of the ASC. Such persons shall be assigned to and serve the ASC for a designated, but renewable, period of time, and salaries and benefits received by such officers or employees shall be paid to them by the agency from which that officer or employee is assigned. All salaries and benefits received by such officers and employees shall be reimbursed by the ASC to the detailee's home agency. Each Federal agency will apply its own rules, regulations, and policies to the circumstances under which officers or employees assigned to the ASC may resume their duties at that agency upon termination of assignment to the ASC.

Article V

Fiscal Year

Section 5.01. *Fiscal Year.*

The ASC budget shall be prepared on the basis of a fiscal year ending on September 30th.

Article VI

Amendments

Section 6.01. *Amendments.* Unless specifically stated herein, any of these Rules may be altered, amended or repealed, or new Rules may be adopted at any meeting, regular or special, of the ASC by the affirmative act of a majority of all ASC members, so long as such action is consistent with the requirements of applicable law. Amendments to these Rules shall not be given retroactive effect.

Article VII

Public Information

Section 7.01. *Freedom of Information Act.*

The Freedom of Information Act (FOIA) is a Federal law that gives the public the right to make requests for Federal agency records. All Federal agencies are required to make requested records available unless the records are protected from disclosure by certain FOIA exemptions. The ASC has adopted regulations (12 CFR 1102). Subpart D of the regulations implements FOIA and describes the procedures for persons to request documents from the ASC. This information is also available on the ASC website at *www.asc.gov.*

Section 7.02. *Public Statements and Statements to the Press.*

No written statements shall be made to the press expressing the ASC's policy or descriptive of its action except as authorized by the ASC. Such statements shall be issued, when authorized and approved, through the office of the Executive Director as delegated by the Chairperson. Where an individual ASC member is responding on issues pending before the ASC, that ASC member should use best efforts to alert other ASC members and the Secretary concerning the substance of the response as soon as possible.

Section 7.03. *Disclaimer.*

Except when otherwise authorized by the ASC, individual ASC members, officers and employees shall include in written statements and oral presentations the following disclaimer of responsibility:

The Appraisal Subcommittee, as a matter of policy, disclaims responsibility for any private publication or statement by any of its Subcommittee members, officers, or employees. The views expressed herein are those of the author and do not necessarily reflect the views of the Subcommittee.

The wording of the disclaimer may vary with the circumstances so long as its substance is clearly communicated. Any written statement or oral presentation which reflects Subcommittee positions must set forth those positions accurately and, if it contains differences with Subcommittee positions, it should clearly state that such positions are solely those of the author.

Article VIII

Advisory Committee

Section 8.01. *Appointment of an Advisory Group.*

Subject to the Federal Advisory Committee Act (5 U.S.C. App. 1–14) and to such procedures as it may from time to time adopt, the ASC may establish nonvoting advisory group(s). Such advisory group(s) shall meet with the ASC on a schedule determined by the ASC. Members of the advisory group(s) may receive from the ASC an allowance, in an amount to be determined by the ASC, for necessary expenses incurred in attending such meetings.

Article IX

Administrative Support

Section 9.01. *Service of Administrative Support.*

(a) To insure that the orderly administration of the affairs of the ASC is accomplished, administrative support functions shall be provided by the permanent staff of the ASC with assistance, when needed, from staff of the member agencies.

(b) The Chairperson shall have the authority to negotiate and execute agreements regarding personnel, payroll, grant administration, procurement, and other services, consistent with directives of the ASC. In executing this authority, the Chairperson shall be authorized to obtain such administrative support services as he/she deems necessary.

Article X

Report to Congress

Section 10.01. *Annual Report to Congress.*

In accordance with section 1103 of Title XI (12 U.S.C. 3332), the ASC shall transmit an annual report to Congress not later than June 15 of each year that describes the manner in which each function assigned to the Appraisal Subcommittee has been carried out during the preceding year. The report shall also detail the activities of the Appraisal Subcommittee, including the results of Compliance Reviews of State appraiser regulatory agencies, and provide an accounting of disapproved

actions and warnings taken in the previous year, including a description of the conditions causing the disapproval and actions taken to achieve compliance.

Section 10.02. *Preparation of Reports.*

The Executive Director or other party as designated by the ASC is directed to prepare in a timely fashion, for review and approval by the ASC, the annual report and such other documents concerning the activities or decisions or recommendations of the ASC as is required by law or requested by the Congress or any other party.

Article XI

Conduct

Section 11.01. *Ethics Provision.*

The ASC members of the ASC and its officers and employees shall be required to abide by a code of ethics, consistent with applicable law.

* * * * *

By the Appraisal Subcommittee.

Dated: December 17, 2010.

Deborah S. Merkle,

Chairman.

[FR Doc. 2010–32230 Filed 12–22–10; 8:45 am]

BILLING CODE P

FEDERAL TRADE COMMISSION

Charges for Certain Disclosures

AGENCY: Federal Trade Commission.

ACTION: Notice regarding charges for certain disclosures.

SUMMARY: The Federal Trade Commission announces that the ceiling on allowable charges under Section 612(f) of the Fair Credit Reporting Act ("FCRA") will increase from $10.50 to $11.00 effective January 1, 2011. Under 1996 amendments to the FCRA, the Federal Trade Commission is required to increase the $8.00 amount referred to in paragraph (1)(A)(i) of Section 612(f) on January 1 of each year, based proportionally on changes in the Consumer Price Index ("CPI"), with fractional changes rounded to the nearest fifty cents. The CPI increased 35.51 percent between September 1997, the date the FCRA amendments took effect, and September 2010. This increase in the CPI, and the requirement that any increase be rounded to the nearest fifty cents, results in a maximum allowable charge of $11.00 effective January 1, 2011.

DATES: *Effective Date:* January 1, 2011.

ADDRESSES: Federal Trade Commission, Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Clarke W. Brinckerhoff, Bureau of Consumer Protection, 202–326–3208, or Keith B. Anderson, Bureau of Economics, Federal Trade Commission, Washington, DC 20580, 202–326–3428.

SUPPLEMENTARY INFORMATION: Section 612(f)(1)(A) of the Fair Credit Reporting Act, which became effective in 1997, provides that a consumer reporting agency may charge a consumer a reasonable amount for making a disclosure to the consumer pursuant to Section 609 of the Act.[1] The law states that, where a consumer reporting agency is permitted to impose a reasonable charge on a consumer for making a disclosure to the consumer pursuant to Section 609, the charge shall not exceed $8.00 and shall be indicated to the consumer before making the disclosure. Section 612(f)(2) states that the Federal Trade Commission ("the Commission") shall increase the $8.00 maximum amount on January 1 of each year, based proportionally on changes in the Consumer Price Index, with fractional changes rounded to the nearest fifty cents. An amendment of this section by the Consumer Financial Protection Act of 2010[2] provides that the newly-created Consumer Financial Protection Bureau will perform this task in future years.

Section 211(a)(2) of the Fair and Accurate Credit Transactions Act of 2003 ("FACT Act") added a new Section 612(a) to the FCRA that gives consumers the right to request free annual disclosures once every 12 months. The maximum allowable charge established by this Notice does not apply to requests made under that provision. The charge does apply when a consumer who orders a file disclosure has already received a free annual disclosure and does not otherwise qualify for an additional free disclosure.

The Commission considers the $8.00 amount referred to in paragraph (1)(A)(i) of Section 612(f) to be the baseline for the effective ceiling on reasonable charges dating from the effective date of the amended FCRA, *i.e.,* September 30, 1997. Each year the Commission calculates the proportional increase in the Consumer Price Index (using the most general CPI, which is for all urban consumers, all items) from September 1997 to September of the current year. The Commission then determines what modification, if any, from the original base of $8.00 should be made effective on January 1 of the subsequent year, given the requirement that fractional changes be rounded to the nearest fifty cents.

Between September 1997 and September 2010, the Consumer Price Index for all urban consumers and all items increased by 35.51 percent—from an index value of 161.2 in September 1997 to a value of 218.439 in September 2010. An increase of 35.51 percent in the $8.00 base figure would lead to a new figure of $10.84. However, because the statute directs that the resulting figure be rounded to the nearest $0.50, the maximum allowable charge should be $11.00.

The Commission therefore determines that the maximum allowable charge for the year 2011 will be $11.00.

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 2010–32296 Filed 12–22–10; 8:45 am]

BILLING CODE 6750–01–P

[1] This provision, originally Section 612(a), was added to the FCRA in September 1996 and became effective in September 1997. It was relabeled Section 612(f) by Section 211(a)(1) of the Fair and Accurate Credit Transactions Act of 2003 ("FACT Act"), Public Law 108–159, which was signed into law on December 4, 2003.

[2] Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, Title X, Section 1088.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

[Document Identifier: CMS–10321]

Office of Consumer Information and Insurance Oversight; Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: The Office of Consumer Information and Insurance Oversight, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of Consumer Information and Insurance Oversight (OCIIO) is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

1. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of*

Information Collection: Early Retiree Reinsurance Program (ERRP); *Use:* Under section 1102 of the Affordable Care Act and implementing regulations at 45 CFR part 149, employment-based plans that offer health benefits to early retirees and their spouses, surviving spouses and dependents are eligible under a temporary program to receive a tax-free reimbursement for the costs of certain health benefits for such individuals (the Early Retiree Reinsurance Program, or ERRP). In order to qualify, plan sponsors must submit a complete application to the U.S. Department of Health & Human Services (HHS). In order to receive reimbursement under the program, they must also submit documentation of actual costs for health care benefits, which consists of documentation of actual costs for the items and services involved, and a list of individuals to whom the documentation applies. Once HHS reviews and analyzes the information on the application, notification will be sent to the plan sponsor about its eligibility to participate in the program. Once HHS reviews and analyzes each reimbursement request, reimbursement under the program will be made to the sponsor, as appropriate. The program's funding is limited to $5 billion, and the program sunsets on January 1, 2014. *Form Number:* CMS–10321 (OMB–0938–1087); *Frequency:* Occasionally; *Affected Public:* Private Sector: Business or other for-profits and Not-for-profit institutions: State, Local, or Tribal Governments; *Number of Respondents:* 13,200; *Number of Responses;* 71,330; *Total Annual Hours:* 1,927,575. (For policy questions regarding this collection, contact Dave Mlawsky at (410) 786–6851. For all other issues call (410) 786–1326.)

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access CMS' Web site at *http://www.cms.hhs.gov/PaperworkReductionActof1995,* or E-mail your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov,* or call the Reports Clearance Office on (410) 786–1326.

In commenting on the proposed information collections please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in one of the following ways by February 22, 2011:

1. *Electronically.* You may submit your comments electronically to *http://www.regulations.gov.* Follow the instructions for "Comment or Submission" or "More Search Options" to find the information collection document(s) accepting comments.

2. By regular mail. Office of Consumer Information and Insurance Oversight, Department of Health and Human Services, Attention: Paperwork Reduction Act, Room 445–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201. Please allow sufficient time for mailed comments to be received before the close of the comment period. (Because access to the interior of the Hubert H. Humphrey Building is not readily available to persons without Federal government identification, commenters are encouraged to leave their comments in the OCIIO drop slots located in the main lobby of the building. A stamp-in clock is available for persons wishing to retain a proof of filing by stamping in and retaining an extra copy of the comments being filed.)

Dated: December 20, 2010.

Kenneth Cohen,

Director, Executive Secretariat and Regulatory Affairs, Office of Consumer Information and Insurance Oversight.

[FR Doc. 2010–32266 Filed 12–22–10; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration on Aging

Funding Availability for Title VI Grant Applications; Extension

Purpose of Notice: Because of the continuing needs of Tribal elders, the Administration on Aging is extending the date for which the Title VI grants applications for the grant period April 1, 2011 to March 31, 2014 are due. Applications will be accepted from Tribes with grants that end on March 31, 2011.

Funding Opportunity Title/Program Name: Older Americans Act (OAA), Title VI, Part A—Grants for Native Americans, Part B—Grants for Native Hawaiian Programs and Part C—Grants for the Native American Caregiver Support Program.

Announcement Type: This is the second announcement regarding these grant dollars extending the due date.

Funding Opportunity Number: Program Announcement No. HHS–2011–AoA–Title VI–1101.

Statutory Authority: The Older Americans Act, Public Law 109–365.

Catalog of Federal Domestic Assistance (CFDA) Number: 93.047, Title VI Parts A and B and 93.054, Title VI Part C.

DATES: The deadline date for the submission of applications is January 7, 2011.

I. Funding Opportunity Description

This announcement seeks proposals for grants to provide nutritional and supportive services to Indian elders and Native Hawaiian elders under Part A and Part B and Family Caregiver support services under Part C. The goal of these programs is to increase home and community based services to older Indians, Alaska Natives and Native Hawaiians, which respond to local needs and are consistent with evidence-based prevention practices. A detailed description of the funding opportunity may be found at *http://www.aoa.gov.*

II. Award Information

1. *Funding Instrument Type:* Grant.

2. *Anticipated Total Priority Area Funding per Budget Period.*

The Administration on Aging (AoA) will accept applications for funding for a three-year project period, April 1, 2011 to March 31, 2014, in FY 2011 under the OAA, Title VI, Part A—Grants for Native Americans, Part B—Grants for Native Hawaiian Programs and Part C—Grants for the Native American Caregiver Support Program. Current annual funding levels for Title VI, Part A and Part B range from $76,160 to $186,000. Current annual funding levels for Title VI, Part C range from $14,410 to $57,680. Distribution of funds among tribal organizations and Native Hawaiian organizations is subject to the availability of appropriations to carry out Title VI. Funding is based on the number of eligible elders age 60 and over in your proposed service area. Successful applications from new grantees will be funded pending availability of additional funds. For those applying for Title VI, Parts A and B funding you have the option to also apply for Part C. However, to apply for Part C, you must apply for both Part A and Part C or Part B and Part C.

III. Eligibility Criteria and Other Requirements

1. Eligible Applicants

Eligibility for grant awards is limited to Tribes with grants that end on March 31, 2011. A tribal organization or Indian tribe must meet the application requirements contained in sections 612(a), 612(b), and 612(c) of the OAA. A public or nonprofit organization serving Native Hawaiians must meet the application requirements contained in sections 622(1), 622(2), and 625 of the OAA. Under the Native American Caregiver Support Program, a tribal or

Native Hawaiian organization must meet the requirements as contained in section 631 of the OAA.

These sections are described in the application kit.

2. Cost Sharing or Matching

Cost Sharing or matching does not apply to these grants.

3. DUNS Number

All grant applicants must obtain a D–U–N–S number from Dun and Bradstreet. It is a nine-digit identification number, which provides unique identifiers of single business entities. The D–U–N–S number is free and easy to obtain from *http://www.dnb.com/US/duns_update/.*

4. Intergovernmental Review

Executive Order 12372, Intergovernmental Review of Federal Programs, is not applicable to these grant applications.

IV. Application and Submission Information

1. Address To Request Application Package

Application kits are available by writing to the U.S. Department of Health and Human Services, Administration on Aging, Office for American Indian, Alaskan Native, and Native Hawaiian Programs, Washington, DC 20201, by calling 202/357–3422, or online at *http://www.aoa.gov.*

2. Address for Application Submission

Applicants are encouraged to submit applications electronically via e-mail to *Grants.Office@aoa.hhs.gov* with the following in the subject line of the e-mail: "FY2011–2014 Title VI Application: (insert your tribal organization name)." If sending via overnight delivery service, applications must be submitted to the U.S. Department of Health and Human Services, Administration on Aging, Office of Grants Management, One Massachusetts Ave., NW., Room 4714, Washington, DC 20201, attn: Yi-Hsin Yan, and documented with a receipt by the deadline listed in the **DATES** section of this Notice.

Faxed applications will not be accepted.

3. Submission Dates and Times

To receive consideration, applications must be received by 11:59 p.m. est on the deadline listed in the **DATES** section of this Notice.

V. Responsiveness Criteria

Each application submitted will be screened to determine whether it was received by the closing date and time. Applications received by the closing date and time will be screened for completeness and conformity with the requirements outlined in Sections III and IV of this Notice and the Program Announcement. Only complete applications that meet these requirements will be considered for funding.

VI. Application Review Information

Not Applicable.

VII. Agency Contacts

Direct inquiries regarding programmatic issues to U.S. Department of Health and Human Services, Administration on Aging, Office for American Indian, Alaskan Native and Native Hawaiian Programs, Washington, DC 20201, *telephone:* (202) 357–3502.

Dated: December 17, 2010.

Kathy Greenlee,

Assistant Secretary for Aging.

[FR Doc. 2010–32248 Filed 12–22–10; 8:45 am]

BILLING CODE 4154–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Docket Number NIOSH 161–A]

Draft Current Intelligence Bulletin "Occupational Exposure to Carbon Nanotubes and Nanofibers"

AGENCY: National Institute for Occupational Safety and Health (NIOSH) of the Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice of public meeting and availability of draft document for public comment.

SUMMARY: On Wednesday, April 8, 2009 [74 FR 15985], the National Institute for Occupational Safety and Health (NIOSH) of the Centers for Disease Control and Prevention (CDC), announced in the **Federal Register** plans to evaluate the scientific data on carbon nanotubes and to issue its findings on the potential health risks. A draft Current Intelligence Bulletin entitled "Occupational Exposure to Carbon Nanotubes and Nanofibers" has been developed which contains an assessment of the toxicological data and provides recommendations for the safe handling of these materials. NIOSH is seeking comments on the draft document and plans to have a public meeting to discuss the document. The draft document and instructions for submitting comments can be found at *http://www.cdc.gov/niosh/docket/review/docket161A/default.html.* This guidance publication does not have the force or effect of the law.

Public Comment Period: Comments must be received by February 18, 2011.

Public Meeting Time and Date: 9 a.m.–4 p.m., February 3, 2011.

Place: Millennium Hotel Cincinnati, Grand Ballroom A, 150 West 5th Street, Cincinnati, OH 45202.

Purpose of Meeting: To discuss and obtain comments on the draft document, "Occupational Exposure to Carbon Nanotubes and Nanofibers". Special emphasis will be placed on discussion of the following:

(1) Whether the hazard identification, risk estimation, and discussion of health effects for carbon nanotubes and nanofibers are a reasonable reflection of the current understanding of the evidence in the scientific literature;

(2) Workplaces and occupations where exposure to carbon nanotubes and nanofibers occur;

(3) Current strategies for controlling occupational exposure to carbon nanotubes and nanofibers (*e.g.,* engineering controls, work practices, personal protective equipment;

(4) Current exposure measurement methods and challenges in measuring workplace exposures to carbon nanotubes and nanofibers;

(5) Areas for future collaborative efforts (*e.g.,* research, communication, development of exposure measurement and control strategies).

Status: The forum will include scientists and representatives from various government agencies, industry, labor, and other stakeholders, and is open to the public. Attendance is limited only by the space available. The meeting room accommodates 100 people. Interested parties should contact the NIOSH Docket Office at *nioshdocket@cdc.gov*, (513) 533–8611, or fax (513) 533–8285, for information about how to register for the meeting. Due to limited space, notification of intent to attend the meeting must be made to the NIOSH Docket Office no later than January 28, 2011. Priority for attendance will be given to those providing oral comments. Other requests to attend the meeting will then be accommodated on a first-come basis.

Persons wanting to provide oral comments will be permitted 15 minutes. If additional time becomes available, presenters will be notified. All requests to present should contain the name, address, telephone number, and relevant business affiliations of the presenter, topic of the presentation, and

the approximate time requested for the presentation. Oral comments made at the public meeting must also be submitted to the NIOSH Docket Office in writing in order to be considered by the Agency.

Request for Information: NIOSH seeks to obtain materials, including published and unpublished reports and research findings, to evaluate the possible health risks of occupational exposure to carbon nanotubes and nanofibers. Examples of requested information include, but are not to be limited to:

(1) Identification of industries or occupations in which exposures to carbon nanotubes and nanofibers can occur;

(2) Trends in the production and use of carbon nanotubes and nanofibers;

(3) Exposure measurement data;

(4) Case reports or other health information demonstrating possible health effects in workers exposed to carbon nanotubes or nanofibers;

(5) Reports of experimental in vivo and in vitro studies that provide evidence of a dose-relationship between exposure to carbon nanotubes and nanofibers and biological activity;

(6) Reports of experimental data on the airborne characteristics of carbon nanotubes or nanofibers, including information on the amounts that are inhalable and respirable;

(7) Criteria and rationale for including workers in a medical surveillance and screening program;

(8) Description of work practices and engineering controls used to reduce or prevent workplace exposure to carbon nanotubes and nanofibers; and

(9) Educational materials for worker safety and training on the safe handling of carbon nanotubes and nanofibers.

ADDRESSES: Written comments or requests to attend or present at the meeting, identified by docket number NIOSH–161–A, may be submitted by any of the following ways:

- *Mail:* NIOSH Docket Office, Robert A. Taft Laboratories, MS–C34, 4676 Columbia Parkway, Cincinnati, OH 45226.
- *Facsimile:* (513) 533–8285.
- *E-mail: nioshdocket@cdc.gov.*

All information received in response to this notice will be available for public examination and copying at the NIOSH Docket Office, 4676 Columbia Parkway, Room 111, Cincinnati, OH 45226. A complete electronic docket containing all comments submitted will be available on the NIOSH Web page at *http://www.cdc.gov/niosh/docket*, and comments will be available in writing by request. NIOSH includes all comments received without change in the docket, including any personal information provided. All electronic comments should be formatted as Microsoft Word. Please make reference to docket number NIOSH 161–A.

FOR FURTHER INFORMATION CONTACT: Ralph D. Zumwalde, NIOSH, Robert A. Taft Laboratories MS–C32, 4676 Columbia Parkway, Cincinnati, OH 45226, telephone (513) 533–8320.

Dated: December 13, 2010.

Tanja Popovic,

Deputy Associate Director for Science, Centers for Disease Control and Prevention.

[FR Doc. 2010–32328 Filed 12–22–10; 8:45 am]

BILLING CODE 4163–19–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–R–153]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services, is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the Agency's function; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

1. *Type of Information Collection Request:* Reinstatement with change of a previously approved collection; *Title of Information Collection:* Medicaid Drug Utilization Review (DUR) Annual Report; *Use:* The DUR program is required to assure that prescriptions are appropriate, medically necessary and are not likely to result in adverse medical results. Each State DUR program must consist of prospective drug use review, retrospective drug use review, data assessment of drug use against predetermined standards, and ongoing educational outreach activities. In addition, States are required to submit an annual DUR program report that includes a description of the nature and scope of State DUR activities. Over the years, technology has changed as has the practice of the pharmacy. Therefore, CMS has revised the old survey vehicle to more fully address the current practices and areas of concern with the Medicaid Pharmacy Programs. *Form Number:* CMS–R–153 (OMB#: 0938–0659); *Frequency:* Annually; *Affected Public:* State, Local, or Tribal Governments; *Number of Respondents:* 51; *Total Annual Responses:* 51; *Total Annual Hours:* 20,298. (For policy questions regarding this collection contact Madlyn Kruh at 410–786–3239. For all other issues call 410–786–1326.)

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access CMS Web site address at *http://www.cms.hhs.gov/PaperworkReductionActof1995*, or e-mail your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov,* or call the Reports Clearance Office on (410) 786–1326.

To be assured consideration, comments and recommendations for the proposed information collections must be received by the OMB desk officer at the address below, no later than 5 p.m. on *January 24, 2011:* OMB, Office of Information and Regulatory Affairs, Attention: CMS Desk Officer. *Fax Number:* (202) 395–6974. *E-mail: OIRA_submission@omb.eop.gov.*

Dated: December 17, 2010.

Martique Jones,

Director, Regulations Development Division-B, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2010–32196 Filed 12–22–10; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier CMS–10367]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the

Centers for Medicare & Medicaid Services (CMS) is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

1. *Type of Information Collection Request:* New collection (Request for a new OMB Control Number); *Title of Information Collection:* Medicaid State Plan Preprint for Use by States When Implementing Section 6505 of the [Patient Protection and] Affordable Care Act; *Use:* [The] CMS has developed a Medicaid State Plan Preprint for use by States and specific to support the January 1, 2011, mandate of the prohibition on payments outside of the United States. The Preprint follows the format and requested information from prior preprints provided to the States by CMS and provides a placeholder and assurance of compliance with section 1902(a) of the Social Security Act; *Form Number:* CMS–10367 (OMB#: 0938–NEW); *Frequency:* Occasionally; *Affected Public:* State, Local, or Tribal Governments; *Number of Respondents:* 56; *Total Annual Responses:* 56; *Total Annual Hours:* 5. (For policy questions regarding this collection contact Carla Ausby at 410–786–2153. For all other issues call 410–786–1326.)

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access CMS' Web site at *http://www.cms.hhs.gov/PaperworkReductionActof1995,* or e-mail your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov,* or call the Reports Clearance Office on (410) 786–1326.

In commenting on the proposed information collections please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in one of the following ways by *February 22, 2011:*

1. *Electronically.* You may submit your comments electronically to *http://www.regulations.gov.* Follow the instructions for "Comment or Submission" or "More Search Options" to find the information collection document(s) accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, *Attention:* Document Identifier/OMB Control Number, Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

Dated: December 17, 2010.

Martique Jones,

Director, Regulations Development Division-B, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2010–32197 Filed 12–22–10; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–N–0266]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Study of Clinical Efficacy Information in Professional Labeling and Direct-to-Consumer Print Advertisements for Prescription Drugs; Correction

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; correction.

SUMMARY: The Food and Drug Administration (FDA) is correcting a notice that appeared in the **Federal Register** of December 3, 2010 (75 FR 75477). The document announced a proposed collection of information that has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995 (the PRA). The document was published with an error. FDA, upon further review, realized that 3 comments had been submitted in response to the 60-day notice and the responses to those comments are included in this notice. This document corrects that error.

FOR FURTHER INFORMATION CONTACT: Elizabeth Berbakos, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, 301–796–3792, *Elizabeth.Berbakos@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION: In FR Doc. 2010–30385, appearing on page 75480, in the **Federal Register** of Friday, December 3, 2010, the following correction is made:

On page 75480, in the third column, the last sentence in the sixth complete paragraph states that no comments were received on the paperwork burden for the 60-day notice that published in the **Federal Register** of June 16, 2010 (75 FR 34142). FDA is correcting that statement to read: Three comments were received that expressed support for the research and recommended minor improvements to the study. The responses to those comments are included in the following paragraphs.

(Comment 1) Several of this comment's suggestions have already been incorporated into our study design. Specifically, we agree that the study design should include the variables of age, education, ethnicity, race, health literacy, and whether the respondent is currently being treated with a prescription drug, and have included them in the questionnaire. Also, we have contracted with an organization that produces realistic ads and stimuli to ensure that we will show respondents realistic materials.

Another question from this comment was the presentation of our manipulations. To clarify, the specific format of the presentation will be text only. We are investigating the use of charts and other visuals in another study (FDA–2009–N–0263 (January 5, 2010), "Presentation of Quantitative Effectiveness and Risk Information to Consumers in Direct-to-Consumer (DTC) Broadcast and Print Advertisements for Prescription Drugs," OMB control number 0910–0663.) Because all of the respondents in the current study will see the information in the same format, this will not compromise our ability to answer the current research questions.

The comment also recommends expanding the physician study to include all health care professionals who have the ability to prescribe (*i.e.,* nurse practitioners and physician assistants). This is a good idea, but it changes our research question from how physicians use labels to how prescribers use labels. These groups vary in education and may vary in experience and training in how to interpret and use clinical trial data. Because we do not have a sample size that is large enough to analyze differences between these groups, we will limit the sample to physicians in this study.

Finally, the comment recommends that FDA publish findings from the preliminary study related to the current project, "Mental Models Study of Health Care Providers' Understanding of Prescription Drug Effectiveness" (FDA–2008–N–0589; April 3, 2009). We agree

and have taken steps to publish this report on FDA's Division of Drug Marketing, Advertising, and Communications Web site: *http://www.fda.gov/AboutFDA/CentersOffices/CDER/ucm090276.htm*.

(Comment 2) This comment had several suggestions regarding the physician study. First, it recommended that we show physicians the Prescribing Information (PI) in a manner consistent with how physicians usually view sections of it, particularly since how each physician views the PI may be highly individualized. We agree. Because there is likely much variability in the way physicians view prescription drug information, we have designed this part of the study to examine specifically those habits. To do so, we will show physicians a highlights section that is hyperlinked to the more complete sections of the PI. We will record the order in which physicians access each section and how much time they spend there. This will provide us with information to gauge how physicians view the information in the PI, something that we currently have no data on.

Second, this comment recommends that we show physicians final magazine ads rather than conceptual ads. We agree and, as discussed in the response to the previous comment, we have contracted with an organization that produces professional-quality ads.

Third, this comment recommends increasing the sample size from 500 to 800 individuals. We agree that a larger sample would be desirable, however, given resource constraints we are not able to increase the sample size. Moreover, we have conducted a power analysis and have determined that our current sample size is adequate to answer our research questions.

Fourth, the comment recommends the removal of statements in the questionnaire that the drug is fictitious and instead label it a "potentially new drug." FDA had many internal discussions regarding this issue and decided that because of the particular sample, it is necessary to be upfront with them about the nature of the drug. Physicians will be more savvy about the particulars of the chemical entities and the realism of the clinical benefits and we do not wish to make them skeptical of our purposes. We agree that this approach is preferable for consumers and so we will inform them that this is a potentially new drug in that part of the study.

Fifth, we agree that the characteristics of participants who are at risk and those who are or are not treating with a prescription drug may differ and we will include these variables in our analyses.

Sixth, the comment recommends altering question 17 of the questionnaire to reflect the physicians' use of the DTC ad versus their guess as to the understandability of the ad for patients. We agree that we are asking physicians to estimate the level of understanding their patients have. These perceptions are of specific interest to us as they relate to physicians' perceptions of DTC advertising and of the presentation of information in the ads. Physicians who have been in practice for any length of time may have a sense of how their patients will understand materials. This is a question that we will also investigate in relation to the number of years physicians have been in practice.

Seventh, the comment recommends that question 30 be split into two questions to separately assess the effect of DTC advertising on patients and the effect of DTC advertising on their practice. We agree and will make that change.

This comment also had two suggestions for the consumer part of the study. First, the comment recommended against delivering this study on a handheld device, as the viewing of the ad may render the concept unclear. We agree and have struggled with this issue, but due to the constraints of the internet panel, we cannot specify the type of device on which participants must take the survey. We have included a question to assess this variable, and we will analyze it to determine if there are sizable differences based on viewing medium.

Second, the comment recommends that the questionnaire avoid medical terminology and reference to the "prescribing information." We have attempted to make the questionnaire clear for consumers and do not see the word "prescribing information" in the questionnaire. The questionnaire provided for comment includes programming notes that the respondent will not see.

(Comment 3) First, this comment recommends evaluating the benefits and risks together and in a similar format so as not to bias the results. We agree that the benefits and risks should be evaluated together and have several measures to investigate both. We are keeping the risk information constant across all of our conditions specifically so as not to bias the results. Our research questions involve the conveyance of information about benefits. Because of the complexity of DTC ads, we cannot manipulate both benefits and risks at the same time. We are conducting other studies examining the presentation of risk information (For example, FDA–2010–N–0417 (August 26, 2010), "Experimental Study of Format Variations in the Brief Summary of Direct-to-Consumer Print Advertisements") and collectively, this body of research will answer questions of benefit and risk presentation. To clarify, risk information will be presented similarly to how it is currently presented in DTC print ads.

Second, the comment recommends the introduction of a control arm that is similar to what is currently being used in the marketplace. Our design includes control conditions that do not present placebo information. These ads will look identical to the ads for products that are currently on the market.

Third, the comment questions the use of comparative benefit and comparative safety questions. We are using these measures for reliability as another way to assess consumers' perceived risk and benefits. As recommended in the comment, we are using them for informational purposes only and not as a specific, separate measure of comparative advertising.

Fourth, the comment recognizes the complexity of the data that are available to be conveyed in DTC ads. We agree that there are a number of questions to be answered that cannot be addressed in the current study: *E.g.,* variations in clinical study designs, instruments used, populations studied, and varying degrees of severity of illness. We cannot address all questions in one study and have chosen to focus on the issues of placebo and framing in a treatment and prevention approach. We hope that the results of this study will spur additional follow on studies conducted by FDA and others. Although the issue of different therapeutic areas is also relevant, and a study looking at the two ends of the disease-seriousness spectrum would be a great follow on, the basic concepts of information processing should not differ depending on drug class. Although we agree that replication is valuable and necessary, we do not believe that limiting the study to two therapeutic areas impugns the internal validity of the study.

Fifth, the comment recommends wording changes to the question about taking the drug if the doctor prescribed it. Although we understand the rationale for changing this question, it is a measure of behavioral intention and as such, we wanted to have a more blunt measure of intention. It will not be used to assess doctor-patient interaction issues.

Sixth, the comment questions the inclusion of physicians in the study, citing concerns that consumer responses

cannot be compared to physician responses and that this comparison is not relevant to the regulation of DTC advertisements. Indeed, the primary reason for conducting the study with physicians is to explore their processing of the prescribing information (PI), wholly separate from the consumer study. Nevertheless, since we have the two samples, we are conducting some exploratory analyses to compare the responses of consumers to information about a drug to the physicians' understanding of the drug. While this does have relevance to the regulation of DTC advertising (*e.g.,* a DTC ad that features a presentation of information that brings consumers closer to the assessment of the physician will be preferred over that same ad with a presentation of information that moves them farther away), we are approaching this comparison as a first, exploratory attempt at this type of analysis.

Dated: December 20, 2010.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2010–32278 Filed 12–22–10; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–N–0074]

Agency Information Collection Activities; Announcement of Office of Management and Budget Approval; Registration and Product Listing for Owners and Operators of Domestic Tobacco Product Establishments and Listing of Ingredients in Tobacco Products

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a collection of information entitled "Registration and Product Listing for Owners and Operators of Domestic Tobacco Product Establishments and Listing of Ingredients in Tobacco Products" has been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995.

FOR FURTHER INFORMATION CONTACT: Jonna Capezzuto, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, 301–796–3794, e-mail: *Jonnalynn.Capezzuto@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: In the **Federal Register** of May 7, 2010 (75 FR 25267), the Agency announced that the proposed information collection had been submitted to OMB for review and clearance under 44 U.S.C. 3507. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. OMB has now approved the information collection and has assigned OMB control number 0910–0650. The approval expires on December 31, 2012. A copy of the supporting statement for this information collection is available on the Internet at *http://www.reginfo.gov/public/do/PRAMain.*

Dated: December 17, 2010.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2010–32277 Filed 12–22–10; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–N–0631]

Agency Information Collection Activities: Proposed Collection; Comment Request; Guidance for Industry on Updating Labeling for Susceptibility Test Information in Systemic Antibacterial Drug Products and Antimicrobial Susceptibility Testing Devices

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on FDA's "Guidance for Industry on Updating Labeling for Susceptibility Test Information in Systemic Antibacterial Drug Products and Antimicrobial Susceptibility Testing Devices." The guidance describes procedures and responsibilities for updating information on susceptibility test interpretive criteria, susceptibility test methods, and quality control parameters in the labeling for systemic antibacterial drug products for human use, and also describes procedures for making corresponding changes to susceptibility test interpretive criteria for antimicrobial susceptibility testing (AST) devices.

DATES: Submit either electronic or written comments on the collection of information by February 22, 2011.

ADDRESSES: Submit electronic comments on the collection of information to *http://www.regulations.gov.* Submit written comments on the collection of information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Elizabeth Berbakos, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., P150–400B, Rockville, MD 20850, 301–796–3792, *Elizabeth.Berbakos@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 below in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4)

ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Guidance for Industry on Updating Labeling for Susceptibility Test Information in Systemic Antibacterial Drug Products and Antimicrobial Susceptibility Testing Devices (OMB Control Number 0910–0638—Extension)

The Food and Drug Administration Amendments Act of 2007 (FDAAA) includes a requirement that FDA identify and periodically update susceptibility test interpretive criteria for antibacterial drug products and make those findings publicly available. As a result of this provision, the guidance explains the importance of making available to health care providers the most current information regarding susceptibility test interpretive criteria for antibacterial drug products. To address concerns about antibacterial drug product labeling with out-of-date information on susceptibility test interpretive criteria, quality control parameters, and susceptibility test methods, the guidance describes procedures for FDA, applications holders, and AST device manufacturers to ensure that updated susceptibility test information is available to health care providers. Where appropriate, FDA will identify susceptibility test interpretive criteria, quality control parameters, and susceptibility test methods by recognizing annually in a **Federal Register** notice, standards developed by one or more nationally or internationally recognized standard development organizations. The FDA recognized standards will be available to application holders of approved antibacterial drug products for updating their product labeling.

Application holders can use one of the following approaches to meet their responsibilities to update their product labeling under the guidance and FDA regulations: Submit a labeling supplement that relies upon a standard recognized by FDA in a **Federal Register** notice, or submit a labeling supplement that includes data supporting a proposed change to the microbiology information in the labeling. In addition, application holders should include in their annual report an assessment of whether the information in the "Microbiology" subsection of their product labeling is current or changes are needed. This information collection is already approved by OMB under Control Number 0910–0572 (the requirement in 21 CFR 201.56(a)(2) to update labeling when new information becomes available that causes the labeling to become inaccurate, false, or misleading) and Control Number 0910–0001 (the requirement in 21 CFR 314.70(b)(2)(v) to submit labeling supplements for certain changes in the product's labeling, and the requirement in 21 CFR 314.81(b)(2)(i) to include in the annual report a brief summary of significant new information from the previous year that might affect the labeling of the drug product).

In addition, under the guidance, if the information in the applicant's product labeling differs from the standards recognized by FDA in the **Federal Register** notice, and the applicant believes that changes to the labeling are not needed, the applicant should provide written justification to FDA why the recognized standard does not apply to its drug product and why changes are not needed to the "Microbiology" subsection of the product's labeling. This justification should be submitted as general correspondence to the product's application, and a statement indicating that no change is currently needed and the supporting justification should be included in the annual report. Based on our knowledge of the need to update information on susceptibility test interpretive criteria, susceptibility test methods, and quality control parameters in the labeling for systemic antibacterial drug products for human use, and our experience with the FDAAA requirement and the guidance recommendations during the past 16 months, we estimate that, annually, approximately two applicants will submit the written justification described previously and in the guidance, and that each justification will take approximately 16 hours to prepare and submit to FDA as general correspondence and as part of the annual report.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN

	Number of respondents	Number of responses per respondent	Total responses	Hours per response	Total hours
Justification submitted as general correspondence and in the annual report	2	1	2	16	32
Total				32	

There are no capital costs or operating and maintenance costs associated with this information collection.

Dated: December 17, 2010.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2010–32276 Filed 12–22–10; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–N–0368]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Pet Event Tracking Network—State, Federal Cooperation To Prevent Spread of Pet Food Related Diseases

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Fax written comments on the collection of information by January 24, 2011.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: FDA Desk Officer, FAX: 202–395–7285, or e-mailed to *oira_submission@omb.eop.gov.* All comments should be identified with the OMB control number 0910-new and title Pet Event Tracking Network—State, Federal Cooperation to Prevent Spread of Pet Food Related Diseases. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Johnny Vilela, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, 301–796–7651, *Juanmanuel.vilela@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Pet Event Tracking Network (PETNet)—State, Federal Cooperation To Prevent Spread of Pet Food Related Diseases—(OMB Control Number 0910-New)

In August 2008, FDA sponsored the "Gateway to Food Protection" meeting, also known as the "50–State" meeting. The meeting included representatives from other Federal Agencies, the States, localities, territories, and tribal partners, and was held to address the challenges necessary to ensure the safety of the U.S. food supply. Work groups were formed during the meeting which met and produced recommendations in specific topic areas. One of the workgroups, the Outbreaks/Food-Borne and Feed-Borne Investigations Workgroup, created a subgroup consisting of veterinarians, animal feed regulators, and others involved with animal health issues. This subgroup developed an ambitious proposal for an early warning system to identify, track, and report disease outbreaks in companion animals or contamination incidents concerning pet food or animals feed, which they named "The Pet Event Tracking Network" (PETNet). The PETNet proposal was developed in response to the 2007 outbreak that occurred in companion animals that was associated with the deliberate adulteration of pet food components, such as wheat gluten, with melamine. As envisioned by the subgroup at that time, PETNet would include a system for reporting outbreaks and would be supported by adequate diagnostic laboratory facilities and an established mechanism for conducting national epidemiological investigations.

The PETNet subgroup subsequently met twice in face-to-face meetings, in May and November 2009, during which time the proposed scope of PETNet was streamlined to focus the program on information sharing, rather than epidemiology or other aspects. One of the main concerns of FDA's State regulatory partners regarding FDA's handling of the melamine incident was that many States provided information to FDA, but the information reported by the States to FDA and other information in the possession of FDA was not shared by FDA with the States. States believed that if they had received more information about what was going on in a timely manner, they could perhaps have taken appropriate action to safeguard animal and the public health by using their own regulatory authorities and resources. The Agency agreed with the States, and thus decided to focus PETNet on being a system for sharing information between FDA, other Federal Agencies, and the States about food-borne illness outbreaks in companion animals. By the end of the November 2009, meeting, this revised vision of PETNet was firmly established with many of the details about the system in place.

FDA is planning to implement an initiative called PETNet that will allow FDA and its State partners to quickly and effectively exchange information about outbreaks of illness in companion animals associated with pet food. FDA has worked closely with its Federal and State partners to develop the PETNet, and believes that it will serve an important function in protecting the public and animal health.

PETNet will be a secure, Internet-based network comprised of FDA, other Federal Agencies, and State regulatory Agencies/officials that have authority over pet food. The Network will provide timely and relevant information about pet food-related incidents to FDA, the States, and other Federal Government Agencies charged with protecting animal and public health. FDA intends to identify and invite State participants from all 50 States to participate in PETNet. Members of the network will be able to both receive alerts about pet food incidents, as well as create alerts when they are aware of a pet food incident within their jurisdiction. The information will be used to help State and Federal regulators determine how best to use inspectional and other resources to either prevent or quickly limit the adverse events caused by adulterated pet food. Many States have regulatory authority beyond that of FDA and often can be in a position to act independently of FDA with the information they will receive from the PetNet.

Use of the system, including the reporting of incidents by States to FDA, will be entirely voluntary. The PETNet system will be housed in Food Shield, a proprietary software system, and will be accessible only to members via password. The system will make use of a standardized electronic form housed on FoodShield to collect and distribute basic information about pet food-related incidents. The form contains the following data elements, almost all of which are drop down menu choices: The species involved, clinical signs, number of animals exposed, number of animals affected, animal ages, date of onset, name and type of pet food involved, the manufacturer and distributor of the pet food (if known), the State where the incident occurred, the origin of the information, whether there are supporting laboratory results, and contact information for the reporting PETNet member (*i.e.*, name, telephone number). The form would be filled out and submitted by a PETNet member on FoodShield, at which time it will be available to other PETNet members. Thus, the information will be entered and received by PETNet members in as close to real time as possible. FDA has designed the form itself to contain only the essential information necessary to alert PETNet members about pet food-related incidents. For further information, such as laboratory results, PETNet members

can contact the reporting PETNet member.

In the **Federal Register** of July 27, 2010 (75 FR 43990), FDA published a 60-day notice requesting public comment on the proposed collection of information. FDA received 12 comments on the 60-day notice, 11 from private citizens and one from a veterinary association. None of the comments addressed paperwork issues. Ten of the comments generally supported the PETNet concept, while two comments generally did not support it.

Several comments suggested that it be mandatory, rather than voluntary, for all 50 States to participate in PETNet. FDA declines to follow the comments' suggestion, but we note that invitations have been sent to all 50 States requesting their participation in PETNet, and at this time 35 States have responded that they will participate in the program.

Several comments stated that the information in PETNet should be publicly available and not just available to Federal and State pet food regulators. FDA disagrees with this comment. Much of the information shared through PETNet will be preliminary reports of potential pet food problems that turn out to be false or to otherwise have no public health significance. FDA and State Agencies routinely receive these types of reports and followup on them without notifying the public. FDA believes that State and Federal regulators can decide how to best use the information in PETNet, including how to use their resources to determine if a pet food incident warranting public notification exists.

One comment recommended that FDA "closely assess reported incidents as soon as possible to ensure no confounding factors bias any determination of a need for a pet food recall." To assist in this effort, the comment recommended that FDA incorporate drop down menus in the PETNet reporting form to collect information about whether the adverse event was confirmed (versus suspected) to have been caused by pet food, if the exposure was acute or chronic, and the clinical outcome of the case.

PETNet will be an additional information resource used by FDA, but will not change FDA's current process for determining the need for pet food recalls. The information the American Veterinary Medical Association recommends FDA collect will be considered by pet food regulatory professional in deciding whether to enter a report into PETNet. Some of the recommended information may also be derived from the current PETNet form. For example, question 11 asks if the reporter has laboratory results available to share. Laboratory results are key factors in confirming whether an adverse event is caused by a pet food. Answers to question 8 will provide an indication about duration of exposure, and some clinical outcomes can be derived form question 6.

One comment stated that the focus of PETNet is wrong and that the U.S. Department of Agriculture (USDA) should be involved because it is their responsibility to inspect pet food plants. FDA notes that it is FDA, not USDA that is responsible for ensuring the safety of pet food, and that FDA conducts inspections of pet food manufacturing establishments. However, USDA is a Federal Agency that can contribute to PETNet and USDA has been invited/will participate in PETNet. Another comment stated that PETNet "lacks data security" and is a "needlessly invasive project" whose object to "identify tainted doggie food" is of questionable value. With respect to data security, the data shared through PETNet is contained on a database limited to State and Federal Government officials, and the data collection form has been designed such that it is highly unlikely to contain confidential or trade secret information that requires additional data protection measures. Additionally, the Agency disagrees that the project is invasive since it is just a method of sharing existing information among State and Federal regulators. Finally, the objective of the project is to protect animal health is valid and consistent with FDA's mission.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

21 U.S.C. 342 & 343/Section 1002(b) of the 2007 FDA amendments act/form FDA	Number of respondents	Annual frequency per response	Total annual responses	Hours per response	Total hours
Form FDA 3756	50	10	500	20/60	167

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

FDA estimates that each State will report (*i.e.,* fill out the PETNet form to alert other PETNet members about a pet food-related incident) approximately 10 times per year. This estimate represents the maximum number of reports that FDA expects a State to submit in a year, and in many cases the number of reports submitted by a State will probably be far less. FDA believes that, given the form only has 11 items and most are drop down fields, 20 minutes is a sufficient amount of time to complete the form. State regulatory officials responsible for pet food already possess computer systems and have the Internet access necessary to participate in PETNet, and thus there are no capital expenditures associated with the reporting.

Regarding recordkeeping, State regulatory officials who report on PETNet receive the reportable information from consumers in their States in the course of their customary and regular duties. Further, these individuals already maintain records of such consumer complaints in the course of their duties which are sufficient for the purposes of reporting on PETNet. Therefore, FDA believes that the proposed collection of information does not have additional recordkeeping requirements.

Dated: December 16, 2010.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2010–32275 Filed 12–22–10; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–D–0466]

Compliance Policy Guide Sec. 527.300 Dairy Products—Microbial Contaminants and Alkaline Phosphatase Activity; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of Compliance Policy Guide Sec. 527.300 Dairy Products—Microbial Contaminants and Alkaline Phosphatase

Activity (the CPG). The CPG provides guidance for FDA staff on its enforcement policies for pathogens and other indicators of inadequate pasteurization or post-pasteurization contamination of dairy products.

DATES: Submit either electronic or written comments on the CPG at any time.

ADDRESSES: Submit written requests for single copies of the CPG to the Division of Compliance Policy (HFC–230), Office of Enforcement, Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857. Send two self-addressed adhesive labels to assist that office in processing your request, or fax your request to 240–632–6861. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the CPG.

Submit electronic comments to *http://www.regulations.gov.* Submit written comments on the CPG to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Monica Metz, Center for Food Safety and Applied Nutrition (HFS–316), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740, 301–436–2041.

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of December 1, 2009 (74 FR 62795), FDA made available draft CPG Sec. 527.300 Dairy Products—Microbial Contaminants and Alkaline Phosphatase Activity and gave interested parties an opportunity to submit comments by February 1, 2010. The agency reviewed and evaluated these comments and has modified the CPG where appropriate.

The CPG provides guidance for FDA staff regarding pathogens and indicators of inadequate pasteurization or post-pasteurization contamination of dairy products. The CPG outlines regulatory enforcement policies for FDA staff to use to initiate legal action recommendations based on analytical determinations that a dairy product contains a pathogenic microorganism (*i.e., Salmonella* species, enterohemorrhagic *Escherichia coli* (EHEC) O157:H7 and other enterohemorrhagic *Escherichia coli, Campylobacter jejuni, Yersinia enterocolitica,* or *Clostridium botulinum*); toxins produced by *Clostridium botulinum,* enterotoxigenic *Staphylococcus,* or *Bacillus cereus; Staphylococcus aureus; Bacillus cereus;* nontoxigenic *Escherichia coli;* or alkaline phosphatase. The CPG also contains information that may be useful to the regulated industry and to the public.

FDA is issuing the CPG as level 1 guidance consistent with FDA's good guidance practices regulation (21 CFR 10.115). The CPG represents FDA's current thinking on pathogens and indicators of inadequate pasteurization or post-pasteurization contamination of dairy products. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternate approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

II. Comments

Interested persons may submit to the Division of Dockets Management (*see* **ADDRESSES**) either electronic or written comments regarding the CPG. It is only necessary to submit one set of comments. It is no longer necessary to send two paper copies of mailed comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

III. Electronic Access

Persons with access to the Internet may obtain the CPG from FDA's Office of Regulatory Affairs history page. It may be accessed at *http://www.fda.gov/ora/compliance_ref/cpg/default.htm.*

Dated: December 16, 2010.

Dara Corrigan,

Associate Commissioner for Regulatory Affairs.

[FR Doc. 2010–32232 Filed 12–22–10; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2004–D–0298] (Formerly Docket No. 2004D–0499)

Compliance Policy Guide; Radiofrequency Identification Feasibility Studies and Pilot Programs for Drugs; Notice To Extend Expiration Date

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; extension of expiration date.

SUMMARY: The Food and Drug Administration (FDA) is extending the expiration date of compliance policy guide (CPG) Sec. 400.210 entitled "Radiofrequency Identification (RFID) Feasibility Studies and Pilot Programs for Drugs" to December 31, 2012.

FOR FURTHER INFORMATION CONTACT: Connie Jung, Office of the Commissioner, Office of Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, rm. 4254, Silver Spring, MD 20993–0002, 301–796–4830.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of November 17, 2004 (69 FR 67360), FDA announced the availability of CPG Sec. 400.210 entitled "Radiofrequency Identification (RFID) Feasibility Studies and Pilot Programs for Drugs." Previous extensions of the expiration date of the CPG were published in 2007 and 2008 (72 FR 65750, November 23, 2007; 73 FR 78371, December 22, 2008). FDA has identified RFID as a promising technology to be used in the various efforts to combat counterfeit drugs. The CPG describes how the Agency intends to exercise its enforcement discretion regarding certain regulatory requirements that might otherwise be applicable to studies involving RFID technology for drugs. The goal of the CPG is to facilitate performance of RFID studies and to allow industry to gain experience with the use of RFID technology and its effect on the long-term safety and integrity of the U.S. drug supply.

On September 27, 2007, the Food and Drug Administration Amendments Act of 2007 (FDAAA) was signed into law. Section 913 of FDAAA addressed pharmaceutical safety and created section 505D of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 355e). Section 505D(b) of the FD&C Act requires the development of standards for the identification, validation, authentication, and tracking and tracing of prescription drugs. Section 505D(b)(3) of the FD&C Act states that these new standards shall address promising technologies, which may include RFID technology.

In implementing section 505D of the FD&C Act, FDA is currently addressing issues, such as promising technologies, that are relevant also for the CPG. In addition, FDA is considering further the experience of stakeholders and the Agency under the CPG. As we consider all of these issues, the CPG will remain in effect until December 31, 2012.

Dated: December 17, 2010.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2010–32274 Filed 12–22–10; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–D–0575]

Draft Compliance Policy Guide Sec. 510.800 Beverages—Serving Size Labeling; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of draft "Compliance Policy Guide Sec. 510.800 Beverages—Serving Size Labeling" (the draft CPG). The draft CPG, when finalized, will provide guidance for FDA staff on FDA's exercise of enforcement discretion related to serving size labeling for certain beverages that are packaged in containers larger than 20 fluid ounces and that display calories per 12 fluid ounce serving on the front of the container.

DATES: Although you can comment on any CPG at any time (*see* 21 CFR 10.115(g)(5)), to ensure that the Agency considers your comment on the draft CPG before it begins work on the final version of the CPG, submit either electronic or written comments on the draft CPG by February 22, 2011.

ADDRESSES: Submit electronic comments on the draft CPG to *http://www.regulations.gov.* Submit written comments on the draft CPG to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit written requests for single copies of the draft CPG to the Division of Compliance Policy (HFC–230), Office of Enforcement, Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857. Send two self-addressed adhesive labels to assist that office in processing your request or fax your request to 240–632–6861. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft CPG.

FOR FURTHER INFORMATION CONTACT: Jillonne Kevala, Center for Food Safety and Applied Nutrition (HFS–830), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740, 301–436–1450.

SUPPLEMENTARY INFORMATION:

I. Background

The draft CPG is intended to provide guidance for FDA staff on the labeling of certain beverages. In particular, the draft CPG sets forth a policy to typically consider not taking an enforcement action when a beverage container larger than 20 fluid ounces states the calories per 12 fluid ounces on the Principal Display Panel (PDP) and correspondingly provides the number of 12 fluid ounce servings in the container and the nutrition information is based on a 12 fluid ounce serving in the Nutrition Facts panel. FDA's labeling regulations require that the labeled serving size be based on Reference Amounts Customarily Consumed (RACC) (21 CFR 101.9(b) and § 101.12(b) (21 CFR 101.12(b))). The RACC for beverages is 240 milliliters (8 fluid ounces) (§ 101.12(b)). FDA's exercise of enforcement discretion is limited to the following beverages in containers that are larger than 20 fluid ounces and that display calories on the PDP of the label per 12 ounces: (1) Sports drinks (this term is used by industry and has not been defined by the Agency), (2) bottled water and water beverages, (3) soft drinks and diet soft drinks, (4) energy drinks (this term is used by industry and has not been defined by the Agency), and (5) ready-to-drink teas. The CPG reflects the Agency's recent response to the American Beverage Association's request that FDA exercise enforcement discretion for industry to label certain beverages based on a 12 fluid ounce serving size (Refs. 1, 2, and 3). The draft CPG also contains information that may be useful to the regulated industry and to the public. FDA is issuing the draft CPG as level 1 draft guidance consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft CPG, when finalized, will represent FDA's current thinking on the exercise of enforcement discretion for serving size labeling for the applicable beverages. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

II. Comments

Interested persons may submit to the Division of Dockets Management (*see* **ADDRESSES**) either electronic or written comments regarding this document. It is only necessary to send one set of comments. It is no longer necessary to send two copies of mailed comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

III. Electronic Access

Persons with access to the Internet may obtain the draft CPG from FDA's Office of Regulatory Affairs history page at *http://www.fda.gov/ora/compliance_ref/cpg/default.htm.*

IV. References

The following references have been placed on display in the Division of Dockets Management (*see* **ADDRESSES**), and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday.

1. Letter from Stuart M. Pape, Counsel to the American Beverage Association, May 27, 2010.

2. Letter from Stuart M. Pape, Counsel to the American Beverage Association, June 24, 2010.

3. Letter from Michael R. Taylor, Deputy Commissioner for Foods, FDA, July 12, 2010.

Dated: December 13, 2010.

Dara Corrigan,

Associate Commissioner for Regulatory Affairs.

[FR Doc. 2010–32249 Filed 12–22–10; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Submission for OMB Review; Comment Request; The NIH–American Association for Retired Persons (AARP) interactive Comprehensive Lifestyle Interview by Computer Study (iCLIC) (NCI)

SUMMARY: Under the provisions of Section 3507(a)(1)(D) of the Paperwork Reduction Act of 1995, the National Cancer Institute (NCI), the National Institutes of Health (NIH), has submitted to the Office of Management and Budget (OMB) a request to review and approve the information collection listed below. This proposed information collection was previously published in the **Federal Register** on October 18, 2010 (75 FR 63833) and allowed 60-days for public comment. There was one public comment received on October 18, 2010 which questioned the use of "spending American tax dollars on this study." A response was sent on December 14, 2010. The purpose of this notice is to allow an additional 30 days for public comment. The National Institutes of Health may not conduct or sponsor, and the respondent is not required to respond to, an information collection that has been extended, revised, or implemented on or after October 1,

1995, unless it displays a currently valid OMB control number.

Proposed Collection: Title: NIH–American Association for Retired Persons (AARP) Comprehensive Lifestyle Interview by Computer (CLIC) Study. *Type of Information Collection Request:* Extension. *Need and Use of Information Collection:* The Nutritional Epidemiology Branch of the Division of Cancer Epidemiology and Genetics of the National Cancer Institute has planned this study to evaluate the feasibility of using these three new computerized questionnaires as well as the Diet and Health Questionnaire (DHQ), a well-established food frequency questionnaire in a population of early-to-late-middle-aged men and women. Participants will be asked to complete computerized questionnaires over a 90 day period, with some questionnaires in a series being completed twice. This evaluation study comprises the necessary performance and feasibility tests for the new computerized questionnaires, which will provide an opportunity to assess the possibility of administering computerized questionnaires in future large prospective cohort studies. The computerized questionnaires will support the ongoing examination between cancer and other health outcomes with nutritional, physical activity, and lifestyle exposures. The computerized questionnaires adhere to The Public Health Service Act, Section 412 (42 U.S.C. 285a–1) and Section 413 (42 U.S.C. 285a–2), which authorizes the Division of Cancer Epidemiology and Genetics of the National Cancer Institute (NCI) to establish and support programs for the detection, diagnosis, prevention and treatment of cancer; and to collect, identify, analyze and disseminate information on cancer research, diagnosis, prevention and treatment. *Frequency of Response:* Either 1 or 2 times. *Affected Public:* Individuals. *Type of Respondents:* U.S. adults (aged 50 and over). The annual reporting burden is displayed in the table below. The estimated total annual burden hours being requested is 6886. The annualized cost to respondents is estimated at: $121,743. There are no Capital Costs, Operating Costs, and/or Maintenance Costs to report.

TABLE 1—ESTIMATES OF ANNUAL BURDEN HOURS

Instrument(s) tested	Frequency of response	Average time per response (minutes/hour)	No. of respondents	Annual hour burden
Read Invitation (Attachments 3)	1.00	1/60 (0.017)	16,667.00	278
Pre-Enrollment (Attachment 6)	1.00	10/60 (0.167)	2,312.00	385
Enrollment Process (Attachment 7)	1.00	5/60 (0.083)	2,288.00	191
ASA24 (Attachments 4–1)	2.00	30/60 (0.500)	1,944.00	1,944
ACT–24 (Attachments 4–2)	2.00	15/60 (0.250)	1,944.00	972
LHQ (Attachments 4–3)	1.00	20/60 (0.333)	1,944.00	648
DHQ (Attachments 4–4)	1.00	45/60 (0.750)	1,944.00	1,458
Web Re-entry (Attachment 8)	6.00	5/60 (0.083)	1,944.00	972
Evaluation Survey (Attachment 9)	1.00	1/60 (0.017)	2,288.00	38
Totals	.....	.....	33,275.00	6,886

Request for Comments: Written comments and/or suggestions from the public and affected agencies are invited on one or more of the following points: (1) Whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) The accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Ways to enhance the quality, utility, and clarity of the information to be collected; and (4) Ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Direct Comments to OMB: Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Attention: NIH Desk Officer, Office of Management and Budget, at *OIRA_submission@omb.eop.gov* or by fax to 202–395–6974. To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact Arthur Schatzkin, M.D., Dr.P.H, Chief, Nutritional Epidemiology Branch, Division of Cancer Epidemiology and Genetics, National Cancer Institute, NIH, DHHS, Executive Plaza South, Room 3040, 6120 Executive Blvd., EPS–MSC 7242, Bethesda, MD 20892–7335 or call non-toll-free number 301–594–2931 or e-mail your request, including your address to: *schatzka@mail.nih.gov*.

Comments Due Date: Comments regarding this information collection are best assured of having their full effect if received within 30 days of the date of this publication.

Dated: December 17, 2010.

Vivian Horovitch-Kelley,

NCI Project Clearance Liaison, National Institutes of Health.

[FR Doc. 2010–32333 Filed 12–22–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Proposed Collection; Comment Request; Technology Transfer Center External Customer Satisfaction Survey (NCI)

SUMMARY: In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, for opportunity for public comment on proposed data collection projects, the National Cancer Institute (NCI), the National Institutes of Health (NIH) will publish periodic summaries of proposed projects to be submitted to the Office of Management and Budget (OMB) for review and approval.

Proposed Collection: Title: Technology Transfer Center External Customer Satisfaction Survey (NCI). *Type of Information Collection Request:* New. *Need and Use of Information Collection:* The purpose of this web-based questionnaire is to: Obtain information on the satisfaction of TTC's external customers with TTC customer services; collect information of preferred and expected communications channels of TTC's external customers; and assess the strategic direction of companies engaging in collaborations and alliances with the NIH. The needs of external technology transfer customers and stakeholders have not been assessed systematically. Input from these groups is essential for defining workflow process improvements for services provided by the NCI TTC to the research community. The results will be used to strengthen the operations of the NCI TTC, including the TTC Competitive Service Center. This questionnaire adheres to The Public Health Service Act, Section 413 (42 U.S.C. 285a–2) which authorizes the Director of the National Cancer Institute in carrying out the National Cancer Program to "encourage and coordinate cancer research by industrial concerns where such concerns evidence a particular capability for such research * * *" *Frequency of Response:* Once. *Affected Public:* Private Sector. *Type of Respondents:* Managers, executives and Directors from Foundations, Not-for-Profit and For-profit organizations that conduct research and development in biomedical applications. The annual reporting burden is estimated in Table 1. There are no Capital Costs, Operating Costs, and/or Maintenance Costs to report.

TABLE 1—ESTIMATES OF ANNUAL BURDEN HOURS

Type of respondents	Number of respondents	Frequency of response	Average time per response (minutes/hour)	Annual hour burden
Managers, Executives, and Directors	4,000	1	20/60 (0.33)	1,333

Request for Comments: Written comments and/or suggestions from the public and affected agencies should address one or more of the following points: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) 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; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact John D. Hewes, PhD, Technology Transfer Specialist, Technology Transfer Center, National Cancer Institute, 6120 Executive Blvd., MSC 7181, Suite 450, Rockville, MD 20852 or call non-toll-free number 301–435–3121 or e-mail your request, including your address to: *hewesj@mail.nih.gov.*

Comments Due Date: Comments regarding this information collection are best assured of having their full effect if received within 60 days of the date of this publication.

Dated: December 17, 2010.

Vivian Horovitch-Kelley,

NCI Project Clearance Liaison Office, National Institutes of Health.

[FR Doc. 2010–32334 Filed 12–22–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflicts: Lung Development and Hypertension.

Date: January 18–20, 2011.

Time: 9 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: George M. Barnas, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4220, MSC 7818, Bethesda, MD 20892, 301–435–0696, *barnasg@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Translational Clinical Oncology.

Date: January 26–27, 2011.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health,6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Denise R. Shaw, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6158, MSC 7804, Bethesda, MD 20892, 301–435–0198, *shawdeni@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Bioengineering Research Grants.

Date: January 28, 2011.

Time: 8 a.m. to 9:30 a.m.

Agenda: To review and evaluate grant applications.

Place: The Westin St. Francis, 335 Powell Street, San Francisco, CA 94102.

Contact Person: Mark Caprara, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5156, MSC 7844, Bethesda, MD 20892, 301–435–1042, *capraramg@mail.nih.gov.*

Name of Committee: Endocrinology, Metabolism, Nutrition and Reproductive Sciences Integrated Review Group; Pregnancy and Neonatology Study Section.

Date: January 31–February 1, 2011.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Michael Knecht, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6176, MSC 7892, Bethesda, MD 20892, (301) 435–1046, *knechtm@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: December 17, 2010.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–32254 Filed 12–22–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Library of Medicine; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App), notice is hereby given of a meeting of the Literature Selection Technical Review Committee.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended because the premature disclosure of journals as potential titles to be indexed by the National Library of Medicine and the discussions would likely significantly frustrate implementation of recommendations.

Name of Committee: Literature Selection Technical Review Committee.

Date: February 24–25, 2011.

Open: February 24, 2011, 9 a.m. to 11 a.m.

Agenda: Administrative.

Place: National Library of Medicine, Building 38, 2nd Floor, Board Room, 8600 Rockville Pike, Bethesda, MD 20894.

Closed: February 24, 2011, 11 a.m. to 5 p.m.

Agenda: To review and evaluate journals as potential titles to be indexed by the National Library of Medicine.

Place: National Library of Medicine, Building 38, 2nd Floor, Board Room, 8600 Rockville Pike, Bethesda, MD 20894.

Closed: February 25, 2011, 8:30 a.m. to 2 p.m.

Agenda: To review and evaluate journals as potential titles to be indexed by the National Library of Medicine.

Place: National Library of Medicine, Building 38, 2nd Floor, Board Room, 8600 Rockville Pike, Bethesda, MD 20894.

Contact Person: Sheldon Kotzin, MLS, Associate Director, Division of Library Operations, National Library of Medicine, 8600 Rockville Pike, Building 38, Room 2W06, Bethesda, MD 20892, 301–496–6921, *kotzins@mail.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

(Catalogue of Federal Domestic Assistance Program No. 93.879, Medical Library Assistance, National Institutes of Health, HHS)

Dated: December 17, 2010.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–32256 Filed 12–22–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Center for Scientific Review Special Emphasis Panel, January 3, 2011, 11 a.m. to January 3, 2011, 4 p.m., National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 which was published in the **Federal Register** on December 10, 2010, 75 FR 76994–76995.

The meeting title has been changed to "Member Conflict: Kidney, Nutrition, Obesity and Diabetes and Cardiovascular and Sleep Epidemiology". The meeting is closed to the public.

Dated: December 17, 2010.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–32257 Filed 12–22–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel; Interventional MRI and X-ray Invasive Hemodynamics Telemetry.

Date: January 14, 2011.

Time: 2 p.m. to 3 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Youngsuk Oh, PhD, Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7182, Bethesda, MD 20892–7924, 301–435–0277, *yoh@mail.nih.gov.*

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel; Development of Pathogen Inactivation Technologies for Blood Components.

Date: January 21, 2011.

Time: 2 p.m. to 4 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Youngsuk Oh, PhD, Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7182, Bethesda, MD 20892–7924, 301–435–0277, *yoh@mail.nih.gov*.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel; Point-of-Care Assay for Engraftment Potential of Umbilical Cord Stem Cells.

Date: January 28, 2011.

Time: 2 p.m. to 4 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Youngsuk Oh, PhD, Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7182, Bethesda, MD 20892–7924, 301–435–0277, *yoh@mail.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: December 17, 2010.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–32255 Filed 12–22–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Agency Information Collection Activities: Submission for OMB Review; Comment Request

Periodically, the Substance Abuse and Mental Health Services Administration (SAMHSA) will publish a summary of information collection requests under OMB review, in compliance with the Paperwork Reduction Act (44 U.S.C. chapter 35). To request a copy of these documents, call the SAMHSA Reports Clearance Officer on (240) 276–1243.

Proposed Project: Evaluation of the SOAR Initiative—NEW

SAMHSA will evaluate the implementation and outcomes of the Supplemental Security Income (SSI)/ Social Security Disability Income (SSDI) Outreach Access and Recovery (SOAR) initiative. The SSI and SSDI programs provide cash assistance to individuals with qualifying disabilities. SOAR aims to increase access to these programs among people who are homeless and thereby improve their quality of life. The crux of the initiative is the provision of technical assistance (TA) to help states and local communities develop strategies to increase the quality of SSI/SSDI applications homeless individuals submit.

To evaluate SOAR's implementation and outputs, SAMHSA will collect data from the following sources:

- In-person interviews with state and local SOAR stakeholders;
- A social network survey of state and local SOAR stakeholders;
- Focus groups with participants of in-person SOAR trainings;
- Evaluative materials completed by participants of in-person SOAR trainings, including pre/post training evaluation forms and a customer satisfaction survey;
- Evaluative materials completed by users of web-based SOAR trainings, including pre/post training evaluation screens and an online customer satisfaction survey.

The first four data collections will be conducted in eight local communities in eight different states that will begin receiving federally-funded SOAR TA for the first time in 2010. For the fifth data collection, SAMHSA will collect data from pre- and post-training evaluation forms and a customer satisfaction survey nationwide for users of a newly developed Web-based SOAR training.

Respondents to the in-person interviews and social network survey will include an average of 15 state and local SOAR stakeholders in each of the eight local communities included in the study (for a total of 120 respondents). Stakeholders include state and local SOAR leaders, administrators and staff from Social Security Administration field offices and state Disability Determination Services offices, SOAR trainers, and administrators and staff from state mental health agencies, housing and other public assistance agencies, homeless service providers, and community-based agencies. Focus group respondents will include an average of 11 individuals who participated in an in-person SOAR training in each of the eight local communities included in the study (for a total of 88 respondents). The majority of respondents will be staff from community-based agencies. Respondents to the in-person training evaluative materials include an average of 15 individuals who participated in the first in-person training in each of the eight local communities included in the study (for a total of 120 respondents). Respondents to the web-based training evaluative materials will be the universe of users who ever log on to the web-based training and receive a user identification number, regardless of in which state or community users reside. SAMHSA anticipates that 2,706 users will access the web-based training in lieu of attending an in-person training. These users will complete all three components of the evaluative materials. In addition, SAMHSA anticipates that 2,050 users will access the web-based training to refresh or supplement what they learned in an in-person training. These users will complete only the first portion of the pre-training evaluation form, which asks for basic background information about the user.

BURDEN ESTIMATES

Data collection activity	Estimated number of respondents	Responses per respondent	Total responses	Average hours per response	Total hour burden
In-person interviews	120	1	120	1	120
Social network survey	120	1	120	.17	20.4
Focus groups	88	1	88	1.5	132
Subtotal	208	—	328	—	272.4
In-person Training Evaluative Materials:					
Pre-training evaluation form	120	1	120	.17	20.4
Post-training evaluation form	120	1	120	.17	20.4
Customer satisfaction survey	120	1	120	.17	20.4
Subtotal	120	—	360	—	61.2
Web-based Training Evaluative Materials:					

BURDEN ESTIMATES—Continued

Data collection activity	Estimated number of respondents	Responses per respondent	Total responses	Average hours per response	Total hour burden
Pre-training evaluation form	2,706	1	2,706	.17	460
Post-training evaluation form	2,706	1	2,706	.17	460
Customer satisfaction survey	2,706	1	2,706	.17	460
Background form	2,050	1	2,050	.10	205
Subtotal	4,756	—	10,168	—	1,585
Total	5,084	—	10,856	—	1,918.6

Written comments and recommendations concerning the proposed information collection should be sent by January 24, 2011 to: SAMHSA Desk Officer, Human Resources and Housing Branch, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503; due to potential delays in OMB's receipt and processing of mail sent through the U.S. Postal Service, respondents are encouraged to submit comments by fax to: 202–395–7285.

Dated: December 15, 2010.

Elaine Parry,

Director, Office of Management, Technology and Operations.

[FR Doc. 2010–32228 Filed 12–22–10; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2010–1110]

Shipboard Air Emission Reduction Technology Report

AGENCY: Coast Guard, DHS.

ACTION: Notice and request for comments.

SUMMARY: In Section 305 of the Coast Guard Authorization Act of 2010, Congress directs the Secretary of the Department in which the Coast Guard is operating to conduct a study, in conjunction with the Environmental Protection Agency, on Ship Emission Reduction Technology for cargo and passenger vessels that operate in United States waters and ports. For this study, the Coast Guard and the Environmental Protection Agency will survey new technology and new applications of existing technology for reducing air emissions from cargo and passenger vessels regulated under the Clean Air Act and the Act to Prevent Pollution from Ships, and identify the impediments, including any laws or regulations, to the implementation of this technology. Through this notice, the Coast Guard and the Environmental Protection Agency invite the public to provide information on the state of current and future air emission reduction technology, including specific comments on any impediments to this technology.

DATES: Comments and related material must either be submitted to our online docket via *http://www.regulations.gov* on or before January 18, 2011 or reach the Docket Management Facility by that date.

ADDRESSES: You may submit comments identified by docket number USCG–2010–1110 using any one of the following methods:

(1) Federal eRulemaking Portal: *http://www.regulations.gov.*

(2) Fax: 202–372–1925.

(3) Mail: Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

(4) Hand delivery: Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

To avoid duplication, please use only one of these four methods. See the "Public Participation and Request for Comments" portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions on this notice, call or e-mail LT Nicholas Woessner, U.S. Coast Guard; telephone 202–372–1307, e-mail *Nicholas.A.Woessner@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

We encourage you to submit comments and related material to be incorporated into the Shipboard Air Emission Reduction Technology report to Congress. All comments received will be posted, without change, to *http://www.regulations.gov* and will include any personal information you have provided.

Submitting comments: If you submit a comment, please include the docket number for this notice (USCG–2010–1110) and provide a reason for each suggestion or recommendation. You may submit your comments and material online, or by fax, mail or hand delivery, but please use only one of these means. We recommend that you include your name and a mailing address, an e-mail address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov,* click on the "submit a comment" box, which will then become highlighted in blue. In the "Document Type" drop down menu select "Notices" and insert "USCG–2010–1110" in the "Keyword" box. Click "Search" then click on the balloon shape in the "Actions" column. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period.

Viewing the comments: To view the comments for the report to Congress on Ship Emission Reduction Technology, go to *http://www.regulations.gov,* click on the "read comments" box, which will then become highlighted in blue. In the "Keyword" box insert "USCG–2010–1110" and click "Search." Click the

"Open Docket Folder" in the "Actions" column. If you do not have access to the internet, you may view the docket online by visiting the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. We have an agreement with the Department of Transportation to use the Docket Management Facility.

Privacy Act: Anyone can search the electronic form of comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review a Privacy Act, system of records notice regarding our public dockets in the January 17, 2008, issue of the **Federal Register** (73 FR 3316).

Background and Purpose

The U.S. implemented the Clean Air Act, Title 42 of the U.S. Code, Chapter 85, and the Act to Prevent Pollution from ships, 33 U.S.C. 1905–1915, by promulgating regulations for ship air emissions in Title 40, Protection of Environment, sections 50–99 of the Code of Federal Regulations and ratifying the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 (MARPOL) Annex VI. These regulations require the reduction of nitrous oxides (NO_X), sulfur oxides (SO_X), and particulate matter (PM) emissions from ships. Additionally, the U.S. has established an emission control area (ECA) for the U.S. under MARPOL Annex VI that further limits NO_X and SO_X emissions from ships. Title 40 of the Code of Federal Regulations and MARPOL Annex VI apply to both new and existing ships and will require the commercial maritime industry to implement new technology that will reduce NO_X, SO_X and PM emissions from all ships.

In developing the ship air emission regulations, the Coast Guard and the Environmental Protection Agency worked with industry and other stakeholders to identify and evaluate emission control technology for ships.[1] At this time, the Coast Guard and the Environmental Protection Agency seek additional information about new and existing technology for reducing these air emissions from cargo or passenger vessels subject to Title 40 of the Code of Federal Regulations and/or MARPOL Annex VI. It also seeks to identify impediments, including any laws or regulations, to implementing this technology.

We are particularly interested in information that includes details about:

—Data and analysis from the maritime community concerning the state of their air emission reduction technologies;

—The technology relating to after-treatment systems, alternative fuels, advanced engine design, auxiliary equipment, and other pertinent processes;

—The projected or measured percent reduction of air emissions achieved from specific equipment;

—Any adverse impacts, safety implications, or any system integration effects with other shipboard equipment;

—Potential capital and operating costs or savings of the equipment's implementation.

Please consider the following questions when responding to this notice:

(A) What new technology exists for reducing air emissions from cargo or passenger ships?

(B) What is the availability of such technology?

(C) What methods or equipment are currently under development that may be able to meet the MARPOL Annex VI requirements?

(D) Are methods or equipment being applied for similar purposes in other transportation modes or industries (*e.g.,* military, rail, over-the-road truck industries, manufacturing, power) that merit investigation for use aboard vessels?

Authority

This notice is issued under authority of 5 U.S.C. 552(a) and 14 U.S.C. 93(a)(4).

Dated: December 17, 2010.

J. G. Lantz,

Director of Commercial Regulations and Standards, U.S. Coast Guard.

[FR Doc. 2010–32193 Filed 12–22–10; 8:45 am]

BILLING CODE 9110–04–P

[1] U.S. Environmental Protection Agency, "Regulatory Impact Analysis: Control of Air Pollution from Category 3 Marine Diesel Engines, EPA–420–R–09–019, December 2009.

DEPARTMENT OF HOMELAND SECURITY

Secret Service

Proposed Information Collection

ACTION: 30-day Notice and request for comments.

SUMMARY: The Department of Homeland Security (DHS) has submitted the following information collection requests (ICR) to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995: 1620–0001. This information collection was previously published in the **Federal Register** on October 8, 2010 at 75 FR 62409, allowing for OMB review and a 60-day public comment period. No comments were received. This notice allows for an additional 30 days for public comments.

DATES: Comments are encouraged and will be accepted until January 24, 2011. This process is conduced in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice should be directed to the Office of Information and Regulatory Affairs, Office of Management and Budget, *Attn:* Desk Officer for United States Secret Service, Department of Homeland Security, and sent via electronic mail to *oira_submission@omb.eop.gov;* or faxed to 202–395–5806.

The Office of Management and Budget is particularly interested in comments which:

(1) 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;

(2) 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;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form(s) and instructions should be directed to: United States Secret Service, Security Clearance Division, Attn: Althea Washington, Communications Center (SCD), 345 Murray Lane, SW., Building T5, Washington, DC 20223. *Telephone number:* (202) 406–6658.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35) requires each Federal agency to provide interested Federal agencies and the public an early opportunity to comment

on information collection requests. The notice for this proposed information collection contains the following: (1) The name of the component of the U.S. Department of Homeland Security; (2) Type of review requested, *e.g.* new, revision, extension, existing or reinstatement; (3) OMB Control Number, if applicable; (4) Title; (5) Summary of the collection; (6) Description of the need for, and proposed use of, the information; (7) Respondents and frequency of collection; and (8) Reporting and/or Recordkeeping burden. The Department of Homeland Security invites public comment.

The Department of Homeland Security is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department, including whether the information will have practical utility; (2) Is the estimate of burden for this information collection accurate; (3) How might the Department enhance the quality, utility, and clarity of the information to be collected; and (4) How might the Department minimize the burden of this collection on the respondents, including through the use of information technology. All comments will become a matter of public record. In this document the U.S. Secret Service is soliciting comments concerning the following information collection:

Title: Supplemental Investigative Data.

OMB No.: 1620–0001.

Form Number: SSF 86A.

Abstract: Respondents are all Secret Service applicants who, if approved for hire, will require a Top Secret Clearance, and possible SCI Access. Responses to questions on the SSF 86A enable the Secret Service to determine an applicant's eligibility for a Top Secret Clearance, and ensure that the applicant meets all internal agency requirements.

Agency: Department of Homeland Security, United States Secret Service.

Frequency: On occasion.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals.

Estimated Number of Respondents: 10,000 respondents.

Estimated Time per Respondent: 3 hour per response.

Total Burden Hours: 30,000.

Total Burden Cost: (capital/startup): None.

Total Burden Cost: (operating/maintaining): None.

Dated: December 14, 2010.

Sharon Johnson,

Chief—Policy Analysis and Organizational Development Branch, U.S. Secret Service, U.S. Department of Homeland Security.

[FR Doc. 2010–32191 Filed 12–22–10; 8:45 am]

BILLING CODE 4810–42–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: Form N–565; Extension of an Existing Information Collection; Comment Request

ACTION: 60-Day Notice of Information Collection Under Review; Form N–565, Application for Replacement Naturalization/Citizenship Document; OMB Control No. 1615–0091.

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) will be submitting the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for sixty days until February 22, 2011.

During this 60 day period, USCIS will be evaluating whether to revise the Form N–565. Should USCIS decide to revise Form N–565 we will advise the public when we publish the 30-day notice in the **Federal Register** in accordance with the Paperwork Reduction Act. The public will then have 30 days to comment on any revisions to the Form N–565.

Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Department of Homeland Security (DHS), USCIS, Chief, Regulatory Products Division, 20 Massachusetts Avenue, NW., Washington, DC 20529–2020. Comments may also be submitted to DHS via facsimile to 202–272–0997 or via e-mail at *rfs.regs@dhs.gov.* When submitting comments by e-mail, please make sure to add OMB Control No. 1615–0091 in the subject box.

Note: The address listed in this notice should only be used to submit comments concerning the extension of the Form N–565. Please do not submit requests for individual case status inquiries to this address. If you are seeking information about the status of your individual case, please check "My Case Status" online at *https://egov.uscis.gov/cris/Dashboard.do,* or call the USCIS National Customer Service Center at 1–800–375–5283 (TTY 1–800–767–1833).

Written comments and suggestions from the public and affected agencies concerning the collection of information should address one or more of the following four points:

(1) 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;

(2) 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;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of this Information Collection:

(1) *Type of Information Collection:* Extension of an existing information collection.

(2) *Title of the Form/Collection:* Application for Replacement Naturalization/Citizenship Document.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form N–565; U.S. Citizenship and Immigration Services (USCIS).

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. Form N–565 is used to apply for a replacement of a Declaration of Intention, Certificate of Citizenship or Replacement Certificate, or to apply for a special certificate of naturalization as a U.S. citizen to be recognized by a foreign country.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 29,298 responses at 55 minutes (.916) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 26,836 annual burden hours.

If you need a copy of the information collection instrument, please visit the Web site at: *http://www.regulations.gov/.*

We may also be contacted at: USCIS, Regulatory Products Division, 20 Massachusetts Avenue, NW., Washington, DC 20529–2020, Telephone number 202–272–8377.

Dated: December 17, 2010.

Sunday Aigbe,

Chief, Regulatory Products Division, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2010–32184 Filed 12–22–10; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: Form I–881; Extension of An Existing Information Collection; Comment Request

ACTION: 60-Day Notice of Information Collection Under Review; Form I–881, Application for Suspension of Deportation or Special Rule Cancellation of Removal (Pursuant to Section 203 of Public Law 105–100, NACARA); OMB Control No. 1615–0072.

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) will be submitting the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for sixty days until February 22, 2011.

During this 60 day period, USCIS will be evaluating whether to revise the Form I–881. Should USCIS decide to revise Form I–881 we will advise the public when we publish the 30-day notice in the **Federal Register** in accordance with the Paperwork Reduction Act. The public will then have 30 days to comment on any revisions to the Form I–881.

Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Department of Homeland Security (DHS), USCIS, Chief, Regulatory Products Division, 20 Massachusetts Avenue NW., Washington, DC 20529–2020. Comments may also be submitted to DHS via facsimile to 202–272–0997 or via e-mail at *rfs.regs@dhs.gov.* When submitting comments by e-mail, please make sure to add OMB Control No. 1615–0072 in the subject box.

Note: The address listed in this notice should only be used to submit comments concerning the extension of the Form I–881. Please do not submit requests for individual case status inquiries to this address. If you are seeking information about the status of your individual case, please check "My Case Status" online at *https://egov.uscis.gov/cris/Dashboard.do,* or call the USCIS National Customer Service Center at 1–800–375–5283 (TTY 1–800–767–1833).

Written comments and suggestions from the public and affected agencies concerning the collection of information should address one or more of the following four points:

(1) 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;

(2) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of this Information Collection:

(1) *Type of Information Collection:* Extension of an existing information collection.

(2) *Title of the Form/Collection:* Application for Suspension of Deportation or Special Rule Cancellation of Removal (Pursuant to Section 203 of Public Law 105–100, NACARA).

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I–881; U.S. Citizenship and Immigration Services (USCIS).

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. Form I–881 is used by a nonimmigrant to apply for suspension of deportation or special rule cancellation of removal. The information collected on this form is necessary in order for USCIS to determine if it has jurisdiction over an individual applying for this release as well as to elicit information regarding the eligibility of an individual applying for release.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 55,000 responses at 12 hours per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 660,000 annual burden hours.

If you need a copy of the information collection instrument, please visit the Web site at: *http://www.regulations.gov/.*

We may also be contacted at: USCIS, Regulatory Products Division, 20 Massachusetts Avenue, NW., Washington, DC 20529–2020, Telephone number 202–272–8377.

Dated: December 17, 2010.

Sunday Aigbe,

Chief, Regulatory Products Division, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2010–32186 Filed 12–22–10; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5375–N–50]

Federal Property Suitable as Facilities To Assist the Homeless

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: This Notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for possible use to assist the homeless.

FOR FURTHER INFORMATION CONTACT: Juanita Perry, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 7262, Washington, DC 20410; telephone (202) 708–1234; TTY number for the hearing- and speech-impaired (202) 708–2565, (these telephone numbers are not toll-free), or call the toll-free Title V information line at 800–927–7588.

SUPPLEMENTARY INFORMATION: In accordance with the December 12, 1988 court order in *National Coalition for the Homeless* v. *Veterans Administration,* No. 88–2503–OG (D.D.C.), HUD publishes a Notice, on a weekly basis, identifying unutilized, underutilized, excess and surplus Federal buildings and real property that HUD has reviewed for suitability for use to assist the homeless. Today's Notice is for the

purpose of announcing that no additional properties have been determined suitable or unsuitable this week.

Dated: December 16, 2010.

Mark R. Johnston,

Deputy Assistant Secretary for Special Needs.

[FR Doc. 2010–32011 Filed 12–22–10; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R9–FHC–2010–N275; 94100–1311–0000–N5]

Information Collection Sent to the Office of Management and Budget (OMB) for Approval; OMB Control Number 1018–0078; Injurious Wildlife; Importation Certification for Live Fish and Fish Eggs

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice; request for comments.

SUMMARY: We (U.S Fish and Wildlife Service) have sent an Information Collection Request (ICR) to OMB for review and approval. We summarize the ICR below and describe the nature of the collection and the estimated burden and cost. This ICR is scheduled to expire on February 28, 2011. We 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. However, under OMB regulations, we may continue to conduct or sponsor this information collection while it is pending at OMB.

DATES: You must submit comments on or before January 24, 2011.

ADDRESSES: Send your comments and suggestions on this information collection to the Desk Officer for the Department of the Interior at OMB–OIRA at (202) 395–5806 (fax) or *OIRA_DOCKET@OMB.eop.gov* (e-mail). Please provide a copy of your comments to the Service Information Collection Officer, U.S. Fish and Wildlife Service, MS 222–ARLSQ, 4401 North Fairfax Drive, Arlington, VA 22203 (mail), or *INFOCOL@fws.gov* (e-mail). Please include 1018–0078 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Dr. Joel Bader, National Coordinator for Aquatic Animal Health, U.S. Fish and Wildlife Service, MS 770, 4401 North Fairfax Drive, Arlington, VA 22203 (mail); or by telephone at (703) 358–2019.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 1018–0078.

Title: Injurious Wildlife; Importation Certification for Live Fish and Fish Eggs, 50 CFR 16.13.

Service Form Number(s): 3–2273, 3–2274, and 3–2275.

Type of Request: Extension without change.

Description of Respondents: Aquatic animal health professionals seeking to be certified Title 50 inspectors; certified Title 50 inspectors who have performed health certifications on live salmonids; and any entity wishing to import live salmonids or their reproductive products into the United States.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: On occasion.

Activity	Number of respondents	Number of responses	Completion time per response	Total annual burden hours
FWS Form 3–2273	16	16	1 hour	16
FWS Form 3–2274	25	50	30 minutes	25
FWS Form 3–2275	25	50	15 minutes	13
Total	66	116		54

Abstract: The Lacey Act (18 U.S.C. 42) (Act) prohibits the possession or importation of any animal or plant deemed to be and prescribed by regulation to be injurious to:

- Human beings;
- The interests of agriculture, horticulture, and forestry; or
- Wildlife or the wildlife resources of the United States.

The Department of the Interior is charged with enforcement of this Act. The Act and regulations at 50 CFR part 16 allow for the importation of animals classified as injurious if specific criteria are met. To effectively carry out responsibilities and protect the aquatic resources of the United States, we must gather information on the animals being imported with regard to their source, destination, and health status. It is also imperative that we ensure the qualifications of those individuals who provide the fish health data upon which we base our decision to allow importation.

We use three forms to collect this information:

(1) FWS Form 3–2273 (Title 50 Certifying Official Form). New applicants and those seeking recertification as a Title 50 certifying official provide information so that we can assess their qualifications.

(2) FWS Form 3–2274 (U.S. Title 50 Certification Form). The certifying official uses this form to affirm the health status of the fish or their reproductive products to be imported.

(3) FWS Form 3–2275 (Title 50 Importation Request Form). We use the information on this form to ensure the safety of the shipment and to track and control importations.

Comments: On October 18, 2010, we published in the **Federal Register** (75 FR 63849) a notice of our intent to request that OMB renew approval for this information collection. In that notice, we solicited comments for 60 days, ending on December 17, 2010. We did not receive any comments.

We again invite comments concerning this information collection on:

- Whether or not the collection of information is necessary, including whether or not the information will have practical utility;
- The accuracy of our estimate of the burden for this collection of information;
- Ways to enhance the quality, utility, and clarity of the information to be collected; and
- Ways to minimize the burden of the collection of information on respondents.

Comments that you submit in response to this notice are a matter of public record. Before including your address, phone number, e-mail 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 OMB in your comment to withhold your personal identifying

information from public review, we cannot guarantee that it will be done.

Dated: December 20, 2010.

Hope Grey,

Information Collection Clearance Officer, Fish and Wildlife Service.

[FR Doc. 2010–32327 Filed 12–22–10; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[AA–11908, AA–11915, AA–11916, AA–11917, AA–11909, AA–11913, AA–11914; LLAK–962000–L14100000–HY0000–P]

Alaska Native Claims Selection

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of decision approving lands for conveyance.

SUMMARY: As required by 43 CFR 2650.7(d), notice is hereby given that the Bureau of Land Management will issue an appealable decision to The Aleut Corporation. The decision will approve the conveyance of only the surface estate in certain lands pursuant to the Alaska Native Claims Settlement Act. The lands are located on the Near Islands, west of Adak, Alaska, and aggregate 66.01 acres. Notice of the decision will also be published four times in the Anchorage Daily News.

DATES: Any party claiming a property interest in the lands affected by the decision may appeal the decision within the following time limits:

1. Unknown parties, parties unable to be located after reasonable efforts have been expended, parties who fail or refuse to sign their return receipt, and parties who receive a copy of the decision by regular mail which is not certified, return receipt requested, shall have until January 24, 2011 to file an appeal.

2. Parties receiving service of the decision by certified mail shall have 30 days from the date of receipt to file an appeal.

Parties who do not file an appeal in accordance with the requirements of 43 CFR part 4, subpart E, shall be deemed to have waived their rights.

ADDRESSES: A copy of the decision may be obtained from: Bureau of Land Management, Alaska State Office, 222 West Seventh Avenue, #13, Anchorage, Alaska 99513–7504.

FOR FURTHER INFORMATION CONTACT: The Bureau of Land Management by phone at 907–271–5960, or by e-mail at *ak.blm.conveyance@ak.blm.gov.* Persons who use a telecommunication device (TTD) may contact the Bureau of Land Management by calling the Federal Information Relay Service (FIRS) at 1–800–877–8339, 24 hours a day, 7 days a week.

Dina L. Torres,

Land Transfer Resolution Specialist, Branch of Preparation and Resolution.

[FR Doc. 2010–32319 Filed 12–22–10; 8:45 am]

BILLING CODE 4310–JA–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[F–19155–07; LLAK964000–L14100000–KC0000–P]

Alaska Native Claims Selection

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of decision approving lands for conveyance.

SUMMARY: As required by 43 CFR 2650.7(d), notice is hereby given that an appealable decision will be issued by the Bureau of Land Management to Doyon, Limited. The decision approves conveyance of the surface and subsurface estates in the lands described below pursuant to the Alaska Native Claims Settlement Act. The lands are in the vicinity of Allakaket, Alaska, and are located in:

Fairbanks Meridian, Alaska

T. 22 N., R. 22 W.,
Secs 4, 5, 8, and 9.
Containing 2,560 acres.

Notice of the decision will also be published four times in the Fairbanks Daily News-Miner.

DATES: Any party claiming a property interest in the lands affected by the decision may appeal the decision within the following time limits:

1. Unknown parties, parties unable to be located after reasonable efforts have been expended to locate, parties who fail or refuse to sign their return receipt, and parties who receive a copy of the decision by regular mail which is not certified, return receipt requested, shall have until January 24, 2011 to file an appeal.

2. Parties receiving service of the decision by certified mail shall have 30 days from the date of receipt to file an appeal.

Parties who do not file an appeal in accordance with the requirements of 43 CFR part 4, subpart E, shall be deemed to have waived their rights.

ADDRESSES: A copy of the decision may be obtained from: Bureau of Land Management, Alaska State Office, 222 West Seventh Avenue, #13, Anchorage, Alaska 99513–7504.

FOR FURTHER INFORMATION CONTACT: The Bureau of Land Management by phone at 907–271–5960, by e-mail at *ak.blm.conveyance@blm.gov,* or by telecommunication device (TTD) through the Federal Information Relay Service (FIRS) at 1–800–877–8339, 24 hours a day, seven days a week.

Linda L. Keskitalo,

Land Law Examiner, Land Transfer Adjudication II Branch.

[FR Doc. 2010–32318 Filed 12–22–10; 8:45 am]

BILLING CODE 4310–JA–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLUT920–09–L13200000–EL000, UTU–88021]

Notice of Invitation to Participate In Coal Exploration License, Utah

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Invitation to Participate in Coal Exploration License.

SUMMARY: All interested qualified parties are hereby invited to participate with PacifiCorp on a pro rata cost sharing basis in its program for the exploration of coal deposits owned by the United States of America in Emery County, Utah.

DATES: The notice of invitation to participate in this coal exploration license was published, once each week for 2 consecutive weeks, in the *Emery County Progress* (beginning the second week of August 2010), and by virtue of this announcement in the **Federal Register**.

Any person seeking to participate in this exploration program must send written notice to both the Bureau of Land Management (BLM) and PacifiCorp, as provided in the **ADDRESSES** section below, no later than January 24, 2011.

ADDRESSES: Copies of the exploration license and plan are available for review from 7:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays (serialized under the number of UTU–88021) in the public room of the BLM State Office, 440 West 200 South, Suite 500, Salt Lake City, Utah.

The written notice to participate in the exploration program should be sent to Stan Perkes, Bureau of Land Management, Utah State Office, Division of Lands and Minerals, P.O. Box 45155, Salt Lake City, Utah 84145 and Scott Child, Manager, Lands and

Regulatory Affairs, PacifiCorp, c/o Interwest Mining Company, 1407 West North Temple, Suite 310, Salt Lake City, Utah 84116.

FOR FURTHER INFORMATION CONTACT: Stan Perkes by telephone at 801–539–4036, or by *e-mail: Stan_Perkes@blm.gov.*

SUPPLEMENTARY INFORMATION: The exploration activities will be performed pursuant to the Mineral Leasing Act of 1920, as amended, 30 U.S.C. 201(b), and to the regulations at 43 CFR part 3410. The purpose of the exploration program is to gain additional geologic knowledge of the coal underlying the exploration area for the purpose of assessing the coal resources. The exploration program is fully described and is being conducted pursuant to an exploration license and plan approved by the BLM. The exploration plan may be modified to accommodate the legitimate exploration needs of persons seeking to participate. The area to be explored includes the following-described lands in Emery County, Utah:

Salt Lake Meridian, Utah

T. 16 S., R. 6 E.,
Sec. 22, SE¼SE¼;
Sec. 23, S½S½;
Sec. 24, S½;
Sec. 25, W½;
Sec. 26, all; and
Sec. 27, E½E½.

Salt Lake Meridian, Utah

T. 16 S., R. 7 E.,
Sec. 19, lot 4, E½NE¼, E½W½NE¼; and
Sec. 20, N½NW¼, W½SW¼NW¼, W½E½SW¼NW¼.

Containing 1,892.78 acres.

The Federal coal within the above-described lands is currently not leased for development of Federal coal resources.

Authority: 43 CFR 3410.2–1(c)(1).

Jeff Rawson,

Associate State Director.

[FR Doc. 2010–32315 Filed 12–22–10; 8:45 am]

BILLING CODE 4310–DQ–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLIDT000000.L11200000.DD0000.241A.00]

Notice of Public Meetings, Twin Falls District Resource Advisory Council, Idaho

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meetings.

SUMMARY: In accordance with the Federal Land Policy and Management Act (FLPMA), the Federal Advisory Committee Act of 1972 (FACA), and the Federal Lands Recreation Enhancement Act of 2004 (FLREA), the U.S. Department of the Interior, Bureau of Land Management (BLM) Twin Falls District Resource Advisory Council (RAC) and subcommittee for the Jarbidge Resource Management Plan (RMP) will meet as indicated below.

DATES: January 12, 2011 and January 26, 2011. On January 12, 2011, the Twin Falls District RAC subcommittee members will meet at the Loong Hing Restaurant, 1719 Kimberly Road, Twin Falls, Idaho. The meeting will begin at 6 p.m., and the public comment period will take place from 6:15 to 6:45 p.m.

On January 26, 2011, the Twin Falls District RAC members will meet at the Best Western Sawtooth Inn at 2653 S. Lincoln Street, Jerome, Idaho. The meeting will begin at 9 a.m. and end no later than 5 p.m. The public comment period for the RAC meeting will take place 9:15 a.m. to 9:45 a.m.

FOR FURTHER INFORMATION CONTACT: Heather Tiel-Nelson, Twin Falls District, Idaho, 2536 Kimberly Road, Twin Falls, Idaho, 83301, (208) 736–2352.

SUPPLEMENTARY INFORMATION: The 15-member RAC advises the Secretary of the Interior, through the Bureau of Land Management, on a variety of planning and management issues associated with public land management in Idaho. During the January 12th meeting, RAC subcommittee members will finalize their comments on the Jarbidge Draft Resource Management Plan/Environmental Impact Statement (RMP/EIS). During the January 26th meeting, there will be a new member orientation, and RAC members will discuss the subcommittee comments regarding the Jarbidge Draft RMP/EIS.

Additional topics may be added and will be included in local media announcements. More information is available at *http://www.blm.gov/id/st/en/res/resource_advisory.3.html.*

RAC meetings are open to the public. For further information about the meeting, please contact Heather Tiel-Nelson, Public Affairs Specialist for the Twin Falls District, BLM at (208) 736–2352.

Dated: December 10, 2010.

Bill Baker,

District Manager.

[FR Doc. 2010–32323 Filed 12–22–10; 8:45 am]

BILLING CODE 4310–GG–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY–923–1310–FI; WYW163285]

Notice of Proposed Reinstatement of Terminated Oil and Gas Lease WYW 163285, Wyoming

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: Under the provisions of the Mineral Leasing Act of 1920, as amended, the Bureau of Land Management (BLM) received a petition for reinstatement from Energy West Corporation for competitive oil and gas lease WYW163285 for land in Sweetwater County, Wyoming. The petition was filed on-time and was accompanied by all the rentals due since the date the lease terminated under the law.

FOR FURTHER INFORMATION CONTACT: Bureau of Land Management, Julie L. Weaver, Chief, Fluid Minerals Adjudication, at (307) 775–6176.

SUPPLEMENTARY INFORMATION: The lessee has agreed to the amended lease terms for rentals and royalties at rates of $10 per acre, or fraction thereof, per year and 16⅔ percent, respectively. The lessee has paid the required $500 administrative fee and $163 to reimburse the Department for the cost of this **Federal Register** notice. The lessee has met all the requirements for reinstatement of the lease as set out in Sections 31(d) and (e) of the Mineral Lands Leasing Act of 1920 (30 U.S.C. 188), and the BLM is proposing to reinstate lease WYW163285 effective September 1, 2010, under the original terms and conditions of the lease and the increased rental and royalty rates cited above. The BLM has not issued a valid lease to any other interest affecting the lands.

Julie L. Weaver,

Chief, Branch of Fluid Minerals Adjudication.

[FR Doc. 2010–32310 Filed 12–22–10; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLORE010000–10–L61400000HN–LXLAH99000–HAG10–0311]

Notice of Realty Action: Direct Sale of Public Lands in Lane County, OR

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Realty Action.

SUMMARY: The Bureau of Land Management (BLM) has examined a 1.51 acre parcel of public land in Blachley, Oregon, and has found it suitable for disposal using direct (non-competitive) sale procedures.

DATES: All comments must be received in writing by the BLM on or before February 7, 2011.

ADDRESSES: Mail all written comments concerning this notice to William Hatton, BLM, Siuslaw Resource Area Manager, Eugene District Office, P.O. Box 10226, Eugene, Oregon 97440.

FOR FURTHER INFORMATION CONTACT: Cheryl Adcock, Realty Specialist, at the above address or phone (541) 683–6145.

SUPPLEMENTARY INFORMATION: The authority for the sale is under Sections 203 and 209 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. 1713 and 1719.

The sale parcel is located in Lane County, Oregon, in Section 11, less than ¼ mile north of Oregon State Highway 36 and is described as follows.

Willamette Meridian

T. 16 S., R. 7 W.,
Sec. 11, lot 2.

The area described contains 1.51 acres, more or less, in Lane County.

This parcel of public land is proposed for sale to Jon F. Tomas and Ann E. Lyon at no less than the appraised fair market value (FMV), which has been determined to be $11,100, as determined by the authorized officer after appraisal. An appraisal report has been prepared by a Review Appraiser of the Northwest Region of the Office of Valuation Services for the purposes of establishing the FMV.

Consistent with Section 203 of FLPMA, a tract of public land may be sold where, as a result of approved land use planning, the sale of the tract meets the disposal criteria of that section. The land described above is identified as suitable for disposal in the BLM Eugene District Resource Management Plan (RMP) approved June 1995, as amended by the RMP Amendment with Environmental Assessment (EA) for Proposed Hancock Land Exchange (EA OR–090–97–42), dated May 1998, and the Land Tenure Adjustment: Proposed Plan Amendment, Hancock Land Exchange and Finding of No Significant Impact for the Eugene RMP, approved August 1998. The proposed disposal action is consistent with the objectives, goals, and decisions of the RMP.

The disposal (sale) of the parcel would serve an important public objective by resolving the management costs of an inadvertent unauthorized use of the public lands. As such, these lands meet the criteria under 43 CFR 2710.0–3(a)(3) which states "Such tract, because of its location or other characteristics, is difficult and uneconomic to manage as part of the public lands and is not suitable for management by another Federal department or agency." The sale of these lands meets the criteria under 43 CFR 2711.3–3(a)(4) and (5), direct sale, to be used where necessary to protect existing equities in the land, to resolve adjoining ownership pattern and access; and to resolve inadvertent unauthorized use and occupancy of the lands. A small portion of the subject parcel contains Mr. Tomas' and Ms. Lyon's front porch. The subject parcel is being used for a driveway, yard, and a well house. A competitive sale is therefore not appropriate and the public interest would be best served by a direct sale. The size of the unauthorized use has been reduced to the smallest aliquot part identified through development of a supplemental plat. These lands are not required for Federal purposes and no significant resource values will be affected by this disposal. The BLM prepared a Determination of National Environmental Policy Act Adequacy (DOI–BLM–OR–E050–2010–0006–DNA) that was approved on April 14, 2010. There was extensive public involvement opportunity in the development of the BLM Eugene District's Land Tenure Adjustment: Proposed Plan Amendment, Hancock Land Exchange and Finding of No Significant Impact for the Eugene Resource Management Plan (RMP), approved August 1998 and the associated RMP Amendment with EA for Proposed Hancock Land Exchange (EA OR–090–97–42), dated May 1998. The Determination of NEPA Adequacy (DOI–BLM–OR–E050–2010–0006–DNA), EA (EA OR–090–97–42), Decision Record, map, and approved appraisal report covering the proposed sale, are available for review at the BLM Eugene District Office.

Minerals for this parcel will be conveyed simultaneously with the surface under the authority of FLPMA Section 209(b)(1) and in accordance with BLM's approved Mineral Potential Report Dated September 21, 2009. Mr. Tomas and Ms. Lyon will be required to pay a $50 nonrefundable filing fee for the conveyance of the available mineral interests. Information pertaining to the conveyance of minerals specific to the parcel is located in the case file and available for public review at the BLM Eugene District Office.

Publication of this Notice of Realty Action in the **Federal Register** segregates the subject lands from all forms of appropriation under the public land laws, including the general mining and mineral leasing laws, except the sale provisions of the FLPMA. Upon publication of this Notice of Realty Action and until completion of the sale, the BLM is no longer accepting land use applications affecting the identified public land, except applications for the amendment of previously filed right-of-way applications or existing authorizations. The segregation will terminate upon issuance of the patent or other document of conveyance to such lands, upon publication in the **Federal Register** of a termination of the segregation, or December 24, 2012, whichever occurs first, unless extended by the BLM State Director in accordance with 43 CFR 2711.1–2(d) prior to the termination date. The land will not be sold until at least 60 days after the date of publication of this notice in the **Federal Register.**

Terms and Conditions of Sale:

The patent issued would contain the following rights, reservations, covenant, terms and conditions:

1. A reservation to the United States for a right-of-way for ditches and canals constructed by the authority of the United States, Act of August 30, 1890 (43 U.S.C. 945);

2. The sale parcel will be subject to all valid existing rights of record at the time of conveyance;

3. The patentees, by accepting patent, agree to indemnify, defend, and hold the United States harmless from any costs, damages, claims, causes of action, penalties, fines, liabilities, and judgments of any kind arising from the past, present, or future acts or omissions of the patentees, their employees, agents, contractors, lessees, or any third party arising out of or in connection with the patentees' use, occupancy, or operations on the patented real property resulting in: (a) Violations of Federal, State, and local laws and regulations that are now, or in the future become, applicable to the real property; (b) Judgments, claims, or demands of any kind assessed against the United States; (c) Costs, expenses, or damages of any kind incurred by the United States; (d) Releases or threatened releases of solid or hazardous waste(s) and/or hazardous substance(s), pollutant(s) or containment(s), and/or petroleum product or derivative of a petroleum product, as defined by Federal and State environmental laws, off, on, into, or under land, property, and other interests of the United States; (e) Other activities by which solid or hazardous substance(s), pollutant(s) or contaminant(s), and/or petroleum product or derivative of a petroleum product, or waste(s), as defined by Federal and State environmental laws,

are generated, released, stored, used, or otherwise disposed of on the patented real property, and any cleanup response, remedial action, or other actions related in any manner to said solid or hazardous substance(s) or waste(s), pollutant(s) or contaminant(s), and/or petroleum product or derivative of a petroleum product; or (f) Natural resource damages as defined by Federal and State law. This covenant shall be construed as running with the patented real property and may be enforced by the United States in a court of competent jurisdiction; and

4. Pursuant to the requirements established by Section 120(h) of the Comprehensive Environmental Response, Compensation and Liability Act, (42 U.S.C. 9620(h)), as amended by the Superfund Amendments and Reauthorization Act of 1988, (100 Stat. 1670), notice is hereby given that the above-described land has been examined and no evidence was found to indicate that any hazardous substances had been stored for one year or more, nor had any hazardous substances been disposed of or released on the subject property. No representation, warranty or covenant of any kind, express or implied, will be given or made by the United States, its officers or employees, as to access to or from the above described parcel of land, the title to the land, whether or to what extent the land may be developed, its physical condition, or its past, present or potential uses, and the conveyance of any such parcel will not be on a contingency basis. It is the buyer's responsibility to be aware of all applicable Federal, State, and local government policies and regulations that would affect the subject land. It is also the buyer's responsibility to be aware of existing or prospective uses of nearby properties. Any land lacking access from a public road or highway will be conveyed as such, and future access acquisition will be the responsibility of the buyer. In the event of a sale, the unreserved mineral interests will be conveyed simultaneously with the sale of the land. These unreserved mineral interests have been determined to have no known mineral value pursuant to 43 CFR 2720.0–6 and 2720.2(a). Acceptance of the sale offer will constitute an application for conveyance of those unreserved mineral interests.

Detailed information concerning the sale, including the reservations, sale procedures and conditions, appraisal, planning and environmental documentation, is available for review at the BLM Eugene District Office, 3106 Pierce Parkway, Suite E, Springfield, Oregon 97477.

In the absence of any objections, this realty action will become the final determination of the Department of the Interior.

Comments, including names, street addresses and other contact information of respondents, will be available for public review. Before including your address, phone number, e-mail 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: 43 CFR 2711.1–2(a))

Charles Fairchild,

Acting Field Manager, Siuslaw Resource Area.

[FR Doc. 2010–32313 Filed 12–22–10; 8:45 am]

BILLING CODE 4310–33–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLCA930000.L58740000.EU0000. LXSS037B0000; CACA 50935]

Notice of Realty Action: Direct Sale of Public Land in Kern County, CA

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Realty Action.

SUMMARY: The Bureau of Land Management (BLM), Ridgecrest Field Office, proposes to sell a parcel of public land consisting of 160 acres in Kern County, California to the County of Kern for the appraised fair market value of $380,000.

DATES: Comments regarding the proposed sale must be received by the BLM on or before February 7, 2011.

ADDRESSES: Written comments concerning the proposed sale should be sent to the Field Manager, BLM, Ridgecrest Field Office, 300 So. Richmond Road, Ridgecrest, California 93555.

FOR FURTHER INFORMATION CONTACT: Dan Ryan, Realty Specialist, BLM, California State Office, 2800 Cottage Way, Sacramento, California 95825 or phone (916) 978–4677.

SUPPLEMENTARY INFORMATION: The following described public land is being proposed for direct sale to Kern County in accordance with Sections 203 and 209 of the Federal Land Policy and Management Act of 1976 (FLPMA), as amended (43 U.S.C. 1713 and 1719);

San Bernardino Meridian

T. 11 N., R. 12 W.,
sec. 34, NW¼.

The area described contains 160 acres, more or less, in Kern County.

The public land is identified as suitable for disposal in the BLM's 1980 California Desert Conservation Area Plan, as amended, and is not needed for any other Federal purpose. The BLM is proposing a direct sale because Kern County wishes to secure the land for a buffer zone for their existing landfill. In accordance with 43 CFR 2711.3–3(a), a local government has been identified as the buyer, and the parcel identified for sale is an integral part of a project of public importance and speculative bidding would jeopardize a timely completion and economic viability of the project. Therefore, a competitive sale is not appropriate and the public interest would be best served by a direct sale. The public land proposed for sale is isolated from other public lands and the BLM's purpose in selling the land is to dispose of land that is difficult and uneconomic to manage as part of the public lands. The BLM has completed a mineral potential report which concluded there are no known mineral values in the land proposed for sale. The BLM proposes that conveyance of the Federal mineral interests would occur simultaneously with the sale of the land.

On December 23, 2010, the above described land will be segregated from appropriation under the public land laws, including the mining laws, except for the sale provisions of the FLPMA. Until completion of the sale, the BLM will no longer accept land use applications affecting the identified public lands, except applications for the amendment of previously filed right-of-way applications or existing authorizations to increase the term of the grants in accordance with 43 CFR 2802.15 and 2886.15. The segregation terminates upon issuance of a patent, publication in the **Federal Register** of a termination of the segregation, or on December 24, 2012, unless extended by the BLM State Director in accordance with 43 CFR 2711.1–2(d) prior to the termination date. The land would not be sold until at least February 22, 2011. Kern County would be required to pay a $50 nonrefundable filing fee for conveyance of the mineral interests. Any patent issued would contain the following terms, conditions, and reservations:

1. A reservation of a right-of-way to the United States for ditches and canals constructed by authority of the United States under the Act of August 30, 1890 (43 U.S.C 945);

2. A condition that the conveyance be subject to all valid existing rights of record;

3. An appropriate indemnification clause protecting the United States from claims arising out of the patentee's use, occupancy, or occupations on the patented lands;

4. Additional terms and conditions that the authorized officer deems appropriate.

Detailed information concerning the proposed land sale, including the appraisal, planning and environmental documents, and a mineral report, are available for review at the location identified in **ADDRESSES** above.

Public comments regarding the proposed sale may be submitted in writing to the attention of the BLM Ridgecrest Field Manager (*see* **ADDRESSES** above) on or before February 7, 2011. Comments received in electronic form, such as e-mail or facsimile, will not be considered. Any adverse comments regarding the proposed sale will be reviewed by the BLM State Director or other authorized official of the Department of the Interior, who may sustain, vacate, or modify this realty action in whole or in part. In the absence of timely filed objections, this realty action will become the final determination of the Department of the Interior.

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, be advised 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 from public review your personal identifying information, we cannot guarantee that we will be able to do so.

Authority: 43 CFR 2711.1–2(a) and (c).

Tom Pogacnik,

Deputy State Director for Natural Resources.

[FR Doc. 2010–32312 Filed 12–22–10; 8:45 am]

BILLING CODE 4310–40–P

INTERNATIONAL TRADE COMMISSION

Notice of Receipt of Complaint; Solicitation of Comments Relating to the Public Interest

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has received a complaint entitled *In Re Certain Reduced Ignition Proclivity Cigarette Paper Wrappers and Products Containing Same,* DN 2774; the Commission is soliciting comments on any public interest issues raised by the complaint.

FOR FURTHER INFORMATION CONTACT: Marilyn R. Abbott, Secretary to the Commission, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–2000. The public version of the complaint can be accessed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov,* and will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–2000.

General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission has received a complaint filed on behalf of Schweitzer-Mauduit International, Inc. on December 17, 2010. The complaint alleges violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain reduced ignition proclivity cigarette paper wrappers and products containing same. The complaint names as respondents Astra Tobacco Corporation of Chapel Hill, NC; delfortgroup AG, of Traun, Austria; LIPtec GmbH, of Neidenfels, Germany; and Julius Glatz GmbH of Neidenfels, Germany.

The complainant, proposed respondents, other interested parties, and members of the public are invited to file comments, not to exceed five pages in length, on any public interest issues raised by the complaint. Comments should address whether issuance of an exclusion order and/or a cease and desist order in this investigation would negatively affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

(i) Explain how the articles potentially subject to the orders are used in the United States;

(ii) Identify any public health, safety, or welfare concerns in the United States relating to the potential orders;

(iii) Indicate the extent to which like or directly competitive articles are produced in the United States or are otherwise available in the United States, with respect to the articles potentially subject to the orders; and

(iv) Indicate whether Complainant, Complainant's licensees, and/or third party suppliers have the capacity to replace the volume of articles potentially subject to an exclusion order and a cease and desist order within a commercially reasonable time.

Written submissions must be filed no later than by close of business, five business days after the date of publication of this notice in the **Federal Register**. There will be further opportunities for comment on the public interest after the issuance of any final initial determination in this investigation.

Persons filing written submissions must file the original document and 12 true copies thereof on or before the deadlines stated above with the Office of the Secretary. Submissions should refer to the docket number ("Docket No. 2774") in a prominent place on the cover page and/or the first page. The Commission's rules authorize filing submissions with the Secretary by facsimile or electronic means only to the extent permitted by section 201.8 of the rules (see Handbook for Electronic Filing Procedures, *http://www.usitc.gov/secretary/fed_reg_notices/rules/documents/handbook_on_electronic_filing.pdf*). Persons with questions regarding electronic filing should contact the Secretary (202–205–2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary.

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and of sections 201.10 and 210.50(a)(4) of the Commission's Rules of Practice and Procedure (19 CFR 201.10, 210.50(a)(4)).

By order of the Commission.

Issued: December 17, 2010.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 2010–32211 Filed 12–22–10; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–282 (Third Review)]

Petroleum Wax Candles From China

Determination

On the basis of the record [1] developed in the subject five-year review, the United States International Trade Commission (Commission) determines, pursuant to section 751(c) of the Tariff Act of 1930 (19 U.S.C. 1675(c)), that revocation of the antidumping duty order on petroleum wax candles from China would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.

Background

The Commission instituted this review on July 1, 2010 (75 FR 38121) and determined on October 4, 2010 that it would conduct an expedited review (75 FR 63200, October 14, 2010).

The Commission transmitted its determination in this review to the Secretary of Commerce on December 16, 2010. The views of the Commission are contained in USITC Publication 4207 (December 2010), entitled *Petroleum Wax Candles from China: Investigation No. 731–TA–282 (Third Review).*

Issued: December 17, 2010.

By order of the Commission.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 2010–32212 Filed 12–22–10; 8:45 am]

BILLING CODE 7020–02–P

[1] The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

INTERNATIONAL TRADE COMMISSION

[Inv. No. 337–TA–752]

In the Matter of Certain Gaming and Entertainment Consoles, Related Software, and Components Thereof; Notice of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Institution of investigation pursuant to 19 U.S.C. 1337.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on November 22, 2010, under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, on behalf of Motorola Mobility, Inc. of Libertyville, Illinois and General Instrument Corporation of Horsham, Pennsylvania. On December 14 and 15, 2010, complainants filed supplemental materials. The complaint alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain gaming and entertainment consoles, related software, and components thereof by reason of infringement of certain claims of U.S. Patent No. 5,319,712 ("the '712 patent"); U.S. Patent No. 5,357,571 ("the '571 patent"); U.S. Patent No. 6,069,896 ("the '896 patent"); U.S. Patent No. 6,980,596 ("the '596 patent"); and U.S. Patent No. 7,162,094 ("the '094 patent"). The complaint further alleges that an industry in the United States exists as required by subsection (a)(2) of section 337.

The complainants request that the Commission institute an investigation and, after the investigation, issue an exclusion order and a cease and desist order.

ADDRESSES: The complaint, except for any confidential information contained therein, is available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Room 112, Washington, DC 20436, telephone 202–205–2000. Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its Internet server at *http://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

FOR FURTHER INFORMATION CONTACT: Anne Goalwin, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, telephone (202) 205–2574.

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2010).

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on December 16, 2010, *Ordered That*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain gaming and entertainment consoles, related software, and components thereof that infringe one or more of claims 6, 8–10, and 17 of the '712 patent; claims 9–18 of the '571 patent; claims 1–3 and 12 of the '896 patent; claims 1–3, 7, and 8 of the '596 patent; and claims 5–8 and 10 of the '094 patent, and whether an industry in the United States exists as required by subsection (a)(2) of section 337;

(2) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainants are:

Motorola Mobility, Inc., 600 North US Highway 45, Libertyville, IL 60048;

General Instrument Corporation, 101 Tournament Drive, Horsham, PA 19044.

(b) The respondent is the following entity alleged to be in violation of section 337, and is the party upon which the complaint is to be served:

Microsoft Corporation, One Microsoft Way, Redmond, WA 98052.

(c) The Commission investigative attorney, party to this investigation, is Anne Goalwin, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street, SW., Suite 401, Washington, DC 20436; and

(3) For the investigation so instituted, the Honorable Paul J. Luckern, Chief Administrative Law Judge, U.S. International Trade Commission, shall

designate the presiding Administrative Law Judge.

Responses to the complaint and the notice of investigation must be submitted by the named respondent in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(d)-(e) and 210.13(a), such responses will be considered by the Commission if received not later than 20 days after the date of service by the Commission of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of the respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

By order of the Commission.
Issued: December 17, 2010.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 2010–32213 Filed 12–22–10; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–617]

In the Matter of Certain Digital Television Products and Certain Products Containing Same and Methods of Using Same; Enforcement Proceeding; Notice of Commission Decision Not To Review an Initial Determination (Order No. 40) Granting a Motion To Terminate the Enforcement Proceeding; Termination of Proceeding

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review the presiding administrative law judge's ("ALJ") initial determination granting complainants' motion to withdraw the enforcement complaint in the above-captioned proceeding, and has terminated the enforcement proceeding.

FOR FURTHER INFORMATION CONTACT: Daniel E. Valencia, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–1999. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–2000. General information concerning the Commission may also be obtained by accessing its Internet server at *http://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on November 15, 2007, based on a complaint filed by Funai Electric Co., Ltd. of Japan and Funai Corporation of Rutherford, New Jersey (collectively "Funai") against several respondents. 72 FR 64240 (2007). The complaint alleged violations of Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain digital television products and certain products containing same by reason of infringement of one or more claims of U.S. Patent Nos. 6,115,074 ("the '074 patent") and 5,329,369.

On April 10, 2009, the Commission terminated its investigation with a finding of violation of Section 337 by reason of infringement of claims 1, 5, and 23 of the '074 patent. 74 FR 17511 (2009). The Commission issued a limited exclusion order prohibiting importation into the United States of certain digital televisions and certain products containing the same that are covered by one or more of claims 1, 5, and 23 of the '074 patent and that are manufactured abroad by or on behalf of, or imported by or on behalf of the respondents in the above referenced investigation.

On September 11, 2009, the Commission instituted an enforcement proceeding based on an enforcement complaint filed by Funai, alleging that certain respondents violated the Commission's limited exclusion order and cease and desist orders. 74 FR 46793.

On May 26, 2010, the Federal Circuit issued a decision that reversed certain Commission findings of infringement by so-called "work-around" products in the underlying investigation and ordered the Commission to take action consistent with its opinion. *See Vizio, Inc.* v. *Int'l Trade Comm'n,* 605 F.3d 1330 (Fed. Cir. 2010).

On November 23, 2010, Funai moved to withdraw its enforcement complaint and terminate the enforcement proceeding. No party opposed this motion. The ALJ granted Funai's motion and issued the subject initial determination ("ID"). No petitions for review of the ID were filed.

The Commission has determined not to review the subject ID, and has terminated the enforcement proceeding.

The authority for the Commission's determination is contained in Section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in section 210.42–43 of the Commission's Rules of Practice and Procedure (19 CFR 210.42–43).

By order of the Commission.

Issued: December 17, 2010.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 2010–32214 Filed 12–22–10; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms, and Explosives

[OMB Number 1140–0027]

Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 30-Day Notice of Information Collection Under Review: User-Limited Permit (Explosives).

The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) 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. 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** Volume 75, Number 201, page 64356 on

October 19, 2010, allowing for a 60 day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until January 24, 2011. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to The Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503. Additionally, comments may be submitted to OMB via facsimile to (202) 395–5806.

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 agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* User-Limited Permit (Explosives).

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection: Form Number:* ATF F 5400.6. Bureau of Alcohol, Tobacco, Firearms and Explosives.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Business or other for-profit. *Other:* none. *Abstract:* The User-Limited Permit is useful to the person making a one-time purchase from out-of-state. This permit is not transferable and is valid only for a single transaction involving the type and quantity of explosive materials specified on the permit. It is nonrenewable. The explosives distributor makes entries on the form and returns the form to the permittee to prevent reuse of the permit.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* There will be an estimated 1,092 respondents, who will complete and retain the form within approximately 12 minutes.

(6) *An estimate of the total burden (in hours) associated with the collection:* There are an estimated 218 total burden hours associated with this collection.

If additional information is required contact: Lynn Murray, Department Clearance Officer, United States Department of Justice, Policy and Planning Staff, Justice Management Division, Two Constitution Square, Room 2E–502, 145 N Street, NE., Washington, DC 20530.

Dated: December 20, 2010.

Lynn Murray,

Department Clearance Officer, PRA, United States Department of Justice.

[FR Doc. 2010–32300 Filed 12–22–10; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms and Explosives

[OMB Number 1140–0090]

Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 30-Day Notice of Information Collection Under Review: ATF F 5630.5R, NFA Special Tax Renewal Registration and Return, ATF F 5630.5RC, NFA Special Tax Location Registration Listing, ATF F 5630.7, NFA Special Tax Registration and Return National Firearms Act.

The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) 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. 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** Volume 75, Number 201, page 64354 on October 19, 2010, allowing for a 60-day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until January 24, 2011. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to The Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503. Additionally, comments may be submitted to OMB via facsimile to (202) 395–7285.

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 agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* ATF F 5630.5R, NFA Special Tax Renewal Registration and Return, ATF F 5630.5RC, NFA Special Tax Location Registration Listing, ATF F 5630.7, NFA Special Tax Registration and Return National Firearms Act.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection: Form Number:* ATF F 5630.5R, ATF F 5630.5RC, ATF F 5630.7. Bureau of Alcohol, Tobacco, Firearms and Explosives.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Business or other for-

profit. *Other:* None. *Abstract:* ATF F 5630.7, NFA Special Tax Registration and Return National Firearms Act is completed and returned by businesses that are subject to Special Occupational Taxes under the National Firearms Act for either initial tax payment or business information changes. This form serves as both a return and a business registration. ATF F 5630.5R, NFA Special Tax Renewal Registration and Return and ATF F 5630.5RC, NFA Special Tax Location Registration Listing are preprinted forms sent to taxpayers for Special Occupation Taxes under the National Firearms Act. Taxpayers validate/correct the information and send the forms back with payment for the applicable tax year.

(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 2,800 taxpayers will complete forms ATF F 5630.5R and ATF F 5630.5RC in approximately 20 minutes (10 minutes for each form). It is also estimated that 200 new taxpayers will complete ATF F 5630.7 in its entirety in approximately 15 minutes. The total number of respondents for this information collection is 3,000.

(6) *An estimate of the total burden (in hours) associated with the collection:* The total burden for ATF F 5630.5R and ATF F 5630.5RC is 933 hours. The total burden for ATF F 5630.7 is 50 hours. The estimated total public burden associated with this information collection is 983 hours.

If additional information is required contact: Lynn Murray, Department Clearance Officer, United States Department of Justice, Policy and Planning Staff, Justice Management Division, 2 Two Constitution Square, Room 2E–502, 145 N Street, NE., Washington, DC 20530.

Dated: December 20, 2010.

Lynn Murray,

Department Clearance Officer, PRA, United States Department of Justice.

[FR Doc. 2010–32326 Filed 12–22–10; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms, and Explosives

[OMB Number 1140–0015]

Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 30-Day Notice of Information Collection Under Review: Application For Tax Exempt Transfer and Registration of Firearm.

The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) will submit 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. 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** Volume 75, Number 201, page 64353 on October 19, 2010, allowing for a 60 day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until January 24, 2011. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to The Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503. Additionally, comments may be submitted to OMB via facsimile to (202) 395–5806.

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

—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) *Title of the Form/Collection:* Application For Tax Exempt Transfer and Registration of Firearm.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection: Form Number:* ATF F 5 (5320.5). Bureau of Alcohol, Tobacco, Firearms and Explosives.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Business or other for-profit. *Other:* Individuals or households and State, Local, or Tribal Government. *Abstract:* ATF F 5 (5320.5) is used to apply for permission to transfer a National Firearms Act (NFA) firearm exempt from transfer tax based on statutory exemptions. The information on the form is used by NFA Branch personnel to determine the legality of the application under Federal, State and local law.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* There will be an estimated 7,888 respondents, who will complete the form within approximately 4 hours.

(6) *An estimate of the total burden (in hours) associated with the collection:* There are an estimated 379,896 total burden hours associated with this collection.

If additional information is required contact: Lynn Murray, Department Clearance Officer, United States Department of Justice, Policy and Planning Staff, Justice Management Division, Two Constitution Square, Room 2E–502, 145 N Street, NE., Washington, DC 20530.

Dated: December 20, 2010.

Lynn Murray,

Department Clearance Officer, PRA, United States Department of Justice.

[FR Doc. 2010–32307 Filed 12–22–10; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms, and Explosives

[OMB Number 1140–0013]

Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 30-Day Notice of Information Collection Under Review: Application for Tax-Exempt Transfer of Firearm and Registration to Special Occupational Taxpayer.

The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) will submit 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. 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** Volume 75, Number 201, page 64355 on October 19, 2010, allowing for a 60 day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until January 24, 2011. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to The Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503. Additionally, comments may be submitted to OMB via facsimile to (202)–395–5806.

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 agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Application for Tax-Exempt Transfer of Firearm and Registration to Special Occupational Taxpayer.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection: Form Number:* ATF F 3 (5320.3). Bureau of Alcohol, Tobacco, Firearms and Explosives.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Business or other for-profit. *Other:* None. *Abstract:* The form is submitted and approved by ATF prior to the transfer of a National Firearms Act weapon from one Special Occupational Taxpaying Federal firearms licensee to another special taxpaying licensee. The form is required whenever such a transfer is to be made.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* There will be an estimated 2,521 respondents, who will complete the form within approximately 30 minutes.

(6) *An estimate of the total burden (in hours) associated with the collection:* There are an estimated 11,144 total burden hours associated with this collection.

If additional information is required contact: Lynn Murray, Department Clearance Officer, United States Department of Justice, Policy and Planning Staff, Justice Management Division, 2 Constitution Square, Room 2E–502, 145 N Street, NE., Washington, DC 20530.

Dated: December 20, 2010.

Lynn Murray,

Department Clearance Officer, PRA, United States Department of Justice.

[FR Doc. 2010–32309 Filed 12–22–10; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms, and Explosives

[OMB Number 1140–0041]

Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 30-Day Notice of Information Collection Under Review: Implementation of Public Law 103–322, The Violent Crime Control and Law Enforcement Act of 1994.

The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) 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. 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** Volume 75, Number 204, page 65382 on October 22, 2010, allowing for a 60 day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until January 24, 2011. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to The Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503. Additionally, comments may be submitted to OMB via facsimile to (202) 395–5806.

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 agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Implementation of Public Law 103–322, The Violent Crime Control and Law Enforcement Act of 1994.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection: Form Number:* None. Bureau of Alcohol, Tobacco, Firearms and Explosives.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Business or other for-profit. *Other:* none. *Abstract:* The Violent Crime Control and Law Enforcement Act of 1994 restrict the manufacture, transfer, and possession of certain semiautomatic assault weapons and large capacity ammunition feeding devices. Federal firearms licensees may transfer these weapons to law enforcement agencies and law enforcement officers with proper documentation. This documentation is necessary for ATF to ensure compliance with the law and to prevent the introduction of semiautomatic assault weapons into commercial channels.

(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 61,529 respondents will provide the necessary documentation and maintain records for a total of 2 hours and 50 minutes.

(6) *An estimate of the total burden (in hours) associated with the collection:* There are an estimated 148,900 total burden hours associated with this collection.

If additional information is required contact: Lynn Murray, Department Clearance Officer, United States Department of Justice, Policy and Planning Staff, Justice Management Division, Two Constitution Square, Room 2–502, 145 N Street, NE., Washington, DC 20530.

Dated: December 20, 2010.

Lynn Murray,

Department Clearance Officer, PRA, United States Department of Justice.

[FR Doc. 2010–32322 Filed 12–22–10; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms, and Explosives

[OMB Number 1140–0019]

Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 30-Day Notice of Information Collection Under Review: Federal Firearms License (FFL) RENEWAL Application.

The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) will submit 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. 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** Volume 75, Number 201, page 64355 on October 19, 2010, allowing for a 60 day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until January 24, 2011. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to The Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503. Additionally, comments may be submitted to OMB via facsimile to (202)–395–5806.

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 agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Federal Firearms License (FFL) RENEWAL Application.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: ATF F 8 (5310.11). Bureau of Alcohol, Tobacco, Firearms and Explosives.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Business or other for-profit. Other: Individuals or households. Abstract: The form is filed by the licensee desiring to renew a Federal firearms license. It is used to identify the applicant, locate the business/collection premises, identify the type of business/collection activity, and determine the eligibility of the applicant.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* There will be an estimated 35,000 respondents, who will complete the form within approximately 25 minutes.

(6) *An estimate of the total burden (in hours) associated with the collection:* There are an estimated 14,700 total burden hours associated with this collection.

If additional information is required contact: Lynn Murray, Department Clearance Officer, United States Department of Justice, Policy and Planning Staff, Justice Management Division, Two Constitution Square, Room 2E–502, 145 N Street, NE., Washington, DC 20530.

Dated: December 20, 2010.

Lynn Murray,

Department Clearance Officer, PRA, United States Department of Justice.

[FR Doc. 2010–32306 Filed 12–22–10; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Operator Response to Schedule for Submission of Additional Evidence, and Operator Response to Notice of Claim

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) hereby announces the submission of the Office of Workers' Compensation Programs (OWCP) sponsored information collection request (ICR) titled, "Operator Response to Schedule for Submission of Additional Evidence, and Operator Response to Notice of Claim," to the Office of Management and Budget (OMB) for review and approval for continued use in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35).

DATES: Submit comments on or before January 24, 2011.

ADDRESSES: A copy of this ICR, with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained from the RegInfo.gov Web site, *http://www.reginfo.gov/public/do/PRAMain* or by contacting Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or sending an e-mail to *DOL_PRA_PUBLIC@dol.gov.*

Submit comments about this request to the Office of Information and Regulatory Affairs, *Attn:* OMB Desk Officer for the Department of Labor, Office of Workers' Compensation Programs (OWCP), Office of Management and Budget, Room 10235, Washington, DC 20503, *Telephone:* 202–395–6929/*Fax:* 202–395–6881 (these are not toll-free numbers), *e-mail: OIRA_submission@omb.eop.gov.*

FOR FURTHER INFORMATION: Contact Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or by e-mail at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: The OWCP, Division of Coal Mine Workers' Compensation (DCMWC), administers the Black Lung Benefits Act (30 U.S.C. 901 *et seq.*), which provides benefits to coal miners totally disabled due to pneumoconiosis, and their surviving dependents. When the DCMWC makes a preliminary analysis of a claimant's eligibility for benefits, and if a coal mine operator has been identified as potentially liable for payment of those benefits, the responsible operator is notified of the preliminary analysis. Regulations require that a coal mine operator be identified and notified of potential liability as early in the adjudication process as possible. Forms CM–2790 and CM–2970 are used for claims filed after January 19, 2001, and indicate that the coal mine operator will submit additional evidence or respond to the notice of claim.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is currently approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information if the collection of information does not display a currently valid OMB control number. *See* 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under OMB Control Number 1240–033. The current OMB approval is scheduled to expire on December 31, 2010; however, it should be noted that information collections submitted to the OMB receive a month-to-month extension while they undergo review. For additional information, see the related notice published in the **Federal Register** on August 20, 2010 (75 FR 51488).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within 30 days of publication of this notice in the **Federal Register**. In order to ensure the appropriate consideration, comments should reference OMB Control Number 1240–0033. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Agency: Office of Workers' Compensation Programs (OWCP).

Title of Collection: Operator Response to Schedule for Submission of Additional Evidence (CM–2970) and Operator Response to Notice of Claim (CM–2970A).

OMB Control Number: 1240–0033.

Affected Public: Private sector, Business or other for-profits.

Total Estimated Number of Respondents: 9,600.

Total Estimated Number of Responses: 9,600.

Total Estimated Annual Burden Hours: 2000.

Total Estimated Annual Costs Burden: $4,512.

Dated: December 17, 2010.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2010–32283 Filed 12–22–10; 8:45 am]

BILLING CODE 4510–CK–P

DEPARTMENT OF LABOR

Notice of Initial Determination Revising the List of Products Requiring Federal Contractor Certification as to Forced/Indentured Child Labor Pursuant to Executive Order 13126

AGENCY: Bureau of International Labor Affairs (ILAB), Labor.

ACTION: Correction. Amendment to **Federal Register** Volume 75, No. 241.

SUMMARY: The Department of Labor is publishing a correction to the Notice of Initial Determination Revising the List of Products Requiring Federal Contractor Certification as to Forced/Indentured Child Labor Pursuant to Executive Order 13126. The notice was originally published in the **Federal Register** Volume 75, No. 241 and on the USDOL Web site on December 16, 2010.

Amendments

- On page 78757, remove the sentence from the Product: Charcoal, Country: Brazil section, second column:

"This information indicates that while children previously worked under forced labor conditions in charcoal production, there is no longer a

reasonable basis the problem has been significantly reduced if not eliminated."

Replace with the sentence:

"This information indicates that while children previously worked under forced labor conditions in charcoal production, the problem has been significantly reduced if not eliminated."

• On page 78757, remove the sentence from the Product: Charcoal, Country: Brazil section, third column:

"These sources, which included the International Labor OrganizaILO, Reporter Brasil, the Citizens' Charcoal Institute (ICC), and the Pastoral Land Commission (CPT), indicate that forced child labor in the production of charcoal has been significantly reduced if not eliminated."

Replace with the sentence:

"These sources, which included the International Labor Organization, Reporter Brasil, the Citizens' Charcoal Institute (ICC), and the Pastoral Land Commission (CPT), indicate that forced child labor in the production of charcoal has been significantly reduced if not eliminated."

Agency Contacts

All inquiries regarding the initial determination or this Amendment should be directed to: Brandie Sasser at U.S. Department of Labor, OCFT, Bureau of International Labor Affairs, 200 Constitution Avenue, NW., Room S–5317, Washington, DC 20210; telephone (202) 693–4834 (please note that this is not a toll-free-number) or e-mail: *sasser.brandie@dol.gov.*

Signed at Washington, DC, this 17th day of December 2010.

Sandra Polaski,

Deputy Undersecretary, Bureau of International Labor Affairs.

[FR Doc. 2010–32227 Filed 12–22–10; 8:45 am]

BILLING CODE 4510–28–P

LEGAL SERVICES CORPORATION

Development of Strategic Plan 2011–2015

AGENCY: Legal Services Corporation.

ACTION: Development of Strategic Plan request for comments.

SUMMARY: LSC is embarking on the process to develop a Strategic Plan for the years 2011–2015. Toward that end, LSC is soliciting suggestions for updating, revising and modifying LSC's Strategic Directions.

DATES: Written comments must be received on or before March 15, 2011.

ADDRESSES: Written comments may be submitted by mail, fax or e-mail to Mattie Cohan, Senior Assistant General Counsel, LSC, at 3333 K Street, NW., Washington, DC 20007, 202–337–6519 (fax), or *mcohan@lsc.gov.*

FOR FURTHER INFORMATION CONTACT: Mattie Cohan, Senior Assistant General Counsel, Legal Services Corporation, 3333 K Street, NW., Washington, DC 20007, 202–295–1624 (phone), 202–337–6519 (fax), or *mcohan@lsc.gov.*

SUPPLEMENTARY INFORMATION: In 2000, the Legal Services Corporation (LSC) Board of Directors first adopted a Strategic Directions document for the period of 2000–2005. In 2006, the LSC Board adopted Strategic Directions 2006–2010. The expiring LSC Strategic Directions 2006–2010 document is available at the LSC Electronic Public Reading Room on the LSC Web site at: *http://www.lsc.gov/pdfs/LSCStrategicDirections20062010.pdf.*

LSC is now undertaking an effort to develop a new Strategic Plan for the years 2011–2015. Toward that end, LSC is soliciting suggestions for updating, revising and modifying LSC's Strategic Directions. In particular, LSC is actively seeking input from the public and all interested stakeholders, who are asked to address:

• To what extent are the goals, objectives and strategies set forth in the Strategic Directions 2006–2010 document still appropriate? To what extent are they obsolete?

• Beyond those identified in response to the question above, what are realistic yet meaningful goals?

• How may LSC most effectively achieve its identified goals? What revised objectives and/or strategies are appropriate for LSC to consider?

In addition, LSC notes that the Strategic Directions adopted in 2000 and 2006 were called "Strategic Directions" rather than a "strategic plan" because they did not set forth significant performance measures. The Board is interested in considering the development of appropriate performance measures by which the Corporation's progress in achieving its strategic goals and objectives may be determined. To that end, comments are requested to address suggestions regarding whether and how LSC may incorporate performance measures into its strategic planning efforts.

In addition, Among other sources, LSC is considering the guidance provided by the Office of Management and Budget as set forth in: *http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-24.pdf* and *http://www.whitehouse.gov/omb/circulars_a11_current_year_a11_toc/*. Although LSC is not subject to the Government Performance and Results Act (GPRA), LSC has looked to GPRA for guidance. LSC welcomes comments on GPRA as a model for LSC as well as suggestions for other strategic planning models and guidance that LSC should consider. Finally, LSC also welcomes comments on whether there are different or additional questions that LSC should consider in its work on strategic directions for 2011–2015. Comments should be submitted as set forth above.

This request for comments is intended for use as LSC embarks on its planning process. LSC anticipates publishing a draft Strategic Plan for additional public comment.

Mattie Cohan,

Senior Assistant General Counsel.

[FR Doc. 2010–32320 Filed 12–22–10; 8:45 am]

BILLING CODE P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: (10-168)]

NASA Advisory Council; Science Committee; Planetary Protection Subcommittee; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Public Law 92–463, as amended, the National Aeronautics and Space Administration (NASA) announces a meeting of the Planetary Protection Subcommittee of the NASA Advisory Council (NAC). This Subcommittee reports to the Science Committee of the NAC. The Meeting will be held for the purpose of soliciting from the scientific community and other persons scientific and technical information relevant to program planning.

DATES: Thursday, January 20, 2011, 9 a.m. to 5 p.m., and Friday, January 21, 2011, 9 a.m. to 1 p.m., Local Time.

ADDRESSES: NASA Headquarters, 300 E Street, SW., Room 7H45, Washington, DC 20546.

FOR FURTHER INFORMATION CONTACT: Ms. Marian Norris, Science Mission Directorate, NASA Headquarters, Washington, DC 20546, (202) 358–4452, fax (202) 358–4118, or *mnorris@nasa.gov.*

SUPPLEMENTARY INFORMATION: The meeting will be open to the public up to the capacity of the room. The agenda for the meeting includes the following topics:

—Mars Mission: Status and Plans.
—Technology development strategy and plans.
—Agency Planetary Protection Integration/Coordination Activities.

It is imperative that the meeting be held on these dates to accommodate the scheduling priorities of the key participants. Attendees will be requested to sign a register and to comply with NASA security requirements, including the presentation of a valid picture ID, before receiving an access badge. Foreign nationals attending this meeting will be required to provide a copy of their passport, visa, or green card in addition to providing the following information no less than 10 working days prior to the meeting: Full name; gender; date/place of birth; citizenship; visa/green card information (number, type, expiration date); passport information (number, country, expiration date); employer/affiliation information (name of institution, address, country, telephone); title/position of attendee. To expedite admittance, attendees with U.S. citizenship can provide identifying information 3 working days in advance by contacting Marian Norris via e-mail at *mnorris@nasa.gov* or by telephone at (202) 358–4452.

Dated: December 17, 2010.

P. Diane Rausch,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 2010–32183 Filed 12–22–10; 8:45 am]

BILLING CODE P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: (10–169)]

NASA Advisory Council; Science Committee; Planetary Science Subcommittee; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Public Law 92–463, as amended, the National Aeronautics and Space Administration (NASA) announces a meeting of the Planetary Science Subcommittee of the NASA Advisory Council (NAC). This Subcommittee reports to the Science Committee of the NAC. The Meeting will be held for the purpose of soliciting from the scientific community and other persons scientific and technical information relevant to program planning.

DATES: Wednesday, January 26, 2011, 8:30 a.m. to 5 p.m., and Thursday, January 27, 2011, 8:30 a.m. to 4 p.m., Local Time.

ADDRESSES: NASA Headquarters, 300 E Street, SW., Rooms 5H45 and 7H45 consecutively, Washington, DC 20546.

FOR FURTHER INFORMATION CONTACT: Ms. Marian Norris, Science Mission Directorate, NASA Headquarters, Washington, DC 20546, (202) 358–4452, fax (202) 358–4118, or *mnorris@nasa.gov.*

SUPPLEMENTARY INFORMATION: The meeting will be open to the public up to the capacity of the room. The agenda for the meeting includes the following topics:

—Update on the Planetary Science Division.
—Update from the Planetary Science Subcommittee Analysis Groups.
—Update on Research and Analysis Program Working Group.
—Update on Progress of Planetary Science Technology Review Panel.

It is imperative that the meeting be held on these dates to accommodate the scheduling priorities of the key participants. Attendees will be requested to sign a register and to comply with NASA security requirements, including the presentation of a valid picture ID, before receiving an access badge. Foreign nationals attending this meeting will be required to provide a copy of their passport, visa, or green card in addition to providing the following information no less than 10 working days prior to the meeting: Full name; gender; date/place of birth; citizenship; visa/green card information (number, type, expiration date); passport information (number, country, expiration date); employer/affiliation information (name of institution, address, country, telephone); title/position of attendee. To expedite admittance, attendees with U.S. citizenship can provide identifying information 3 working days in advance by contacting Marian Norris via e-mail at *mnorris@nasa.gov* or by telephone at (202) 358–4452.

Dated: December 17, 2010.

P. Diane Rausch,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 2010–32187 Filed 12–22–10; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Records Schedules; Availability and Request for Comments

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice of availability of proposed records schedules; request for comments.

SUMMARY: The National Archives and Records Administration (NARA) publishes notice at least once monthly of certain Federal agency requests for records disposition authority (records schedules). Once approved by NARA, records schedules provide mandatory instructions on what happens to records when no longer needed for current Government business. They authorize the preservation of records of continuing value in the National Archives of the United States and the destruction, after a specified period, of records lacking administrative, legal, research, or other value. Notice is published for records schedules in which agencies propose to destroy records not previously authorized for disposal or reduce the retention period of records already authorized for disposal. NARA invites public comments on such records schedules, as required by 44 U.S.C. 3303a(a).

DATES: Requests for copies must be received in writing on or before January 24, 2011. Once the appraisal of the records is completed, NARA will send a copy of the schedule. NARA staff usually prepare appraisal memorandums that contain additional information concerning the records covered by a proposed schedule. These, too, may be requested and will be provided once the appraisal is completed. Requesters will be given 30 days to submit comments.

ADDRESSES: You may request a copy of any records schedule identified in this notice by contacting the Life Cycle Management Division (NWML) using one of the following means:

Mail: NARA (NWML), 8601 Adelphi Road, College Park, MD 20740–6001.

E-mail: *request.schedule@nara.gov.*

FAX: 301–837–3698.

Requesters must cite the control number, which appears in parentheses after the name of the agency which submitted the schedule, and must provide a mailing address. Those who desire appraisal reports should so indicate in their request.

FOR FURTHER INFORMATION CONTACT: Laurence Brewer, Director, Life Cycle Management Division (NWML), National Archives and Records

Administration, 8601 Adelphi Road, College Park, MD 20740–6001. Telephone: 301–837–1539. E-mail: *records.mgt@nara.gov.*

SUPPLEMENTARY INFORMATION: Each year Federal agencies create billions of records on paper, film, magnetic tape, and other media. To control this accumulation, agency records managers prepare schedules proposing retention periods for records and submit these schedules for NARA's approval, using the Standard Form (SF) 115, Request for Records Disposition Authority. These schedules provide for the timely transfer into the National Archives of historically valuable records and authorize the disposal of all other records after the agency no longer needs them to conduct its business. Some schedules are comprehensive and cover all the records of an agency or one of its major subdivisions. Most schedules, however, cover records of only one office or program or a few series of records. Many of these update previously approved schedules, and some include records proposed as permanent.

The schedules listed in this notice are media neutral unless specified otherwise. An item in a schedule is media neutral when the disposition instructions may be applied to records regardless of the medium in which the records are created and maintained. Items included in schedules submitted to NARA on or after December 17, 2007, are media neutral unless the item is limited to a specific medium. (*See* 36 CFR 1225.12(e).)

No Federal records are authorized for destruction without the approval of the Archivist of the United States. This approval is granted only after a thorough consideration of their administrative use by the agency of origin, the rights of the Government and of private persons directly affected by the Government's activities, and whether or not they have historical or other value.

Besides identifying the Federal agencies and any subdivisions requesting disposition authority, this public notice lists the organizational unit(s) accumulating the records or indicates agency-wide applicability in the case of schedules that cover records that may be accumulated throughout an agency. This notice provides the control number assigned to each schedule, the total number of schedule items, and the number of temporary items (the records proposed for destruction). It also includes a brief description of the temporary records. The records schedule itself contains a full description of the records at the file unit level as well as their disposition. If NARA staff has prepared an appraisal memorandum for the schedule, it too includes information about the records. Further information about the disposition process is available on request.

Schedules Pending:

1. Department of Agriculture, Agricultural Research Service (N1–310–11–1, 3 items, 3 temporary items). Master files of electronic information systems containing information related to agricultural research projects of the mid-Atlantic area, including an integrated farm system model, a dairy greenhouse gas model, and a system that tracks germplasm collections.

2. Department of Commerce, National Institute of Standards and Technology (N1–167–09–3, 2 items, 2 temporary items). Records of the Technology Innovation Program, including project narratives, drawings, correspondence, budget information, project impact reviews, periodic reports, and project assessments.

3. Department of Energy, Federal Energy Regulatory Commission (N1–138–10–4, 10 items, 10 temporary items). Records related to power transmission providers and utilities, including correspondence, tax information, administrative reports, management planning, and delegations of authority.

4. Department of Energy, Western Area Power Administration (N1–201–10–1, 1 item, 1 temporary item). Master files of an electronic information system used to track property, assets, and related work orders for maintenance, labor and materials, parts, and other related information.

5. Department of Health and Human Services, Centers for Medicare & Medicaid Services (N1–440–09–3, 1 item, 1 temporary item). Master files of an electronic information system used to monitor and improve utilization and quality of care for Medicare and Medicaid beneficiaries.

6. Department of Health and Human Services, Centers for Medicare & Medicaid Services (N1–440–10–5, 10 items, 8 temporary items). Records of the senior leadership, including calendars, telephone logs, meeting requests, speech files, conference and public hearing files, briefing books and routine correspondence. Proposed for permanent retention are decision documents, final reports, and substantive correspondence.

7. Department of Homeland Security, U.S. Immigration and Customs Enforcement (N1–567–11–1, 1 item, 1 temporary item). Master files of an electronic information system containing information on a backlog of unresolved immigration surety bonds to facilitate discharging or collecting the bonds.

8. Department of the Interior, Fish and Wildlife Service (N1–22–08–1, 4 items, 3 temporary items). Master files of an electronic information system used to track and present photographs, videos, and other electronic records documenting fish and wildlife activities.

9. Department of Justice, Civil Rights Division (N1–60–09–32, 2 items, 1 temporary item). Inputs of an electronic information system used for voting redistricting activities. Proposed for permanent retention are the master files containing census and geographic information system data used to map proposed changes to voting districts for analysis under Section 5 of the Voting Rights Act.

10. Department of Justice, Federal Bureau of Investigation (N1–65–10–30, 2 items, 2 temporary items). Inputs and master files of an electronic information system used to track police training given to state and local law enforcement officers.

11. Department of Justice, National Drug Intelligence Center (N1–523–10–01, 3 items, 3 temporary items). Public Web site content describing the mission and activities of the National Drug Intelligence center, including materials derived from primary intelligence products.

12. Department of Justice, U.S. Trustee Program (N1–60–09–73, 1 item, 1 temporary item). Master files of an electronic information system used to track appointments of bankruptcy trustees and general case identification.

13. Department of State, Bureau of East Asian and Pacific Affairs (N1–59–10–10, 4 items, 4 temporary items). Records of the Office of Public Affairs (EAP/P), including press guidance files, speaker biographies, public remarks by EAP officials, and Voice of America editorials submitted to EAP/P for comment.

14. Department of Transportation, Federal Highway Administration (N1–406–09–23, 21 items, 21 temporary items). Records of the Federal Aid Division, including highway bridge and tunnel correspondence, designs and plans, geotechnical and hydraulic files, testing of materials, policies and procedures, program files, records of inspections, construction cost files, coordination records, and bridge and tunnel failure records maintained by the field offices.

15. Department of Transportation, Federal Highway Administration (N1–406–09–22, 10 items, 10 temporary

items). Records of the Federal Aid Research and Technology program, including planning research files, asphalt and pavement research files, statewide contract files, delineation files, recycling and reuse records, transportation pooled fund studies, and local technical assistance program records.

16. Department of the Treasury, Internal Revenue Service (N1–58–10–14, 1 item, 1 temporary item). Template forms used by taxpayers to update changes related to their filed credit card information.

17. Social Security Administration, Agency-wide (N1–47–10–2, 5 items, 5 temporary items). Content and management records associated with the agency's internal and external Web sites.

Dated: December 17, 2010.

Michael J. Kurtz,

Assistant Archivist for Records Services—Washington, DC.

[FR Doc. 2010–32314 Filed 12–22–10; 8:45 am]

BILLING CODE 7515–01–P

NATIONAL SCIENCE FOUNDATION

Designing a Digital Future: Federally Funded Research and Development in Networking and Information Technology

AGENCY: National Coordination Office (NCO) for the Networking and Information Technology Research and Development (NITRD) Program, National Science Foundation.

SUBJECT: Request for Information: Report "Designing a Digital Future: Federally Funded Research and Development in Networking and Information Technology".

ACTION: Request for Information (RFI).

SUMMARY: Networking and Information Technology Research and Development (NITRD) Program; National Coordination Office (NCO); Request for Information (RFI) Regarding the President's Council of Advisors on Science and Technology (PCAST) Report Entitled "Designing a Digital Future: Federally Funded Research and Development in Networking and Information Technology"

This document is a request for comments on strategies for meeting the goals and recommendations of the recently released PCAST report on networking and information technology research and development (*see http://www.whitehouse.gov/administration/eop/ostp/pcast).*

DATES: *Comment Date:* To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. on January 31, 2011.

ADDRESSES: You may submit comments by any of the following methods (please do not submit duplicate comments).

Electronically: You may submit electronic comments on this request for information at *http://www.nitrd.gov/pcast-2010/report/nitrd-program/comments.* Emailed comments will be accepted at *pcast2010comments@nitrd.gov.* Attachments should be in OpenOffice, Microsoft Word, or Adobe PDF formats.

Regular, Express, Overnight Mail, or Courier: National Coordination Office for the Networking and Information Technology Research and Development Program, 4201 Wilson Blvd, Suite II–405, Arlington, VA 22230. Please submit one original and two copies. Please also allow sufficient time for mailed comments to be received before the close of the comment period.

FOR FURTHER INFORMATION CONTACT: Joan Stanley, National Coordination Office for the Networking and Information Technology Research and Development Program, 703–292–4873.

SUPPLEMENTARY INFORMATION:

Inspection of Public Comments: All comments received before the close of the comment period will be available for public inspection, including any personally identifiable or confidential business information that is included in a comment. Please do not include any information in your comment submission that you do not wish to share with the general public. Such information includes, but is not limited to: A person's Social Security number; date of birth; driver's license number; State identification number or foreign country equivalent; passport number; financial account number; credit or debit card number; or any business information that could be considered to be proprietary. We will post all comments received before the close of the comment period at *http://www.nitrd.gov/pcast-2010/report/nitrd-program/comments.* Follow the instructions on the Web site to view public comments.

I. Background

On December 16, 2010, the President's Council of Advisors on Science and Technology (PCAST) released an important new report entitled "Designing a Digital Future: Federally Funded Research and Development in Networking and Information Technology" (the PCAST Report). (The full report is available at *http://www.whitehouse.gov/administration/eop/ostp/pcast* and at the NITRD Web site *http://www.nitrd.gov*). PCAST is an advisory group of the nation's leading scientists and engineers who directly advise the President and the Executive Office of the President. PCAST makes policy recommendations in the many areas where understanding of science, technology, and innovation is key to strengthening our economy and forming policy that works for the American people. PCAST is administered by the Office of Science and Technology Policy (OSTP). NITRD seeks public comment on how the PCAST report's recommendations may best be addressed.

II. Solicitation of Comments

NITRD seeks comment on the questions below. Comments on other aspects of the PCAST report are also welcome.

1. The PCAST report calls for national, long-term, multi-agency research initiatives on networking and information technologies (NIT) for the health, energy, transportation, and cyberinfrastructure sectors.

a. What are the most important NIT R&D challenges in each of these sectors?

b. What NIT R&D challenges are common across all of these sectors?

c. What emerging innovations in these or other sectors could be used to achieve a leap forward in progress?

2. The PCAST report recommends collaborative programs to support high risk/high reward R&D in the following frontier areas: Fundamentals of privacy protection and protected disclosure of confidential data; human-machine and social collaboration and problem-solving in networked, on-line environments where large numbers of people participate in common activities; data collection, storage, management, and automated large-scale data analysis; and advanced domain-specific sensors, integration of NIT into physical systems, and innovative robotics.

a. What are some high-risk concepts that carry the potential for fundamentally changing the landscape in these frontier areas?

b. What limitations in NIT hold back progress today in these frontier areas? How might these limitations be overcome?

c. What efforts currently underway in these areas could be accelerated through collaboration, cooperation, and coordination?

3. The PCAST report calls for fundamental changes in K-12 STEM education in the United States, including the incorporation of computer science (CS) as an essential component.

a. What CS concepts and approaches are most important to effective elementary, secondary, and post-secondary curricula? Among these, which are commonly found in curricula today? Which are missing?

b. What do teachers need (including preparation and training, tools, and resources) to be able to deliver CS education effectively?

c. What factors are important in promoting student interest in CS?

Dated: December 17, 2010.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. 2010–32279 Filed 12–22–10; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2010–0377]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: U.S. Nuclear Regulatory Commission (NRC).

ACTION: Notice of pending NRC action to submit an information collection request to the Office of Management and Budget (OMB) and solicitation of public comment.

SUMMARY: The NRC invites public comment about our intention to request the OMB's approval for renewal of an existing information collection that is summarized below. We are required to publish this notice in the **Federal Register** under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35).

Information pertaining to the requirement to be submitted:

1. *The title of the information collection:* NUREG/BR–0238, Materials Annual Fee Billing Handbook; NRC Form 628, "Financial EDI Authorization"; NUREG/BR–0254, Payment Methods; and NRC Form 629, "Authorization for Payment by Credit Card."

2. *Current OMB approval number:* 3150–0190.

3. *How often the collection is required:* On occasion (as needed to pay invoices.)

4. *Who is required or asked to report:* Anyone conducting business with the Nuclear Regulatory Commission including licensees, applicants and individuals who are required to pay a fee for inspections and licenses.

5. *The number of annual respondents:* 583 (11 for NRC Form 628 and 572 for NRC Form 629 and NUREG/BR–0254).

6. *The number of hours needed annually to complete the requirement or request:* 47 (.9 hour for NRC Form 628 and 46 hours for NRC Form 629 and NUREG/BR–0254).

7. *Abstract:* The U.S. Department of the Treasury encourages the public to pay monies owed the government through use of the Automated Clearinghouse Network and credit cards. These two methods of payment are used by licensees, applicants, and individuals to pay civil penalties, full cost licensing fees, and inspection fees to the NRC. The NRC Form 628, "Financial EDI Authorization," provides an option to make electronic payment through the Automated Clearinghouse (ACH) Network and authorizes the licensee's bank to pay invoices to the NRC through the ACH. The NRC Form 628 requests the licensee's name; electronic funds transfer contact, telephone number, address, authorized signature and title. NRC Form 629, "Authorization for Payment by Credit Card," is another option used to authorize payment. The credit card authorization form is used by licensees to authorize payment by credit card for license fees and for payment of fees for fingerprint cards, and solicits information that identifies the cardholder's name, address, account number, card expiration date, cards accepted, cardholder's signature, invoice number or license number.

There are no recordkeeping requirements associated with this collection.

Submit, by February 22, 2011, comments that address the following questions:

1. Is the proposed collection of information necessary for the NRC to properly perform its functions? Does the information have practical utility?

2. Is the burden estimate accurate?

3. Is there a way to enhance the quality, utility, and clarity of the information to be collected?

4. How can the burden of the information collection be minimized, including the use of automated collection techniques or other forms of information technology?

The public may examine and have copied for a fee publicly available documents, including the draft supporting statement, at the NRC's Public Document Room, Room O–1F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland. OMB clearance requests are available at the NRC worldwide Web site: *http://www.nrc.gov/public-involve/doc-comment/omb/index.html.* The document will be available on the NRC home page site for 60 days after the signature date of this notice. Comments submitted in writing or in electronic form will be made available for public inspection. Because your comments will not be edited to remove any identifying or contact information, the NRC cautions you against including any information in your submission that you do not want to be publicly disclosed. Comments submitted should reference Docket No. NRC–2010–0377. You may submit your comments by any of the following methods. Electronic comments: Go to *http://www.regulations.gov* and search for Docket No. NRC–2010–0377. Mail comments to NRC Clearance Officer, Tremaine Donnell (T–5 F53), U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. Questions about the information collection requirements may be directed to the NRC Clearance Officer, Tremaine Donnell (T–5 F53), U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, by telephone at 301–415–6258, or by e-mail to *INFOCOLLECTS.Resource@NRC.GOV.*

Dated at Rockville, Maryland, this 15th day of December 2010.

For the Nuclear Regulatory Commission.

Tremaine Donnell,

NRC Clearance Officer, Office of Information Services.

[FR Doc. 2010–32250 Filed 12–22–10; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 52–044; NRC–2010–0361]

Toshiba Corporation; Acceptance for Docketing of an Application for Renewal of the U.S. Advanced Boiling Water Reactor Design Certification

On November 2, 2010, Toshiba Corporation (Toshiba) submitted an application to the U.S. Nuclear Regulatory Commission (NRC) for a design certification (DC) renewal for the U.S. Advanced Boiling Water Reactor (ABWR) in accordance with the requirements contained in 10 CFR part 52, "Licenses, Certifications and Approvals for Nuclear Power Plants." A notice of receipt and availability of this application was previously published in the **Federal Register** (75 FR 71744) on November 24, 2010.

The NRC staff has determined that Toshiba has submitted information in accordance with 10 CFR part 52 that is acceptable for docketing. The Docket Number established for the Toshiba ABWR DC renewal is 52–044.

The NRC staff will perform a detailed technical review of the application. Docketing of the application does not preclude the NRC from requesting additional information from the applicant as the review proceeds, nor does it predict whether the Commission will grant or deny the application. The Commission will receive a report on the DC renewal application from the Advisory Committee on Reactor Safeguards in accordance with 10 CFR 52.57, "Application for Renewal." The Commission will announce in a future **Federal Register** notice the opportunity to comment on a proposed rulemaking to issue the renewal. If the Commission finds that the DC renewal application meets the applicable standards of the Atomic Energy Act and the Commission's regulations, and that required notifications to other agencies and bodies have been made, the Commission will issue a DC renewal, in the form and containing conditions and limitations that the Commission finds appropriate and necessary.

Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR), located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland, and will be accessible electronically through the Agencywide Documents Access and Management System (ADAMS) Public Electronic Reading Room link at the NRC Web site *http://www.nrc.gov/reading-rm/adams.html.* The application is also available at *http://www.nrc.gov/reactors/new-reactors/design-cert.html.* Persons who do not have access to ADAMS or who encounter problems in accessing documents located in ADAMS should contact the NRC PDR Reference staff by telephone at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr.resource@nrc.gov.*

Dated at Rockville, Maryland, this day of December.

For The Nuclear Regulatory Commission.

David Misenhimer,

Project Manager, BWR Projects Branch, Division of New Reactor Licensing, Office of New Reactors.

[FR Doc. 2010–32253 Filed 12–22–10; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–305; NRC–2010–0387]

Dominion Energy Kewaunee, Inc.; Kewaunee Power Station; Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (NRC) is considering issuance of an amendment to Facility Operating License No. DPR–43, issued to Dominion Energy Kewaunee, Inc. (DEK, the licensee), for operation of the Kewaunee Power Station (KPS) located in Ottawa County, Wisconsin, in accordance with Title 10 of the Code of Federal Regulations (10 CFR) 50.90. Therefore, as required by 10 CFR 51.21, the NRC performed an environmental assessment. Based on the results of the environmental assessment, the NRC is issuing a finding of no significant impact in accordance with 10 CFR 51.32.

Environmental Assessment

Identification of the Proposed Action

The proposed action would be a full conversion from the current technical specifications (CTS) to the improved technical specifications (ITS) consistent with improved standard technical specifications as described in NUREG 1431, "Standard Technical Specifications—Westinghouse Plants, Rev. 3.0" (Agencywide Documents Access and Management System (ADAMS) Accession No. ML041830612). Standard Technical Specifications (STS) Rev. 3.0 is modified by the following NRC-approved TS Task Force (TSTF) Travelers: TSTF–475–A, Rev. 1; TSTF–479–A, Rev. 0; TSTF–482–A, Rev. 0; TSTF–485–A, Rev. 0; TSTF–490–A, Rev. 0; TSTF–491–A, Rev. 2; TSTF–493, Rev. 4; TSTF–497–A, Rev. 0; and TSTF–511–A, Rev. 0. The proposed action also encompasses beyond scope issues included in the Notice of Consideration of Issuance of Amendment.

The proposed action is in accordance with the licensee's application dated August 24, 2009 (ADAMS Accession No. ML092440398), as supplemented by letters dated October 22, 2009 (ADAMS Accession No. ML093070092), April 13, 2010 (ADAMS Accession Nos. ML101060517 and ML101040090), May 12, 2010 (ADAMS Accession No. ML101380399), July 1, 2010 (ADAMS Accession No. ML101890176), July 16, 2010 (ADAMS Accession No. ML102370370), August 18, 2010 (ADAMS Accession No. ML102371064), September 7, 2010 (ADAMS Accession No. ML102730383), September 8, 2010 (ADAMS Accession No. ML102580700), October 15, 2010 (ADAMS Accession No. ML102920037), and December 2, 2010 (ADAMS Accession No. ML103400328). The information provided to the NRC staff through the joint NRC–DEK ITS conversion Web page, hosted by EXCEL Services Corporation (EXCEL) can be found in these supplements.

To expedite its review of the application, the NRC staff issued its requests for additional information (RAI) through the KPS ITS Conversion web page and the licensee addressed the RAI by providing responses on the Web page. Entry into the database is protected so that only the licensee and NRC reviewers can enter information into the database to add RAIs (NRC) or provide responses to the RAIs (licensee); however, the public can enter the database to read the questions asked and the responses provided. To be in compliance with the regulations for written communications for license amendment requests, and to have the database on the KPS dockets before the amendment is issued, the licensee has submitted the information from the database in its supplements to the NRC. No further RAI items are being processed prior to the issuance of the amendment.

Members of the public can access the Web site by going to *http://www.excelservices.com.* Persons who visit the EXCEL Web site and are unable to locate Kewaunee ITS Conversion information should contact EXCEL directly to acquire archived content. As an alternative, the licensee's submitted information cited above is available at the NRC Web site (*http://www.nrc.gov*).

The Need for the Proposed Action:

The Commission's "Proposed Policy Statement on Technical Specifications Improvements for Nuclear Power Reactors" (52 FR 3788), dated February 6, 1987, contained an Interim Policy Statement that set forth objective criteria for determining which regulatory requirements and operating restrictions should be included in the technical specifications (TS). When it issued the Interim Policy Statement, the Commission also requested comments on it. Subsequently, to implement the Interim Policy Statement, each reactor vendor owners group and the NRC staff began developing standard TS (STS) for reactors supplied by each vendor. The Commission then published its "Final Policy Statement on Technical Specifications Improvements for Nuclear Power Reactors" (58 FR 39132), dated July 22, 1993, in which it

addressed comments received on the Interim Policy Statement, and incorporated experience in developing the STS. The Final Policy Statement formed the basis for a revision to 10 CFR 50.36 (60 FR 36953), dated July 19, 1995, that codified the criteria for determining the content of TSs. The NRC Committee to Review Generic Requirements reviewed the STS, made note of their safety merits, and indicated its support of conversion by operating plants to the STS.

For KPS the following document the STS and form the basis for the KPS conversion to the ITS:

NUREG–1431, Rev. 3.0, and the following NRC approved TSTF Travelers:

1. TSTF–475–A, Rev. 1 "Control Rod Notch Testing Frequency and [source range monitor] SRM Insert Control Rod Action",

2. TSTF–479–A, Rev. 0 "Changes to Reflect Revision of 10 CFR 50.55a",

3. TSTF–482–A, Rev. 0 "Correct LCO 3.0.6 Bases",

4. TSTF–485–A, Rev. 0 "Correct Example 1.4–1",

5. TSTF–490–A, Rev. 0 "Deletion of E Bar Definition and Revision to [Reactor Coolant System] RCS Specific Activity Technical Specification",

6. TSTF–491–A, Rev. 2 "Removal of Main Steam and Main Feedwater Valve Isolation Times from Technical Specifications",

7. TSTF 493, Rev. 4 "Clarify Application of Setpoint Methodology for [Limiting Safety System Setting] LSSS Functions",

8. TSTF–497–A, Rev. 0 "Limit Inservice Testing Program SR 3.0.2 Application to Frequencies of 2 Years or Less",

9. TSTF–511–A, Rev. 0 "Eliminate Working Hour Restrictions from TS 5.2.2 to Support Compliance with 10 CFR Part 26."

The proposed changes to the CTS are based on NUREG–1431, Rev. 3.0, associated TSTF documents, and the guidance provided in the Final Policy Statement. The objective of this action is to rewrite, reformat, and streamline the CTS (*i.e.,* to convert the CTS to the ITS). Emphasis was placed on human factors principles to improve clarity and understanding. The ITS Bases section has been significantly expanded to clarify and better explain the purpose and foundation of each specification.

In addition to NUREG–1431, Rev. 3.0, and associated TSTF documents, portions of the CTS were also used as the bases for the development of the KPS ITS. The NRC staff discussed plant-specific issues (*i.e.,* unique design features, requirements, and operating practices) with the licensee.

Relocated specifications include those changes to the CTS that relocate certain requirements, which do not meet the 10 CFR 50.36 selection criteria. These requirements may be relocated to the Bases section, the KPS Updated Safety Analysis Report (USAR), the core operating limits report, the operational quality assurance plan, plant procedures, or other licensee-controlled documents. Relocation of requirements to licensee-controlled documents does not eliminate them, but rather, places them under more appropriate regulatory controls (*i.e.* 10 CFR 50.54(a)(3) and 10 CFR 50.59) to manage their implementation and future changes.

The proposed action is necessary to allow the licensee to implement the ITS. The ITS are based on Westinghouse STS and they are considered an improvement over the CTS.

Environmental Impacts of the Proposed Action

The NRC has completed its environmental assessment of the proposed amendment action. The staff concludes that the proposed action to convert the CTS for the plant to ITS would not significantly affect plant safety and would not have a significant adverse effect on the probability of an accident occurring.

The proposed action would not result in an increased radiological hazard beyond those previously analyzed in the Updated Safety Analysis Report. There will be no change to radioactive effluents that affect radiation exposures to plant workers and members of the public. No changes will be made to plant buildings or the site property. Therefore, no changes or different types of radiological impacts are expected as a result of the proposed action.

The proposed action does not result in changes to any of the following: To land use or water use, or result in changes to the quality or quantity of non-radiological effluents. No changes to the National Pollution Discharge Elimination System permit are needed. No effects on the aquatic or terrestrial habitat in the vicinity or the plant, or to threatened, endangered, or protected species under the Endangered Species Act, or impacts to essential fish habitat covered by the Magnuson-Stevens Act are expected. There are no impacts to the air or ambient air quality.

The proposed action does not have a potential to affect any historical or cultural resources because no previously undisturbed area will be affected by the proposed amendment. There would be no impact to socioeconomic resources. Therefore, no changes to or different types of non-radiological environmental impacts are expected as a result of the proposed action.

Accordingly, the NRC concludes that there are no significant environmental impacts associated with the proposed action, and thus, the proposed action will not have a significant effect on the quality of the human environment. The details of the NRC staff's safety evaluation will be provided with the license amendment approving the conversion to the approved technical specifications that will be issued to the licensee.

Environmental Impacts of the Alternatives to the Proposed Action

As an alternative to the proposed action, the staff considered denial of the proposed action (*i.e.,* the "no-action" alternative). Denial of the application would result in no change in current environmental impacts. Thus, the environmental impacts of the proposed action and the "no-action" alternative are similar.

Alternative Use of Resources

The action does not involve the use of any different resources than those previously considered in the "Final Environmental Statement for the KPS," dated December, 1972, and the "Generic Environmental Impact Statement for License Renewal of Nuclear Plants [NUREG 1437], Supplement 40, Regarding Kewaunee Power Station, Final Report," dated August 2010 (ADAMS Accession No. ML102150106).

Agencies and Persons Consulted

On September 23, 2010, the NRC staff consulted with the Wisconsin State official, Jeff Kitsembel, Nuclear Engineer, of the Public Service Commission of Wisconsin and the State Liaison Official for Wisconsin, regarding the environmental impact of the proposed action. The State official had no comments.

Finding of No Significant Impact

On the basis of the environmental assessment, the NRC concludes that the proposed action will not have a significant effect on the quality of the human environment. Accordingly, the NRC has determined not to prepare an environmental impact statement for the proposed action.

For further details with respect to the proposed action, see the licensee's previously referenced application letter and its supplemental letters. The information provided to the NRC staff through the joint NRC–DEK ITS

conversion web page, hosted by Excel Services Corporation, can be found in the application document and its supplements.

Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR), located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the ADAMS Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html.*

Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the NRC PDR Reference staff by telephone at 1–800–397–4209 or 301–415–4737, or send an e-mail to *pdr.resource@nrc.gov.*

Dated at Rockville, Maryland, this 8th day of December 2010.

For the Nuclear Regulatory Commission.

Peter S. Tam,

Senior Project Manager, Plant Licensing Branch III–1, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2010–32246 Filed 12–22–10; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2010–0180]

Notice of Availability of NUREG–1800, Revision 2; "Standard Review Plan for Review of License Renewal Applications for Nuclear Power Plants" and NUREG–1801, Revision 2; "Generic Aging Lessons Learned (GALL) Report"

AGENCY: Nuclear Regulatory Commission (NRC).

ACTION: Issuance of NUREG–1800, "Standard Review Plan for Review of License Renewal Applications for Nuclear Power Plants" and NUREG–1801, Revision 2; "Generic Aging Lessons Learned (GALL) Report".

SUMMARY: The NRC staff is issuing the revised NUREG–1800, "Standard Review Plan for Review of License Renewal Applications for Nuclear Power Plants" (SRP–LR); and the revised NUREG–1801, "Generic Aging Lessons Learned (GALL) Report." These revised documents describe methods acceptable to the NRC staff for implementing the license renewal rule, Title 10, of the Code of Federal Regulations Part 54 (10 CFR part 54), as well as techniques used by the NRC staff in evaluating applications for license renewals. The draft versions of these documents were issued for public comment on May 18, 2010 (75 FR 27838). The NRC staff assessment of public comments and the technical bases for changes made in the GALL Report will be issued at a later date as NUREG–1950, "Disposition of Public Comments and Technical Bases for Changes in the License Renewal Guidance Documents NUREG–1800 and NUREG–1801."

ADDRESSES: Electronic copies are available in the Commission's Public Document Room (PDR). The public may examine and have copied, for a fee, publicly available documents at the NRC's PDR, Public File Area O1 F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland. Copies are also available from the NRC's Agencywide Documents Access and Management System (ADAMS). Publicly available documents created or received at the NRC are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html.* From this page, the public can gain entry into ADAMS, which provides text and image files of NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC's PDR reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr.resource@nrc.gov.* The SRP–LR, Revision 2, is under ADAMS Accession Number ML103490036. The GALL Report, Revision 2, is available under ADAMS Accession Number ML103490041.

FOR FURTHER INFORMATION CONTACT: Mr. Robert Gramm, License Renewal Project Manager, Office of Nuclear Reactor Regulation, Mail Stop O–11 F1, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Telephone 301–415–1010, or by e-mail to *Robert.Gramm@nrc.gov.*

Dated at Rockville, Maryland, this 16th day of December 2010.

For the Nuclear Regulatory Commission.

Brian E. Holian,

Director, Division of License Renewal, Office of Nuclear Reactor Regulation.

[FR Doc. 2010–32252 Filed 12–22–10; 8:45 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2011–10 and CP2011–46; Order No. 611]

New Postal Product

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recently-filed Postal Service request to add Priority Mail Contract 31 to the competitive product list. This notice addresses procedural steps associated with this filing.

DATES: *Comments are due:* December 29, 2010.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Commenters who cannot submit their views electronically should contact the person identified in **FOR FURTHER INFORMATION CONTACT** by telephone for advice on alternatives to electronic filing.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, *stephen.sharfman@prc.gov* or 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction
II. Notice of Filing
III. Ordering Paragraphs

I. Introduction

Pursuant to 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.,* the Postal Service filed a formal request and associated supporting information to add Priority Mail Contract 31 to the competitive product list.[1] The Postal Service asserts that Priority Mail Contract 31 is a competitive product "not of general applicability" within the meaning of 39 U.S.C. 3632(b)(3). *Id.* at 1. The Postal Service states that the prices and classification underlying this contract are supported by Governors' Decision No. 09–6 in Docket No. MC2009–25. *Id.* The Request has been assigned Docket No. MC2011–10.

The Postal Service contemporaneously filed a contract related to the proposed new product pursuant to 39 U.S.C. 3632(b)(3) and 39 CFR 3015.5. The instant contract has been assigned Docket No. CP2011–46.

Request. In support of its Request, the Postal Service filed six attachments as follows:

- Attachment A—a redacted copy of Governors' Decision No. 09–6, originally filed in Docket No. MC2009–25, authorizing certain Priority Mail contracts;
- Attachment B—a redacted copy of the contract;
- Attachment C—a proposed change in the Mail Classification Schedule competitive product list;

[1] Request of the United States Postal Service to Add Priority Mail Contract 31 to Competitive Product List and Notice of Filing (Under Seal) of Contract and Supporting Data, December 16, 2010 (Request).

• Attachment D—a Statement of Supporting Justification as required by 39 CFR 3020.32;

• Attachment E—a certification of compliance with 39 U.S.C. 3633(a); and

• Attachment F—an application for non-public treatment of materials to maintain redacted portions of the contract and supporting documents under seal.

In the Statement of Supporting Justification, Josen Punnoose, Manager, Shipping Support (A), Shipping Services, asserts that the service to be provided under the contract will cover its attributable costs, make a positive contribution to institutional costs, and increase contribution toward the requisite 5.5 percent of the Postal Service's total institutional costs. *Id.,* Attachment D. Thus, Mr. Punnoose contends there will be no issue of subsidization of competitive products by market dominant products as a result of this contract. *Id.*

Related contract. A redacted version of the specific Priority Mail Contract 31 is included with the Request. The contract will become effective on the day that the Commission provides all necessary regulatory approvals. The contract states it "shall expire 3 years from the effective date, unless (1) terminated by either Party with 30 days notice to the other Party in writing * * *" The Postal Service represents that the contract is consistent with 39 U.S.C. 3633(a). *Id.,* Attachment D.

The Postal Service filed much of the supporting materials, including the specific Priority Mail Contract 31, under seal. It maintains that the contract and related financial information, including the customer's name and the accompanying analyses that provide prices, terms, conditions, cost data, and financial projections, should remain under seal. *Id.,* Attachment F. It also requests that the Commission order that the duration of such treatment of all customer-identifying information be extended indefinitely, instead of ending after 10 years. *Id.* at 7.

II. Notice of Filings

The Commission establishes Docket Nos. MC2011–10 and CP2011–46 for consideration of the Request pertaining to the proposed Priority Mail Contract 31 product and the related contract, respectively.

Interested persons may submit comments on whether the Postal Service's filings in the captioned dockets are consistent with the policies of 39 U.S.C. 3632, 3633, or 3642 and 39 CFR part 3015 and 39 CFR 3020, subpart B. Comments are due no later than December 29, 2010. The public portions of these filings can be accessed via the Commission's Web site (*http://www.prc.gov*).

The Commission appoints Derrick D. Dennis to serve as Public Representative in these dockets.

III. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket Nos. MC2011–10 and CP2011–46 for consideration of the matters raised in each docket.

2. Pursuant to 39 U.S.C. 505, Derrick D. Dennis is appointed to serve as officer of the Commission (Public Representative) to represent the interests of the general public in these proceedings.

3. Comments by interested persons in these proceedings are due no later than December 29, 2010.

4. The Secretary shall arrange for publication of this order in the **Federal Register**.

By the Commission.

Shoshana M. Grove,

Secretary.

[FR Doc. 2010–32219 Filed 12–22–10; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2011–9 and CP2011–44; Order No. 610]

New Postal Product

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recently-filed Postal Service request to add Priority Mail Contract 30 to the competitive product list. This notice addresses procedural steps associated with this filing.

DATES: *Comments are due:* December 29, 2010.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Commenters who cannot submit their views electronically should contact the person identified in **FOR FURTHER INFORMATION CONTACT** by telephone for advice on alternatives to electronic filing.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, *stephen.sharfman@prc.gov* or 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction
II. Notice of Filing
III. Ordering Paragraphs

I. Introduction

Pursuant to 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.,* the Postal Service filed a formal request and associated supporting information to add Priority Mail Contract 30 to the competitive product list.[1] The Postal Service asserts that Priority Mail Contract 30 is a competitive product "not of general applicability" within the meaning of 39 U.S.C. 3632(b)(3). *Id.* at 1. The Postal Service states that prices and classification underlying this contract are supported by Governors' Decision No. 09–6 in Docket No. MC2009–25. *Id.* The Request has been assigned Docket No. MC2011–9.

The Postal Service contemporaneously filed a contract related to the proposed new product pursuant to 39 U.S.C. 3632(b)(3) and 39 CFR 3015.5. It states the instant contract is the immediate successor to the Priority Mail Contract 1 contract in Docket Nos. MC2008–8 and CP2008–26. The current contract expires on December 31, 2010.[2] The instant contract has been assigned Docket No. CP2011–44.

Request. In support of its Request, the Postal Service filed six attachments as follows:

• Attachment A—a redacted copy of Governors' Decision No. 09–6, originally filed in Docket No. MC2009–25, authorizing certain Priority Mail contracts;

• Attachment B—a redacted copy of the contract;

• Attachment C—a proposed change in the Mail Classification Schedule competitive product list;

• Attachment D—a Statement of Supporting Justification as required by 39 CFR 3020.32;

• Attachment E—a certification of compliance with 39 U.S.C. 3633(a); and

• Attachment F—an application for non-public treatment of materials to

[1] Request of the United States Postal Service to Add Priority Mail Contract 30 to Competitve Product List and Notice of Filing (Under Seal) of Contract and Support Data, December 15, 2010 (Request)

[2] The contract for Priority Mail Contract 1 was originally set to expire on October 15, 2010. In order No. 560, the Commission granted the Postal Service's motion for temporary relief allowing the contract to remain in effect until November 30, 2010, based on the expectation that the Postal Service would file the successor contract promptly. *See* Docket Nos. MC2008–8 and CP2008–26, Motion of the United States Postal Service for Temporary Relief, October 14, 2010, at 1. Obn November 29, 2010, the Postal Service filed a motion requesting an additional extension for the contract for Priority Mail Contract 1. In Order No. 598, the Commission granted the Postal Service's motion for temporary relief allowing the contrat to remain in effect until December 31, 2010. By this order, the commission extends the effective date of the contract for Priority Mail Contract 1 until January 31, 2011.

maintain redacted portions of the contract and supporting documents under seal.

In the Statement of Supporting Justification, Josen Punnoose, Manager, Shipping Support (A), Shipping Services, asserts that the service to be provided under the contract will cover its attributable costs, make a positive contribution to institutional costs, and increase contribution toward the requisite 5.5 percent of the Postal Service's total institutional costs. *Id.,* Attachment D. Thus, Mr. Punnoose contends there will be no issue of subsidization of competitive products by market dominant products as a result of this contract. *Id.*

Related contract. A redacted version of the specific Priority Mail Contract 30 is included with the Request. The contract will become effective on the day that the Commission provides all necessary regulatory approvals. The contract states it "shall expire 3 years from the effective date, unless (1) terminated by either Party with 30 days notice to the other Party in writing * * * ." The Postal Service represents that the contract is consistent with 39 U.S.C. 3633(a). *Id.,* Attachment D.

The Postal Service filed much of the supporting materials, including the specific Priority Mail Contract 30, under seal. It maintains that the contract and related financial information, including the customer's name and the accompanying analyses that provide prices, terms, conditions, cost data, and financial projections should remain under seal. *Id.,* Attachment F. It also requests that the Commission order that the duration of such treatment of all customer-identifying information be extended indefinitely, instead of ending after 10 years. *Id.* at 7.

II. Notice of Filings

The Commission establishes Docket Nos. MC2011–9 and CP2011–44 for consideration of the Request pertaining to the proposed Priority Mail Contract 30 product and the related contract, respectively.

Interested persons may submit comments on whether the Postal Service's filings in the captioned dockets are consistent with the policies of 39 U.S.C. 3632, 3633, or 3642 and 39 CFR part 3015 and 39 CFR 3020, subpart B. Comments are due no later than December 29, 2010. The public portions of these filings can be accessed via the Commission's Web site (*http://www.prc.gov*).

The Commission appoints Derrick D. Dennis to serve as Public Representative in these dockets.

III. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket Nos. MC2011–9 and CP2011–44 for consideration of the matters raised in each docket.

2. Pursuant to 39 U.S.C. 505, Derrick D. Dennis is appointed to serve as officer of the Commission (Public Representative) to represent the interests of the general public in these proceedings.

3. Comments by interested persons in these proceedings are due no later than December 29, 2010.

4. The current contract filed in Docket Nos. MC2008–8 and CP2008–26 for Priority Mail Contract 1 is authorized to continue in effect through January 31, 2011.

5. The Secretary shall arrange for publication of this order in the **Federal Register.**

By the Commission.

Shoshana M. Grove,

Secretary.

[FR Doc. 2010–32220 Filed 12–22–10; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2011–11 and CP2011–47; Order No. 612]

New Postal Product

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recently-filed Postal Service request to add Priority Mail Contract 32 to the competitive product list. This notice addresses procedural steps associated with this filing.

DATES: *Comments are due:* December 29, 2010.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Commenters who cannot submit their views electronically should contact the person identified in **FOR FURTHER INFORMATION CONTACT** by telephone for advice on alternatives to electronic filing.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, *stephen.sharfman@prc.gov* or 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction
II. Notice of Filing
III. Ordering Paragraphs

I. Introduction

Pursuant to 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.,* the Postal Service filed a formal request and associated supporting information to add Priority Mail Contract 32 to the competitive product list.[1] The Postal Service asserts that Priority Mail Contract 32 is a competitive product "not of general applicability" within the meaning of 39 U.S.C. 3632(b)(3). *Id.* at 1. The Postal Service states that the prices and classification underlying this contract are supported by Governors' Decision No. 09–6 in Docket No. MC2009–25. *Id.* The Request has been assigned Docket No. MC2011–11.

The Postal Service contemporaneously filed a contract related to the proposed new product pursuant to 39 U.S.C. 3632(b)(3) and 39 CFR 3015.5. The instant contract has been assigned Docket No. CP2011–47.

Request. In support of its Request, the Postal Service filed six attachments as follows:

- Attachment A—a redacted copy of Governors' Decision No. 09–6, originally filed in Docket No. MC2009–25, authorizing certain Priority Mail contracts;
- Attachment B—a redacted copy of the contract;
- Attachment C—a proposed change in the Mail Classification Schedule competitive product list;
- Attachment D—a Statement of Supporting Justification as required by 39 CFR 3020.32;
- Attachment E—a certification of compliance with 39 U.S.C. 3633(a); and
- Attachment F—an application for non-public treatment of materials to maintain redacted portions of the contract and supporting documents under seal.

In the Statement of Supporting Justification, Josen Punnoose, Manager, Shipping Support (A), Shipping Services, asserts that the service to be provided under the contract will cover its attributable costs, make a positive contribution to institutional costs, and increase contribution toward the requisite 5.5 percent of the Postal Service's total institutional costs. *Id.,* Attachment D. Thus, Mr. Punnoose contends there will be no issue of subsidization of competitive products by market dominant products as a result of this contract. *Id.*

Related contract. A redacted version of the specific Priority Mail Contract 32

[1] Request of the United States Postal Service to Add Priority Mail Contract 32 to Competitive Product List and Notice of Filing (Under Seal) of Contract and Supporting Data, December 16, 2010 (Request).

is included with the Request. The contract will become effective on the day that the Commission provides all necessary regulatory approvals. The contract states it "shall expire 3 years from the effective date, unless (1) terminated by either Party with 30 days notice to the other Party in writing * * *." The Postal Service represents that the contract is consistent with 39 U.S.C. 3633(a). *See id.,* Attachment D.

The Postal Service filed much of the supporting materials, including the specific Priority Mail Contract 32, under seal. It maintains that the contract and related financial information, including the customer's name and the accompanying analyses that provide prices, terms, conditions, cost data, and financial projections should remain under seal. *See id.,* Attachment F. It also requests that the Commission order that the duration of such treatment of all customer-identifying information be extended indefinitely, instead of ending after 10 years. *Id.* at 7.

II. Notice of Filings

The Commission establishes Docket Nos. MC2011–11 and CP2011–47 for consideration of the Request pertaining to the proposed Priority Mail Contract 32 product and the related contract, respectively.

Interested persons may submit comments on whether the Postal Service's filings in the captioned dockets are consistent with the policies of 39 U.S.C. 3632, 3633, or 3642 and 39 CFR part 3015 and 39 CFR part 3020, subpart B. Comments are due no later than December 29, 2010. The public portions of these filings can be accessed via the Commission's Web site (*http://www.prc.gov*).

The Commission appoints Derrick D. Dennis to serve as Public Representative in these dockets.

III. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket Nos. MC2011–11 and CP2011–47 for consideration of the matters raised in each docket.

2. Pursuant to 39 U.S.C. 505, Derrick D. Dennis is appointed to serve as officer of the Commission (Public Representative) to represent the interests of the general public in these proceedings.

3. Comments by interested persons in these proceedings are due no later than December 29, 2010.

4. The Secretary shall arrange for publication of this order in the **Federal Register**.

By the Commission.

Shoshana M. Grove,

Secretary.

[FR Doc. 2010–32218 Filed 12–22–10; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2011–12 and CP2011–48; Order No. 613]

New Postal Product

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recently-filed Postal Service request to add Express Mail Contract 10 to the competitive product list. This notice addresses procedural steps associated with this filing.

DATES: *Comments are due:* December 29, 2010.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Commenters who cannot submit their views electronically should contact the person identified in **FOR FURTHER INFORMATION CONTACT** by telephone for advice on alternatives to electronic filing.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, *stephen.sharfman@prc.gov* or 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction
II. Notice of Filing
III. Ordering Paragraphs

I. Introduction

Pursuant to 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.,* the Postal Service filed a formal request and associated supporting information to add Express Mail Contract 10 to the competitive product list.[1] The Postal Service asserts that Express Mail Contract 10 is a competitive product "not of general applicability" within the meaning of 39 U.S.C. 3632(b)(3). *Id.* at 1. The Postal Service states that the prices and classification underlying this contract are supported by Governors' Decision No. 09–14 in Docket No. MC2010–5 and CP2010–5. *Id.* The Request has been assigned Docket No. MC2011–12.

The Postal Service contemporaneously filed a contract related to the proposed new product pursuant to 39 U.S.C. 3632(b)(3) and 39 CFR 3015.5. The contract has been assigned Docket No. CP2011–48.

Request. In support of its Request, the Postal Service filed six attachments as follows:

- Attachment A—a redacted copy of Governors' Decision No. 09–14, originally filed in Docket No. MC2010–5, authorizing certain Express Mail contracts;
- Attachment B—a redacted copy of the contract;
- Attachment C—a proposed change in the Mail Classification Schedule competitive product list;
- Attachment D—a Statement of Supporting Justification as required by 39 CFR 3020.32;
- Attachment E—a certification of compliance with 39 U.S.C. 3633(a); and
- Attachment F—an application for non-public treatment of materials to maintain redacted portions of the contract and supporting documents under seal.

In the Statement of Supporting Justification, Josen Punnoose, Manager, Shipping Support (A), Shipping Services, asserts that the service to be provided under the contract will cover its attributable costs, make a positive contribution to institutional costs, and increase contribution toward the requisite 5.5 percent of the Postal Service's total institutional costs. *Id.,* Attachment D. Thus, Mr. Punnoose contends there will be no issue of subsidization of competitive products by market dominant products as a result of this contract. *Id.*

Related contract. A redacted version of the specific Express Mail Contract 10 is included with the Request. The contract will become effective the day that the Commission provides all necessary regulatory approvals. The contract states it "shall expire 3 years from the effective date, unless (1) terminated by either Party with 30 days notice to the other Party in writing * * *." The Postal Service represents that the contract is consistent with 39 U.S.C. 3633 (a). *See id.,* Attachment D.

The Postal Service maintains that the contract and related financial information, including the customer's name and the accompanying analyses that provide prices, terms, conditions, cost data, and financial projections, should remain under seal. *See id.,* Attachment F. It also requests that the Commission order that the duration of such treatment of all customer-identifying information be extended indefinitely, instead of ending after 10 years. *Id.* at 7.

[1] Request of the United States Postal Service to Add Express Mail Contract 10 to Competitive Product List and Notice of Filing (Under Seal) of Supporting Data, December 16, 2010 (Request).

II. Notice of Filings

The Commission establishes Docket Nos. MC2011–12 and CP2011–48 for consideration of the Request pertaining to the proposed Express Mail Contract 10 product and the related contract, respectively.

Interested persons may submit comments on whether the Postal Service's filings in the captioned dockets are consistent with the policies of 39 U.S.C. 3632, 3633, or 3642 and 39 CFR part 3015 and 39 CFR 3020, subpart B. Comments are due no later than December 29, 2010. The public portions of these filings can be accessed via the Commission's Web site (*http://www.prc.gov*).

The Commission appoints Derrick D. Dennis to serve as Public Representative in these dockets.

III. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket Nos. MC2011–12 and CP2011–48 for consideration of the matters raised in each docket.

2. Pursuant to 39 U.S.C. 505, Derrick D. Dennis is appointed to serve as officer of the Commission (Public Representative) to represent the interests of the general public in these proceedings.

3. Comments by interested persons in these proceedings are due no later than December 29, 2010.

4. The Secretary shall arrange for publication of this order in the **Federal Register**.

By the Commission.

Shoshana M. Grove,

Secretary.

[FR Doc. 2010–32221 Filed 12–22–10; 8:45 am]

BILLING CODE 7710–FW–P

RAILROAD RETIREMENT BOARD

Agency Forms Submitted for OMB Review, Request for Comments

Summary: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), the Railroad Retirement Board (RRB) is submitting five (5) Information Collection Requests (ICR) to the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget (OMB). Our ICR(s) describe the information we seek to collect from the public. Review and approval by OIRA ensures that we impose appropriate paperwork burdens.

The RRB invites comments on the proposed collections of information to determine (1) the practical utility of the collections; (2) the accuracy of the estimated burden of the collections; (3) ways to enhance the quality, utility and clarity of the information that is the subject of collection; and (4) ways to minimize the burden of collections on respondents, including the use of automated collection techniques or other forms of information technology. Comments to RRB or OIRA must contain the OMB control number of the ICR. For proper consideration of your comments, it is best if RRB and OIRA receive them within 30 days of publication date.

1. *Title and Purpose of Information Collection:* 3220–0005, Employer Reporting.

Under Section 9 of the Railroad Retirement Act (RRA), and Section 6 of the Railroad Unemployment Insurance Act (RUIA), railroad employers are required to submit reports of employee service and compensation to the RRB as needed for administering the RRA and RUIA. To pay benefits due on a deceased employee's earnings records or determine entitlement to, and amount of annuity applied for, it is necessary at times to obtain from railroad employers current (lag) service and compensation not yet reported to the RRB through the annual reporting process. The reporting requirements are specified in 20 CFR 209.6 and 209.7.

The RRB utilizes Form G–88a.1, Notice of Retirement and Verification of Date Last Worked, Form G–88a.2, Notice of Retirement and Request for Service Needed for Eligibility, and Form AA–12, Notice of Death and Compensation, to obtain the required lag service and related information from railroad employers. Form G–88a.1 is a computer-generated listing sent by the RRB to railroad employers and used for the specific purpose of verifying information previously provided to the RRB regarding the date last worked by an employee. Form G–88a.2 is used by the RRB to secure lag service and compensation information when it is needed to determine benefit eligibility. Form AA–12 obtains a report of lag service and compensation from the last railroad employer of a deceased employee. This report covers the lag period between the date of the latest record of employment processed by the RRB and the date an employee last worked, the date of death or the date the employee may have been entitled to benefits under the Social Security Act. The information is used by the RRB to determine benefits due on the deceased employee's earnings record. The RRB proposes no changes to Form AA–12, Form G–88a.1 and Form G–88a.2.

In addition, 20 CFR 209.12(b) requires all railroad employers to furnish the RRB with the home addresses of all employees hired within the last year (new-hires). Form BA–6a, Form BA–6 Address Report, is used by the RRB to obtain home address information of employees from railroad employers that do not have the home address information computerized and who submit the information in a paper format. The form also serves as an instruction sheet to railroad employers who can also submit the information electronically by magnetic tape cartridge, CD–ROM, secure e-mail, or via the Internet utilizing the RRB's Employer Reporting System (ERS). Completion of the forms is mandatory. One response is requested of each respondent. The RRB proposes no changes to Form BA–6a.

Information Collection Request (ICR)

Title: Employer Reporting.

OMB Control Number: 3220–0005.

Form(s) submitted: AA–12, G–88A.1, G–88A.2, BA–6a (Internet) and electronic equivalents.

Type of request: Extension without change of a currently approved collection.

Affected public: Business or other for-profit, Individuals or Households.

Abstract: Under the Railroad Retirement Act and the Railroad Unemployment Insurance Act, railroad employers are required to report service and compensation for employees needed to determine eligibility to and the amounts of benefits paid.

Estimated burden for the ICR:

Form No.	Annual responses	Time (minutes)	Burden (hours)
AA–12	60	5	5
G–88A.1	360	5	30
G–88A.1 (Class I railroads)	144	20	48
G–88A.2	1,300	5	108
BA–6a (RR initiated)(paper)	80	32	43
BA–6a (RRB initiated)(paper)	250	32	133

Form No.	Annual responses	Time (minutes)	Burden (hours)
BA–6a Electronic Equivalent*	14	15	4
BA–6a Internet (RR initiated)	250	17	71
BA–6a Internet (RRB initiated)	250	12	50
BA–6a (E-mail)	30	15	8
BA–6a (File Transfer Protocol)	10	15	2
Total	2,748		502

2. *Title and Purpose of Information Collection:* 3220–0008, Railroad Service and Compensation Reports/System Access Application/Report Certification.

Under Section 9 of the Railroad Retirement Act (RRA) and Section 6 of the Railroad Unemployment Insurance Act (RUIA) the Railroad Retirement Board (RRB) maintains for each railroad employee, a record of compensation paid to that employee by all railroad employers for whom the employee worked after 1936. This record, which is used by the RRB to determine eligibility for, and amount of, benefits due under the laws it administers, is conclusive as to the amount of compensation paid to an employee during such period(s) covered by the report(s) of the compensation by the employee's railroad employer(s), except in cases when an employee files a protest pertaining to his or her reported compensation within the statute of limitations cited in Section 9 of the RRA and Section 6 of the RUIA.

To enable the RRB to establish and maintain the record of compensation, employers are required to file with the RRB, in such manner and form and at such times as the RRB prescribes, reports of compensation of employees. Railroad Employers' Reports and Responsibilities are prescribed in 20 CFR 209. The RRB utilizes Form BA–3, *Annual Report of Compensation* and Form BA–4, *Report of Creditable Compensation Adjustments,* to secure required information from railroad employers. Form BA–3 provides the RRB with information regarding annual creditable service and compensation for each individual who worked for a railroad employer covered by the RRA and RUIA in a given year. Form BA–4 provides for the adjustment of any previously submitted reports and also the opportunity to provide any service and compensation that had been previously omitted. Requirements specific to Forms BA–3 and BA–4 are prescribed in 20 CFR 209.8 and 209.9.

Employers currently have the option of submitting the reports for the aforementioned forms, electronically by File Transfer Protocol (FTP), secure E-mail or via the Internet utilizing the RRB's Employer Reporting System (ERS) (for Form BA–4), or in like format on magnetic tape cartridges or CD–ROM. The RRB proposes no changes to Form BA–3 or BA–4.

The information collection also includes RRB Form BA–12, Application for Employer Reporting Internet Access and Form G–440, Report Specifications Sheet. Form BA–12 is completed by railroad employers to obtain system access to the RRB's Employer Reporting System (ERS). Once access is obtained, authorized employees may submit reporting forms to the RRB via the Internet. The form determines what degree of access (view/only, data entry/modification or approval/submission) is appropriate for that employee. It is also used to terminate an employee's access to ERS. The RRB proposes no changes to Form BA–12. Form G–440, Report Specifications Sheet, serves as a certification document for various RRB employer reporting forms (Forms BA–3, BA–4, Form BA–6a, BA–6, Address Report (OMB 3220–0005), BA–9, Report of Separation Allowance or Severance Pay (OMB 3220–0173) and BA–11, Report of Gross Earnings (OMB 3220–0132)). It records the type of medium the report was submitted on, and serves as a summary recapitulation sheet for reports filed on paper. The RRB proposes no changes to Form G–440.

Submission of Form BA–3, BA–4, and G–440 is mandatory. Completion of Form BA–12 is voluntary. It is completed only if an employer wants to submit reports via the Internet. One response is requested of each respondent for all of the forms in the collection. Depending on circumstances and method of submission chosen, multiple responses will be received from a respondent for Form BA–4 and G–440.

Information Collection Request (ICR)

Title: Railroad Service and Compensation Reports/System Access Application/Report Certification.

OMB Control Number: 3220–0008.

Form(s) submitted: BA–3, BA–3 (electronic equivalents), BA–4, BA–4 (Internet), BA–4 (electronic equivalents), BA–12.

Type of request: Extension without change of a currently approved collection.

Affected public: Business or other for-profit.

Abstract: Under the Railroad Retirement Act and the Railroad Unemployment Insurance Act, employers are required to report service and compensation for each employee to update Railroad Retirement Board records for payments of benefits. The collection obtains service and compensation information, information needed to ensure secure system access from employers who voluntarily opt to use the RRB's Internet-based Employer Reporting System to submit reporting forms and information needed to certify employer reporting transactions.

Estimated burden for the ICR:

Reporting	Responses	Time [1]	Burden (hours)
BA–3:			
Paper	196	116.85 (7,011 min)	22,903
Electronic Media	386	46.25 (2,775 min)	17,852
Total BA–3	582		40,755
BA–4:			
Paper	160	1.25 (75 min)	200
Electronic Media	285	1.00 (60 min)	285

Reporting	Responses	Time [1]	Burden (hours)
BA–4 (Internet)	3,852	.33 (20 min)	1,284
Total BA–4	4,297		1,769
BA–12:			
Initial Access	300	.33 (20 min)	100
Access Termination	50	.166 (10 min)	8
Total BA–12	350		108
G–440 (certification):			
Form BA–3 (zero employees)	96	.25 (15 min)	24
Form BA–11 (zero employees)	305	.25 (15 min)	76
Paper forms (without recap)	446	.25 (15 min)	112
Electronic transactions	904	.50 (30 min)	452
BA–3 and BA–4 (with recap)	368	1.25 (75 min)	460
Total G–440	2,119		1,124
Grand Total	7,348		43,756

3. *Title and Purpose of Information Collection*: 3220–0022, Application and Claim for Unemployment Benefits and Employment Service.

Section 2 of the Railroad Unemployment Insurance Act (RUIA), provides unemployment benefits for qualified railroad employees. These benefits are generally payable for each day of unemployment in excess of four during a registration period (normally a period of 14 days).

Section 12 of the RUIA provides that the RRB establish, maintain and operate free employment facilities directed toward the reemployment of railroad employees. The procedures for applying for the unemployment benefits and employment service and for registering and claiming the benefits are prescribed in 20 CFR part 325.

The RRB utilizes the following forms to collect the information necessary to pay unemployment benefits: Form UI–1 (or its Internet equivalent, Form UI–1 (Internet)), *Application for Unemployment Benefits and Employment Service,* is completed by a claimant for unemployment benefits once in a benefit year, at the time of first registration. Completion of Form UI–1 or UI–1 (Internet) also registers an unemployment claimant for the RRB's employment service. The RRB proposes no changes to Form UI–1 or UI–1 (Internet).

The RRB also utilizes Form UI–3, (or its Internet equivalent Form UI–3 (Internet)) *Claim for Unemployment Benefits* for use in claiming unemployment benefits for days of unemployment in a particular registration period, normally a period of 14 days. The RRB proposes no changes to Form UI–3 or UI–3 (Internet). Completion of Forms UI–1, UI–1 (Internet), UI–3 and UI–3 (Internet) is required to obtain or retain benefits. The number of responses required of each claimant varies, depending on their period of unemployment.

Information Collection Request (ICR)

Title: Application and Claim for Unemployment Benefits and Employment Service.

OMB Control Number: 3220–0022.

Form(s) submitted: UI–1, UI–1 (Internet), UI–3, UI–3 (Internet).

Type of request: Extension without change of a currently approved collection.

Affected public: Individuals or households.

Abstract: Under Section 2 of the Railroad Unemployment Insurance Act, unemployment benefits are provided for qualified railroad employees. The collection obtains the information needed for determining the eligibility to and amount of such benefits from railroad employees.

Estimated Burden for the ICR:

Form No.	Annual responses	Time (minutes)	Burden (hours)
UI–1	12,747	10	2,124
UI–1 (Internet)	3,416	10	569
UI–3	108,217	6	10,822
UI–3 (Internet)	37,951	6	3,795
Total	162,331		17,311

4. *Title and Purpose of Information Collection:* 3220–0132, Gross Earnings Report.

In order to carry out the financial interchange provisions of section 7(c)(2) of the Railroad Retirement Act (RRA), the RRB obtains annually from railroad employers the gross earnings for their employees on a one-percent basis, i.e., 1% of each employer's railroad employees. The gross earnings sample is based on the earnings of employees whose social security numbers end with the digits "30." The gross earnings are used to compute payroll taxes under the financial interchange.

The gross earnings information is essential in determining the tax amounts involved in the financial interchange with the Social Security Administration and Centers for Medicare and Medicaid Services. Besides being necessary for current financial interchange calculations, the gross earnings file tabulations are also an integral part of the data needed to estimate future tax income and corresponding financial interchange amounts. These estimates are made for internal use and to satisfy requests from

other government agencies and interested groups. In addition, cash flow projections of the social security equivalent benefit account, railroad retirement account and cost estimates made for proposed amendments to laws administered by the RRB are dependent on input developed from the information collection.

The RRB utilizes Form BA–11 or its electronic equivalent(s) to obtain gross earnings information from railroad employers. Employers have the option of preparing and submitting BA–11 reports on paper, (or in like format) on magnetic tape cartridges, CD–ROM, File Transfer Protocol (FTP) or secure e-mail. Completion is mandatory. One response is required of each respondent. The RRB proposes no changes to Form BA–11.

Information Collection Request Details (ICR)

Title: Gross Earnings Report.

OMB Control Number: 3220–0132.

Form(s) submitted: BA–11, BA–11 (electronic equivalents).

Type of request: Extension without change of a currently approved collection.

Affected public: Business or other for-profit.

Abstract: Section 7(c)(2) of the Railroad Retirement Act requires a financial interchange between the OASDHI trust funds and the railroad retirement account. The collection obtains gross earnings of railway employees on a 1% basis. The information is used in determining the amount which would place the OASDHI funds trust in the position they would have been if railroad service had been covered by the Social Security and FIC Acts.

Estimated burden for the ICR:

Form No.	Annual responses	Time (minutes)	Burden (hours)
BA–11 (magnetic tape**/file transfer protocol***)	8	300	40
BA–11 (CD–ROM)**	38	30	19
BA–11 (manual form)*	76	30	38
BA–11 (secure E-mail)***	47	30	24
Total	169	.....	121

5. *Title and Purpose of Information Collection*: 3220–0173, Railroad Separation Allowance or Severance Pay Report.

Section 6 of the Railroad Retirement Act provides for a lump-sum payment to an employee or the employee's survivors equal to the Tier II taxes paid by the employee on a separation allowance or severance payment for which the employee did not receive credits toward retirement. The lump-sum is not payable until retirement benefits begin to accrue or the employee dies. Also, Section 4(a–1)(iii) of the Railroad Unemployment Insurance Act provides that a railroad employee who is paid a separation allowance is disqualified for unemployment and sickness benefits for the period of time the employee would have to work to earn the amount of the allowance. The reporting requirements are specified in 20 CFR 209.14. In order to calculate and provide payments, the Railroad Retirement Board (RRB) must collect and maintain records of separation allowances and severance payments which were subject to Tier II taxation from railroad employers. The RRB uses Form BA–9 to obtain information from railroad employers concerning the separation allowances and severance payments made to railroad employees and/or the survivors of railroad employees. Employers currently have the option of submitting a paper BA–9, (or in like format) a magnetic tape cartridge, CD–ROM, electronically by File Transfer Protocol (FTP) or secure E-mail. Completion is mandatory. One response is requested of each respondent. The RRB proposes no changes to Form BA–9.

Information Collection Request (ICR)

Title: Railroad Separation Allowance or Severance Pay Report.

OMB Control Number: 3220–0173.

Form(s) submitted: BA–9, BA–9 (electronic equivalents).

Type of request: Extension without change of a currently approved collection.

Affected public: Business or other for profit.

Abstract: Section 6 of the Railroad Retirement Act provides for a lump-sum payment to an employee or the employee's survivor equal to the Tier II taxes paid by the employee on a separation allowance or severance payment for which the employee did not receive credits toward retirement. The collection obtains information concerning the separation allowances and severance payments paid from railroad employers.

Estimated Burden for the ICR:

Form No.	Annual responses	Time (minutes)	Burden (hours)
BA–9 (paper)	265	76	336
BA–9 (magnetic tape)	50	76	63
BA–9 (CD–ROM)	10	76	13
BA–9 (secure E-mail)	25	76	32
BA–9 (FTP)	10	76	13
Total	360	.....	457

For Further Information Contact: Copies of the form and supporting documents can be obtained from Charles Mierzwa, the agency clearance officer at (312–751–3363) or *Charles.Mierzwa@rrb.gov.*

Comments regarding the information collection should be addressed to Patricia A. Henaghan, Railroad Retirement Board, 844 North Rush Street, Chicago, Illinois 60611–2092 or *Patricia.Henaghan@rrb.gov* and to the OMB Desk Officer for the RRB, at the Office of Management and Budget,

Room 10230, New Executive Office Building, Washington, DC 20503.

Charles Mierzwa,

Clearance Officer.

[FR Doc. 2010–32302 Filed 12–22–10; 8:45 am]

BILLING CODE 7905–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC–29541]

Notice of Applications for Deregistration Under Section 8(f) of the Investment Company Act of 1940

December 16, 2010.

The following is a notice of applications for deregistration under section 8(f) of the Investment Company Act of 1940 for the month of December 2010. A copy of each application may be obtained via the Commission's Web site by searching for the file number, or an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090. An order granting each application will be issued unless the SEC orders a hearing. Interested persons may request a hearing on any application by writing to the SEC's Secretary at the address below and serving the relevant applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on January 11, 2011, and should be accompanied by proof of service on the applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

FOR FURTHER INFORMATION CONTACT: Diane L. Titus at (202) 551–6810, SEC, Division of Investment Management, Office of Investment Company Regulation, 100 F Street, NE., Washington, DC 20549–4041.

New Providence Investment Trust [File No. 811–8295]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On February 18, 2010, applicant transferred its assets to The Jacob Wisdom Fund, a series of Jacob Funds Inc., based on net asset value. Expenses of approximately $81,630 incurred in connection with the reorganization were paid by Atlanta Investment Counsel, LLC and Jacob Asset Management of New York, LLC, applicant's investment advisers.

Filing Dates: The application was filed on September 30, 2010, and amended on December 1, 2010.

Applicant's Address: 116 S. Franklin St., Rocky Mount, NC 27804.

AARP Funds [File No. 811–21825]

AARP Portfolios [File No. 811–21839]

Summary: Each applicant seeks an order declaring that it has ceased to be an investment company. On September 29, 2010, each applicant made a liquidating distribution to its shareholders, based on net asset value. Expenses of $44,000 and $38,500, respectively, incurred in connection with the liquidations were paid by applicants and AARP Financial Inc., applicants' investment adviser. Each applicant has less than $1,000 in miscellaneous outstanding expenses which will be paid by AARP Financial Inc. or its affiliates.

Filing Date: The applications were filed on December 6, 2010.

Applicants' Address: 650 F St., NW., 2nd Floor, Washington, DC 20004.

Investment Grade Municipal Income Fund Inc. [File No. 811–7096]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. Between April 16, 2010 and April 20, 2010, applicant's outstanding auction preferred shares were redeemed in full, with each preferred shareholder receiving the liquidation preference of $50,000 per share plus any accumulated but unpaid dividends. On May 10, 2010, applicant made a liquidating distribution to its common shareholders, based on net asset value. Expenses of $263,000 incurred in connection with the liquidation were paid by applicant.

Filing Date: The application was filed on November 15, 2010.

Applicant's Address: 1285 Avenue of the Americas, 12th Floor, New York, NY 10019–6028.

BBH Asian Opportunity Registered Fund, LLC [File No. 811–22200]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. Applicant has never made a public offering of its securities and does not propose to make a public offering or engage in business of any kind.

Filing Date: The application was filed on November 23, 2010.

Applicant's Address: 140 Broadway, New York, NY 10005.

UM Investment Trust [File No. 811–21044]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. Applicant has never made a public offering of its securities and does not propose to make a public offering or engage in any business activities other than those necessary for winding up its affairs.

Filing Dates: The application was filed on October 21, 2010, and amended on December 3, 2010.

Applicant's Address: 245 Park Ave., New York, NY 10167.

Morgan Stanley Opportunistic Municipal High Income Fund [File No. 811–21857]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. Applicant has never made a public offering of its securities and does not propose to make a public offering or engage in business of any kind.

Filing Dates: The application was filed on September 30, 2010, and amended on December 3, 2010.

Applicant's Address: 522 Fifth Ave., New York, NY 10036.

BlackRock Core Alternatives Portfolio LLC [File No. 811–22254]

BlackRock Core Alternatives TEI Portfolio LLC [File No. 811–22364]

BlackRock Core Alternatives FB Portfolio LLC [File No. 811–22365]

BlackRock Core Alternatives FB TEI Portfolio LLC [File No. 811–22366]

Summary: Each applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. Applicants have never made a public offering of their securities and do not propose to make a public offering or engage in business of any kind.

Filing Date: The applications were filed on December 8, 2010.

Applicants' Address: 100 Bellevue Parkway, Wilmington, DE 19809.

Oppenheimer Principal Protected Trust [File No. 811–21281]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On August 26, 2010, applicant transferred its assets to Oppenheimer Main Street Funds, Inc., based on net asset value. Expenses of approximately $74,707 incurred in

connection with the reorganization were paid by applicant.

Filing Date: The application was filed on December 2, 2010.

Applicant's Address: OppenheimerFunds, Inc., 6803 S. Tucson Way, Centennial, CO 80112.

BlackRock California Investment Quality Municipal Trust Inc. [File No. 811–7664]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. By September 30, 2010, applicant had redeemed all of its Series W7 Preferred Shares at their liquidation preference plus any accrued but unpaid dividends. On September 30, 2010, applicant made a liquidating distribution to its common shareholders, based on net asset value. Expenses of $25,025 incurred in connection with the liquidation were paid by applicant. Applicant has retained approximately $100,000 in cash to pay any contingent liabilities recognized after the liquidation date.

Filing Dates: The application was filed on October 5, 2010 and amended on December 6, 2010.

Applicant's Address: 100 Bellevue Parkway, Wilmington, DE 19809.

T. Rowe Price Tax-Free Intermediate Bond Fund, Inc. [File No. 811–7051]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On November 13, 2006, applicant transferred its assets to T. Rowe Price Summit Municipal Funds, Inc., based on net asset value. Expenses of approximately $17,940 incurred in connection with the reorganization were paid by applicant, the acquiring fund and T. Rowe Price Associates, Inc., applicant's investment adviser.

Filing Dates: The application was filed on June 26, 2009, and amended on December 2, 2010.

Applicant's Address: 100 E. Pratt St., Baltimore, MD 21202.

AFBA 5Star Funds [File No. 811–8035]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On March 12, 2010, applicant transferred its assets to corresponding series of FBR Funds, based on net asset value. Expenses of $94,946 incurred in connection with the reorganization were paid by AFBA Investment Management Company, applicant's investment adviser, and FBR Fund Advisers, Inc., investment adviser to the acquiring fund.

Filing Dates: The application was filed on September 22, 2010, and amended on December 14, 2010.

Applicant's Address: 909 N. Washington St., Alexandria, VA 22314.

Liquid Institutional Reserves [File No. 811–6281]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On April 22, 2004, applicant made a liquidating distribution to its shareholders, based on net asset value. Expenses of $6,560 incurred in connection with the liquidation were paid by UBS Global Asset Management (Americas) Inc., an affiliate of applicant's investment adviser.

Filing Date: The application was filed on December 9, 2010.

Applicant's Address: c/o UBS Global Asset Management, Attn: Keith A. Weller, 1285 Avenue of the Americas, 12th Floor, New York, NY 10019.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–32287 Filed 12–22–10; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63573; File No. 4–622]

Credit Rating Standardization Study

AGENCY: Securities and Exchange Commission.

ACTION: Request for comment.

SUMMARY: The Securities and Exchange Commission is requesting public comment to help inform its study pursuant to Section 939(h) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 on the feasibility and desirability of: Standardizing credit ratings terminology, so that all credit rating agencies issue credit ratings using identical terms; standardizing the market stress conditions under which ratings are evaluated; requiring a quantitative correspondence between credit ratings and a range of default probabilities and loss expectations under standardized conditions of economic stress; and standardizing credit rating terminology across asset classes, so that named ratings correspond to a standard range of default probabilities and expected losses independent of asset class and issuing entity.

DATES: The Commission will accept comments regarding issues related to the study on or before February 7, 2011.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/other.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number 4–622 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number 4–622. This file number should be included on the subject line if e-mail is used. To help us 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*). Comments are also 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 a.m. and 3 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Randall W. Roy, Assistant Director, Division of Trading and Markets, at (202) 551–5522; Alan A. Dunetz, Branch Chief, Division of Trading and Markets, at (212) 336–0072; Kevin S. Davey, Securities Compliance Examiner, at (212) 336–0075; Kristin A. Devitto, Securities Compliance Examiner, at (212) 336–0038; Mark M. Attar, Branch Chief, Division of Trading and Markets, at (202) 551–5889; or Raymond A. Lombardo, Branch Chief, Division of Trading and Markets, at (202) 551–5755, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–7010.

Discussion:

On July 21, 2010, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act") into law. Under Section 939(h) of the Dodd-Frank Act, the Securities and Exchange Commission (the "Commission") is required to study the feasibility and desirability of: (A) Standardizing credit

ratings terminology, so that all credit rating agencies issue credit ratings using identical terms; (B) standardizing the market stress conditions under which ratings are evaluated; (C) requiring a quantitative correspondence between credit ratings and a range of default probabilities and loss expectations under standardized conditions of economic stress; and (D) standardizing credit rating terminology across asset classes, so that named ratings correspond to a standard range of default probabilities and expected losses independent of asset class and issuing entity. Not later than one year after the date of enactment of the Dodd-Frank Act, the Commission must submit to Congress a report containing the findings of the study and the recommendations, if any, of the Commission with respect to the study.

Request for Comment:

The Commission believes that submissions by interested parties with a wide range of views, including those of investors who use credit ratings, portfolio managers, credit rating agencies, investment firms, underwriters, issuers, regulators and the academic community, will provide valuable information as it conducts the study required by Section 939(h) of the Dodd-Frank Act. Accordingly, the Commission requests commenters' views on each of the topics to be addressed in the Commission's study under Section 939(h) of the Dodd-Frank Act. In particular, the Commission seeks commenters' views in response to the following questions:

(1) Is it feasible and desirable to standardize credit ratings terminology, so that all credit rating agencies issue credit ratings using identical terms?

a. Do commenters agree that the term "credit ratings terminology" as used in Section 939(h) of the Dodd-Frank Act refers to the symbols and numbers credit rating agencies use to denote credit ratings and the definitions and meanings they promulgate for those symbols and numbers? If not, what other (or additional) credit rating terminology should this study focus on? Commenters who identify other terminologies should indicate for all subsequent questions whether they are discussing the other terminologies or ratings symbols and numbers and their corresponding definitions and meanings.

b. Are there credit rating terminologies used by different credit rating agencies that are currently comparable? If so, please identify and explain how they are comparable.

c. Identify differences in the credit rating terminologies used by credit rating agencies. What is the significance of these differences?

d. What issues do commenters encounter when they seek to compare ratings from different credit rating agencies?

e. Some credit rating agencies employ multiple credit rating scales designed to distinguish between different types of issues and/or issuers. For example, a credit rating agency may employ different credit rating symbols for ratings of long term securities, short term securities, money market funds, claims paying abilities of insurance companies, and issues and/or issuers in different jurisdictions. Do commenters believe that some types of credit rating symbols used by credit rating agencies are more or less suitable to standardization? Is it feasible or desirable to use a single credit rating scale for all types of issues and issuances? Should a standardized credit rating scale include separate symbols for different types of credit ratings? If so, what separate credit symbols should be included in the standardized credit rating terminology? Alternatively, should credit rating terminologies for some types of issues or issuers not be standardized? If so, for which types of issuers or issuances?

f. The credit ratings of some credit rating agencies address probability of default while the ratings of other credit rating agencies address expected loss. Other rating scales may address other metrics such as, for example, distance to distress (*e.g.,* with respect to the public finance ratings of some credit rating agencies). Do commenters believe that it is more or less desirable to have credit ratings of different credit rating agencies address different risks? Why?

g. Some credit rating agencies employ credit rating modifiers including, for example, "credit watch" and "rating outlook" to indicate a view as to the likelihood that a credit rating may change. Do commenters believe that it is feasible or desirable to include such credit rating modifiers in a standardized credit rating terminology? Why?

h. If commenters believe that standardizing credit ratings terminology is desirable and feasible:

i. What level of detail should be included in the standardized credit rating terminology?

ii. What mix of quantitative and qualitative factors should be referenced in each rating definition?

iii. Should a standardized credit rating terminology address likelihood of default, expected loss, or some other metric?

iv. Some credit rating agencies issue a number of broad categories of credit ratings that can be further delineated using identifiers (*e.g.,* pluses and minuses) to allow additional gradations of ratings. How many gradations of credit quality should be included in a standardized terminology for credit ratings?

v. Should a standardized credit rating terminology employ a separate terminology for certain asset classes (*e.g.,* for structured finance ratings)? Are there asset classes or types of ratings, such as short term or financial strength ratings, where a separate terminology should be considered?

vi. What organizations or combination of organizations should be responsible for developing and administering the standardized credit rating terminology? For example, should the Commission develop and administer the standardized terminology? Should an independent board or organization be formed to develop and administer the standardized terminology?

vii. What time period should be allowed for credit rating agencies to map their existing ratings to a new credit rating terminology, or for private contracts and investment management agreements that reference credit ratings to be changed to refer to the standardized terminology?

viii. Do commenters believe that it would be more desirable for credit rating agencies to retain their existing credit rating terminologies and make publicly available detailed information on how each credit rating agency's ratings can be mapped to a standardized terminology? Or would it be more desirable if the credit rating agency used only the standardized terminology?

(2) Is it feasible and desirable to standardize the market stress conditions under which credit ratings are evaluated?

a. Under what market stress conditions are credit ratings currently evaluated?

b. To what degree do commenters believe that credit rating agencies currently identify the market stress conditions under which credit ratings are evaluated? To the extent these market stress conditions are identified by credit rating agencies, do commenters believe that the market stress conditions used by different credit rating agencies at comparable credit rating levels are similar? If so, how are they similar? If not, how do they differ?

c. Do commenters believe that market stress conditions can be defined in a consistent manner across different industry sectors and geographic regions?

d. Do commenters believe that standardized market stress conditions

are equally relevant to the evaluation of all asset classes or issuers? For example, are there some asset classes or issuers where the relative degree of idiosyncratic risk versus systemic risk differs? If so, are market stress conditions less relevant, for example, to asset classes and issuers where there is a higher level of idiosyncratic risk?

e. If commenters believe that it is feasible and desirable to standardize the market stress conditions under which credit ratings are evaluated:

i. What parameters should be defined in these market stress conditions? For example, unemployment rates, declines in GDP and financial market declines are widely referenced indicators of market stress. What other parameters do commenters believe should be defined?

ii. How should market stress conditions differ across different industry sectors and geographic regions?

iii. Should these stress conditions reference specific historical market stresses such as, for example, the Great Depression or the 2008 financial crisis?

iv. Should each credit rating level have its own specifically defined stress conditions?

(3) Is it feasible and desirable to require a quantitative correspondence between credit ratings and a range of default probabilities and loss expectations under standardized conditions of economic stress?

a. To what extent do credit rating agencies or others assign a quantitative correspondence between credit ratings and a range of default probabilities and loss expectations?

i. To what extent do commenters believe that the correspondence is similar for comparable ratings from different credit rating agencies?

ii. To what extent do commenters believe that the correspondence is similar across industry sectors and geographical regions?

iii. To what extent do commenters believe that the correspondence is constant throughout the economic cycle?

iv. To what extent do commenters believe that the correspondence has been constant over time? For example, do commenters believe that the range of default probabilities and loss expectations corresponding to the credit ratings of different credit rating agencies have become more or less conservative over time?

b. Does the ability to assign a correspondence between credit ratings and a range of default probabilities and loss expectations in a sector vary depending on the degree to which a rating methodology for that sector is more or less quantitative in nature? Are there other factors, such as the quality or amount of historical performance data or structural complexity that may make it more or less difficult to assign a correspondence between credit ratings and a range of default probabilities and loss expectations?

c. Does the likelihood of rating transitions for similarly rated assets vary among asset classes? If so, how should variation in the likelihood of rating transitions be addressed when a quantitative correspondence is assigned between credit ratings and a range of default probabilities and loss expectations?

d. Is there a role for market-based measures such as credit spreads or option-based approaches (*i.e.,* Merton-type models which provide a distance to default measure based on equity prices) in determining a correspondence between credit ratings and a range of default probabilities and loss expectations?

e. If commenters believe that requiring a quantitative correspondence between credit ratings and a range of default probabilities and loss expectations under standardized conditions of economic stress is feasible and desirable:

i. What factors should be considered in determining the range of default probabilities and loss expectations associated with each rating? Should specific time horizons be specified for each default probability and loss expectation range? If so, how many different time horizons should be specified for each credit rating, and what are appropriate time horizons?

ii. The ratings of some credit rating agencies primarily address probability of default while others address expected loss. Should credit rating agencies be allowed to choose whether their ratings address one or the other? Should a single rating address both probability of default and loss expectation or should default probabilities and loss severity be addressed separately?

iii. What are the views of commenters on how the accuracy of the quantitative correspondence assigned by a given credit rating agency between its credit ratings and a range of default probabilities and loss expectations should be measured?

(4) Is it feasible and desirable to standardize credit rating terminology across asset classes, so that named credit ratings correspond to a standard range of default probabilities and expected losses independent of asset class and issuing entity?

a. To what degree do commenters believe that credit ratings are currently comparable across asset classes? For example, do commenters believe that credit ratings of structured finance products or municipal securities are comparable to credit ratings in other sectors?

b. In cases where credit rating agencies currently use the same credit rating terminology for multiple asset classes, what is the view of commenters on the adequacy and transparency of the procedures credit rating agencies use to achieve comparability?

c. What mix of quantitative and qualitative factors should be considered when standardizing credit rating terminology across asset classes, so that named credit ratings correspond to a standard range of default probabilities and expected losses?

i. To what degree should standardization be based on quantitative factors such as, for example, historical performance metrics including rating transition and default studies? What other quantitative factors should be considered?

ii. To what degree should standardization be based on qualitative factors such as, for example, analyst judgment regarding the comparability of credits from different sectors? What other qualitative factors should be considered?

d. Are there asset classes where the risk characteristics of the asset class, limitations on the quality of data, structural complexity, limitations on historical performance data, or other factors make it more difficult to apply to that asset class a standardized credit rating terminology which applies to other asset classes and issuers so that named ratings correspond to a standard range of default probabilities and expected losses?

All interested parties are invited to submit their views, in writing, on these questions.

By the Commission.

Dated: December 17, 2010.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2010–32280 Filed 12–22–10; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63562; File No. SR–Phlx–2010–177]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NASDAQ OMX PHLX, Inc. Relating to Options Overlying QNET

December 16, 2010.

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 15, 2010, NASDAQ OMX PHLX, Inc. ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the Exchange's Fee Schedule for Sector Index Options to expand the promotional pricing period for options overlying the NASDAQ Internet Index ("QNET").

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaqtrader.com/micro.aspx?id=PHLXfilings,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange previously filed a rule change to add additional transaction fees to Category III of its Fee Schedule, titled Sector Index Options, for options overlying QNET from trade date April 30, 2010 through trade date December 30, 2010.[3] The purpose of the promotional pricing is to assess a fixed rate across all market participants for a specified period of time to incentivize members to trade QNET.

The Exchange currently assesses a $.20 per contract transaction fee for options overlying QNET for the following market participants: Customers, registered options traders (on-floor), specialists, professionals,[4] firms and broker-dealers. Pursuant to the rule change, on December 31, 2010, the Exchange will assess the options transaction charges for sector index options as designated by category of market participant on the Fee Schedule.[5]

The Exchange is proposing to expand the promotional pricing to trade date December 31, 2010. This proposal would eliminate the $.20 per contract transaction promotional pricing after December 31, 2010, and would instead cause members to be assessed the applicable sector index options transaction charges, by market participant, starting on January 3, 2011 (the next trade date). For example, for transactions in QNET sector index options, a customer would no longer be assessed $.20 per contract on trade date January 3, 2011, but instead would be assessed the option transaction charge, which is currently $.44 per contract.

The Exchange recently filed a proposal to amend its calculation of transaction fees for billing purposes from settlement date to trade date billing.[6] In that filing, the Exchange amended the billing cycle so that a member who receives an invoice for the month of December 2010 will be assessed fees from November 30, 2010 (trade date) through December 31, 2010 (trade date) instead of through December 30, 2010 (trade date).[7] The Exchange is proposing to amend the QNET promotional pricing to allow members to obtain the promotional pricing through the end of the December billing period. The Exchange also proposes amending the Fee Schedule to reflect this amendment of the date for the QNET promotional period.

2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act [8] in general, and furthers the objectives of Section 6(b)(4) of the Act [9] in particular, in that it is an equitable allocation of reasonable fees and other charges among Exchange members. The Exchange believes that expanding the promotional pricing for sector index option fees for QNET is equitable because all market participants would be able to obtain the promotional pricing for the extra day. The Exchange further believes that offering the $.20 per contract fee for a specified promotional period and thereafter assessing the standard sector index option transaction fees is also equitable because it is intended to encourage trading in QNET.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act [10] and

[3] *See* Securities Exchange Act Release No. 61984 (April 26, 2010), 75 FR 23313 (May 3, 2010) (SR–Phlx–2010–60).

[4] The Exchange defines a "professional" as any person or entity that (i) is not a broker or dealer in securities, and (ii) places more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s).

[5] *See* footnote 3. The Exchange's filing eliminates the $.20 per contract transaction promotional pricing after December 30, 2010, and instead assesses members the applicable sector index options transaction charges, by market participant, starting on December 31, 2010. For example, for transactions in QNET sector index options, a customer would no longer be assessed the $.20 per contract on trade date December 31, 2010, but instead would be assessed the option transaction charge, which is currently $.44 per contract.

[6] *See* Securities Exchange Act Release No. 63406 (December 1, 2010), 75 FR 76511 (December 8, 2010) (SR–Phlx–2010–165).

[7] *See* footnote 6.

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(4).

[10] 15 U.S.C. 78s(b)(3)(A)(ii).

paragraph (f)(2) of Rule 19b–4 [11] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–Phlx–2010–177 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–Phlx–2010–177. This file number should be included on the subject line if e-mail 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. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Phlx–2010–177 and should be submitted on or before January 13, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–32222 Filed 12–22–10; 8:45 am]

BILLING CODE 8011–01–P

[11] 17 CFR 240.19b–4(f)(2).

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63564; File No. SR–CHX–2010–25]

Self-Regulatory Organizations; Chicago Stock Exchange, Inc.; Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Change To Eliminate the Validated Cross Trade Entry Functionality

December 16, 2010.

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 10, 2010, the Chicago Stock Exchange, Inc. (the "Exchange" or "CHX") 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 and is approving the proposed rule change on an accelerated basis.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The CHX proposes to amend its rules to eliminate the Validated Cross Trade Entry Functionality for Exchange-registered Institutional Brokers. The text of this proposed rule change is available on the Exchange's Web site at (*http://www.chx.com*) and in 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 CHX included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received regarding the proposal. The text of these statements may be examined at the places specified in Item IV below. The CHX has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its rules relating to the submission and execution of certain cross orders by CHX-registered Institutional Brokers ("Institutional Brokers") by eliminating the ability of an Institutional Broker to execute trades on the Exchange's trading facilities outside of the Exchange's Matching System.[4] Institutional Brokers represent a voluntary registration category of Exchange Participants and the provisions of Article 17 of the Exchange's Rules apply specifically to them. Institutional Brokers are deemed to be trading on the facilities of the Exchange.[5] Institutional Brokers are the successors to the previous Floor Broker category and they largely handle orders from their customers on a manual basis.[6]

With the adoption and implementation of Regulation NMS ("Reg NMS"), the Exchange transitioned from its traditional floor-based, auction trading archetype to its current electronic trading model.[7] In order to facilitate the handling and execution of orders by Institutional Brokers, Article 17 has provided a means by which Institutional Brokers could attempt to manually execute and report transactions outside the CHX Matching System while complying with the trade-through prohibitions of Reg NMS and the order priority rules of the

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See,* Article 20 for rules relating to the operation of the CHX Matching System.

[5] *See,* Securities Exchange Act Rel. No. 54550 (Sept. 29, 2006), 71 FR 59563 (October 10, 2006) (SR–CHX–2006–05) at Section II.C. (Institutional Broker), note 65 and accompanying text.

[6] For example, an Institutional Broker Representative ("IBR") may receive an order instruction from a customer over the telephone or some electronic means of communication (*e.g.,* e-mail or instant message). The IBR is then responsible for entering the terms of the order into an electronic database (for the purpose of facilitating automated surveillance of such activity. *See,* Article 11, Rule 3) and seeking execution thereof.

[7] *See,* Securities Exchange Act Rel. No. 54550 (Sept. 29, 2006), 71 FR 59563 (October 10, 2006) (SR–CHX–2006–05).

Exchange.[8] The Exchange's Brokerplex order entry system, which is available for use by all Institutional Brokers, includes a functionality known as "Validated Cross." The Validated Cross functionality allows an Institutional Broker to electronically validate whether a proposed cross transaction would constitute an improper trade-through under Reg NMS and/or violate the Exchange's priority rules before the trade can be consummated and reported. The purpose of the Validated Cross functionality has been to permit an Institutional Broker to receive an execution instruction from a customer, to immediately validate it within Brokerplex for compliance with applicable regulations and complete the full transaction reporting within a timeframe which is consistent with industry standards. By using this functionality, the broker and its customers could avoid being disadvantaged simply because the IBR was not able to type the trade data into the system before the National Best Bid or Offer ("NBBO") and/or CHX order book changed.

Despite these apparent advantages, reliance on and usage of the Validated Cross functionality by Institutional Brokers has declined over time. Additionally, the Exchange has conducted an analysis of whether the Validated Cross allows Institutional Broker to submit trades which would be blocked if submitted as a regular cross order and has concluded that the Validated Cross is effective for that purpose only in a very small percentage of instances. Even though we are proposing to get rid of the Validated Cross functionality, Institutional Brokers will continue to have the ability to submit other cross orders to the CHX Matching System for execution. Given the additional systems and regulatory costs to maintaining the Validated Cross functionality, the Exchange is proposing to eliminate it within the Brokerplex trading application and delete the associated rule text. Since the Validated Cross was the only means by which an Institutional Broker could execute and report a trade on our facilities outside of the Matching System, the Exchange is also proposing to eliminate the clause in section (a) of Article 9, Rule 13 which referred to trades executed outside the Matching System by an Institutional Broker.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act in general,[9] and furthers the objectives of Section 6(b)(5) in particular,[10] in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transaction in securities, to remove impediments and perfect the mechanisms of a free and open market, and, in general, to protect investors and the public interest. The elimination of the Validated Cross functionality available to Institutional Brokers will simplify the order entry process, eliminate certain regulatory concerns presented by the Validated Cross and reduce the burden on the Exchange to maintain overlapping order entry functionality.

B. Self-Regulatory Organization's Statement of Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments Regarding the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove the proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–CHX–2010–25 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CHX–2010–25. This file number should be included on the subject line if e-mail 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 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the CHX. 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 publicly available. All submissions should refer to File Number SR–CHX–2010–25 and should be submitted on or before January 13, 2011.

V. Commission's Findings and Order Granting Accelerated Approval of the Proposed Rule Change

After careful consideration, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[11] In

[8] *See,* Reg NMS Rule 611 (Order Protection Rule); Article 20, Rule 8 (Operation of the Matching System).

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(5).

[11] In approving the proposed rule change, the Commission notes that it has considered the

Continued

particular, the Commission finds that the proposed rule change is consistent with the requirements of Section 6(b)(5) of the Act,[12] which requires, among other things, that the Exchange's rules be designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and in general, to protect investors and the public interest. The Commission agrees with the Exchange that the elimination of the Validated Cross functionality will simplify CHX's order entry process, eliminate certain regulatory concerns presented by the Validated Cross functionality, and reduce the burden on the Exchange to maintain overlapping order entry functionality.[13]

The Commission finds good cause, pursuant to Section 19(b)(2) of the Act,[14] for approving the proposed rule change prior to the 30th day after publication of notice in the **Federal Register**. The Exchange represents that accelerated approval will allow the Exchange to implement these changes prior to the application of its customary end-of-the-year software change freeze, and thereby minimize the systems and operational risks it says are inherent to coding changes made late in the year. Further, accelerated approval of the proposed rule change will allow the Exchange to more quickly address certain regulatory concerns associated with the Validated Cross functionality.

VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[15] that the proposed rule change (SR–CHX–2010–25) be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–32223 Filed 12–22–10; 8:45 am]

BILLING CODE 8011–01–P

proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[12] 15 U.S.C. 78f(b)(5).

[13] *See supra* Section II.A.2.

[14] 15 U.S.C. 78s(b)(2).

[15] 15 U.S.C.78s(b)(2).

[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63566; File No. SR–CBOE–2010–115]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Modify How Odd-Lots Are Handled on CBSX

December 16, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act") [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 14, 2010, the Chicago Board Options Exchange, Incorporated ("Exchange" or "CBOE") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The 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 modify how odd-lot orders are handled on the CBOE Stock Exchange ("CBSX"). The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.org/Legal*), at the Exchange's principal office, and on the Commission's Web site at *http://www.sec.gov/rules/sro.shtml.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

Currently, CBSX handles and executes round lot orders differently from the manner in which it handles and executes odd lot and mixed lot orders.[3] If CBSX is not displaying the NBBO and step-up is not achieved pursuant to the CBSX flash process in Rule 52.6, the round lot order is then routed to the exchange displaying the NBBO for execution. Odd lot orders, however, currently are not routed to the exchange displaying the NBBO for execution. The proposed change will ensure that odd and mixed lot orders will be handled and executed in a more consistent manner with round lot orders.

Under the proposed rule change, Odd-Lot orders will be matched by the CBSX System against interest at the best price in the CBSX Book. Odd-Lot orders (or the odd-lot portion of a mixed lot order) that are not marketable will be maintained in the System so that they may trade against later submitted orders (they will be traded using CBSX's matching rules). Marketable Odd-lot orders will be handled similar to round lot orders. If fulfilling an Odd-Lot order would result in an impermissible trade-through of another exchange, the order will be routed to other exchanges to be filled at prices better than the CBSX disseminated price. If an execution is not attained at the away exchange(s), the returned order is eligible for execution on CBSX. We note that the flash process utilized by CBSX prior to routing away orders will not be employed for Odd-lot orders.

If an incoming Odd-lot order trades against a quote in the CBSX Book, the new quantity remaining in the quote will be rounded down to the nearest lower round-lot amount (zero or multiple of 100) for display purposes, with the remaining Odd-Lot amount being cancelled. If an incoming order trades against a limit order resting on the CBSX Book and an Odd-Lot amount remains from the limit order resting on the CBSX Book, that Odd-Lot amount will remain in the system eligible for execution but will not be displayed.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the "Act") [4] and the rules and regulations thereunder and, in particular, the requirements of Section 6(b) of the Act.[5] Specifically, the Exchange believes the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] A "round lot" order is an order for a quantity that is a multiple of 100 (100, 200, 300, etc.). An "odd lot" order is an order for a quantity that is less than 100. A "mixed lot" order is an order for a quantity that is greater than 100 but not a multiple of 100 (135, 372, 1126, etc.).

[4] 15 U.S.C. 78s(b)(1).

[5] 15 U.S.C. 78f(b).

proposed rule change is consistent with the Section 6(b)(5)[6] requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, to remove impediments to and to perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest. Handling odd and mixed lot orders in the same manner as round lot orders allows CBSX to simplify the handling of odd-lot orders to the benefit of investors.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposal.

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[7] and Rule 19b–4(f)(6) thereunder.[8]

The Exchange has requested that the Commission waive the 30-day operative delay. Waiver of the 30-day operative delay would allow CBSX to immediately begin processing odd-lot orders and mixed-lot orders in a manner similar to its processing of round-lot orders. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest and designates the proposal operative upon filing.[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.

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 e-mail to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2010–115 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2010–115. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, on official business days between the hours of 10 a.m. and 3 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–CBOE–2010–115 and should be submitted on or before January 13, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–32224 Filed 12–22–10; 8:45 am]

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[6] 15 U.S.C. 78f(b)(5).

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[9] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63572; File No. SR–EDGA–2010–18]

Self-Regulatory Organizations; EDGA Exchange, Inc.; Notice of Filing of Amendment No. 2 to Proposed Rule Change To Amend EDGA Rules 11.9(b)(1)(C) and 11.5(c)(7) Regarding Step-Up Orders

December 17, 2010.

On November 8, 2010, EDGA Exchange, Inc. (the "Exchange" or "EDGA") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] a proposed rule change regarding Step-Up Orders. The proposed rule change was published for comment in the **Federal Register** on November 24, 2010.[3] On November 23, 2010, the Exchange submitted Amendment No. 1 to the proposed rule change.[4] On December 14, 2010, the Exchange submitted Amendment No. 2 to the proposed rule change, as described in Items I and II below, which items have been prepared by the Exchange.[5] The Commission is publishing this notice of Amendment No. 2 to solicit comments on the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 63335 (November 18, 2010), 75 FR 71783.

[4] In Amendment No. 1, the Exchange corrected an error in the purpose section of the original filing purpose section changing the current duration of the Step-Up Display Period from 25 milliseconds to 10 milliseconds.

[5] Amendment No. 2 replaces in its entirety the original filing and Amendment No. 1. In Amendment No. 2, the Exchange proposes to: (a) change the Step-Up Display Period (as defined below) from 25 milliseconds to 10 milliseconds, and (b) eliminate the discretion in the rule to vary the Step-Up Display Period without a rule filing.

proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend EDGA Rule 11.9(b)(1)(C) regarding the description of the Step-up order type. The Exchange also proposes to introduce Rule 11.5(c)(7) to allow Mid-Point Match orders entered in response to Step-up orders to be processed pursuant to Rule 11.9(b)(1)(C). The text of the proposed rule change is available on the Exchange's Internet Web site at *http://www.directedge.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 self-regulatory organization has prepared summaries, set forth in Sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

This Amendment No. 2 replaces in its entirety the original filing, SR–EDGA–2010–18 (November 8, 2010) and partial Amendment No. 1 (November 23, 2010).

Exchange Rule 11.5(c)(11) defines a Step-up order as a "market or limit order with the instruction that the System display the order to Users at or within the NBBO price pursuant to Rule 11.9(b)(1)(C)." Exchange Rule 11.9(b)(1)(C), in turn, states that orders shall be displayed to Users [6] (hereinafter referred to as "Members"),[7] in a manner that is separately identifiable from other Exchange orders, at or within the NBBO price for a period of time not to exceed five hundred milliseconds, as determined by the Exchange (the "Step-up Display Period)."

In this amendment, the Exchange proposes to change the Step-up Display Period, which is currently set at 25 milliseconds, to 10 milliseconds. The Exchange also proposes to eliminate the prior discretion in the rule to vary the Step-up Display Period without a rule filing.

The Exchange proposes to amend Rule 11.9(b)(1)(C) to add language to the rule text which will provide that at the conclusion of the Step-up Display Period, the Step-up order shall execute against responsive User orders priced at or within the NBBO, prevailing at the end of the Step-up Display Period on a price/time priority basis consistent with Rule 11.8(a)(1) and (2). Rules 11.8(a)(1) and (2), in turn, provide that orders of Users shall be ranked and maintained in the EDGA Book based on the following priority: (i) The highest-priced order to buy (or lowest-priced order to sell) shall have priority over all other orders to buy (or orders to sell); (ii) where orders to buy (or sell) are made at the same price, the order clearly established as the first entered into the System at such particular price shall have precedence at that price, up to the number of shares of stock specified in the order. Commencing on the six month anniversary of {Insert Commission approval date of this rule filing}, the orders eligible for executing against Step-up orders shall be expanded to include User orders priced better but not outside the NBBO at the end of the Step-up Display Period (such orders, "Eligible Book Orders").

In effect, Step-up orders permit a Member to initiate a price auction of such orders by displaying order solicitation information to other Members simultaneously, provided such other Members have elected to receive such order information (each such Member, an "Electing Member.") After the passage of the Step-up Display Period, the Step-up orders are executed against responses and, commencing on the six month anniversary of {Insert Commission approval date of this rule filing}, Eligible Book Orders, on a price/time priority basis in accordance with Rule 11.8(a)(1) and (2). Responses are accumulated for the Step-up Display Period by the Exchange, rather than processed at arrival time. Eligible Book Orders will continue to be eligible for execution against the EDGA Book during the Step-up Display Period.

For example, assume the NBBO (national best bid/offer) is 10.10×10.12. If Member A enters a Step-up order to buy 500 shares of ABC security at the prevailing national best offer ($10.12) and such Step-up order cannot execute against the EDGA Book then Electing Members will receive a solicitation to sell 500 shares of ABC security at $10.12 or lower. If Electing Members X, Y, and Z transmit an order to sell 500 shares (or less) of ABC security at the prevailing national best offer or lower (*i.e,* $10.12 or lower), within the Step-up Display Period, they would all participate in a price auction, which would be awarded at the end of the Step-up Display Period on a price/time priority basis based on the prevailing NBBO at the end of such time period. Therefore, if EDGA receives an order to sell 500 shares at $10.11 from Electing Member X, then receives an order to sell 200 shares at $10.10 from Electing Member Y and lastly receives an order to sell 200 shares at $10.11 from Electing Member Z, Electing Member Y would have priority over Electing Members X and Z based on price priority, assuming that such orders were received within the Step-up Display Period. As a result, Electing Member Y's order would execute against Member A's Step-up order for 200 shares at $10.10. The remaining 300 shares would be awarded to Electing Member X at $10.11, since Electing Member X has time priority over Electing Member Z. Following the six month anniversary of {Insert Commission approval date of this rule filing}, if non-electing Member W had an order to sell 500 shares at $10.11 that was entered before Electing Member X's order and it was not otherwise executed on the EDGX Book prior to the end of the Step-up Display Period, then the remaining 300 shares in the above example would be executed against Member W's order, since Member W would have time priority over both Electing Members X and Z.

The Exchange believes that this proposed amendment provides more transparency regarding the timing associated with the price auction.

The Exchange also proposes to add a new order type as Rule 11.5(c)(7) to allow Mid-Point Match orders that are entered in response to Step-up orders to be eligible for execution pursuant to Rule 11.9(b)(1)(C), as described above. As proposed, the Mid-Point Match order would be "an order with an instruction to execute it at the midpoint of the NBBO." This order type differs from the Mid-Point Peg order in that it can only be used in response to a Step-up order type, whereas the Mid-Point Peg order can be entered as a limit order but cannot be used in response to a Step-up order. Further, the Mid-Point Peg order can execute at a price better than the midpoint of the NBBO, while the Mid-Point Match order will be time-stamped

[6] Exchange Rule 11.9(b)(1) provides that (prior to display of an order to a User), an incoming order shall first attempt to be matched for execution against orders in the EDGA Book.

[7] Exchange Rule 1.5(cc) defines a User as any "any Member or Sponsored Participant who is authorized to obtain access to the System pursuant to Rule 11.3."

and priced at the end of the Step-up Display Period.

In response to the price auction described above, the Exchange will not accept orders priced in subpennies. The respondent User could enter a Mid-Point Match order, however, that would be eligible for execution at the midpoint of the prevailing NBBO at the end of the Step-up Display Period.

The Exchange believes the midpoint response described above will provide an additional pricing mechanism for the respondent User that is willing to offer price improvement, but is unwilling to cross the spread between the national best bid and offer to do so. By providing this option, the Exchange believes that a greater proportion of Step-up orders will receive price improvement. In addition, because the midpoint response will execute all trades at the midpoint of the NBBO, it will never execute a trade outside of the NBBO. If the national best bid for a security underlying a Step-up order equals or "locks" the national best offer for such security, a Mid-Point Match order response will execute all trades at the locked price.

The Step-up order process will not generate an execution if the national best bid (offer) for the security underlying a Step-up order is priced better than or "crosses" the national best offer (bid) for such security. In the event of a "crossed" market or an absence of responsive User orders at or within the NBBO and, commencing on the six month anniversary of {Insert Commission approval date of this rule filing}, Eligible Book Orders at the end of the Step-up Display Period, the Step-up process shall terminate and the Step-up order shall be cancelled or routed in accordance with the User's instructions.

Other technical amendments

The Exchange proposes to make conforming changes to the numbering of current rules 11.5(c)(7)–(14) to (c)(8)–(15) as a result of the insertion of the Mid-Point Match order type in Rule 11.5(c)(7), as described above. Similarly, the references to the newly numbered rules are also proposed to amended in Rule 11.5(c) and Rule 11.8(a)(2)(C).

2. Statutory Basis

The statutory basis for the proposed rule change is Section 6(b)(5) of the Act,[8] which requires the rules of an exchange 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. The proposed rule change also is designed to support the principles of Section 11A(a)(1)[9] of the Act in that it seeks to assure fair competition among brokers and dealers and among exchange markets. The Exchange believes that the proposed rule meets these requirements in that it seeks to promote the efficient execution of investor transactions, and thus investor confidence, over the long term by providing additional transparency relating to the execution of Step-up orders.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of the notice of the proposed rule change in the **Federal Register**[10] or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove such proposed rule change, as amended, or

(B) Institute proceedings to determine whether the proposed rule change, as amended, 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 e-mail to *rule-comments@sec.gov.* Please include File Number SR–EDGA–2010–18 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–EDGA–2010–18. This file number should be included on the subject line if e-mail 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,[11] all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing, as amended, 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–EDGA–2010–18 and should be submitted on or before January 13, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–32285 Filed 12–22–10; 8:45 am]

BILLING CODE 8011–01–P

[8] 15 U.S.C. 78f(b)(5).

[9] 15 U.S.C. 78k–1(a)(1).

[10] The Commission notes that the notice of the proposed rule change was first published in the **Federal Register** on November 24, 2010.

[11] The text of the proposed rule change, as amended, is available on the Commission's Web site at *http://www.sec.gov/rules/sro.shtml.*

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63574; File No. SR–EDGX–2010–17]

Self-Regulatory Organizations; EDGX Exchange, Inc.; Notice of Filing of Amendment No. 2 to Proposed Rule Change To Amend EDGX Rules 11.9 and 11.5

December 17, 2010.

On November 8, 2010, EDGX Exchange, Inc. (the "Exchange" or "EDGX") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act") [1] and Rule 19b–4 thereunder,[2] a proposed rule change regarding Step-Up Orders. The proposed rule change was published for comment in the **Federal Register** on November 24, 2010.[3] On November 23, 2010, the Exchange submitted Amendment No. 1 to the proposed rule change.[4] On December 14, 2010, the Exchange submitted Amendment No. 2 to the proposed rule change, as described in Items I and II below, which items have been prepared by the Exchange.[5] The Commission is publishing this notice of Amendment No. 2 to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend EDGX Rule 11.9(b)(1)(C) regarding the description of the Step-up order type. The Exchange also proposes to modify Rule 11.5(c)(7) to allow Mid-Point Match orders entered in response to Step-up orders to be processed pursuant to Rule 11.9(b)(1)(C). The text of the proposed rule change is available on the Exchange's Internet Web site at *http://www.directedge.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 self-regulatory organization has prepared summaries, set forth in Sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

This Amendment No. 2 replaces in its entirety the original filing, SR–EDGX–2010–17 (November 8, 2010) and partial Amendment No. 1 (November 23, 2010).

Exchange Rule 11.5(c)(11) defines a Step-up order as a "market or limit order with the instruction that the System display the order to Users at or within the NBBO price pursuant to Rule 11.9(b)(1)(C)." Exchange Rule 11.9(b)(1)(C), in turn, states that orders shall be displayed to Users [6] (hereinafter referred to as "Members"),[7] in a manner that is separately identifiable from other Exchange orders, at or within the NBBO price for a period of time not to exceed five hundred milliseconds, as determined by the Exchange (the "Step-up Display Period)."

In this amendment, the Exchange proposes to change the Step-up Display Period, which is currently set at 25 milliseconds, to 10 milliseconds. The Exchange also proposes to eliminate the prior discretion in the rule to vary the Step-up Display Period without a rule filing.

The Exchange proposes to amend Rule 11.9(b)(1)(C) to add language to the rule text which will provide that at the conclusion of the Step-up Display Period, the Step-up order shall execute against responsive User orders priced at or within the NBBO, prevailing at the end of the Step-up Display Period on a price/time priority basis consistent with Rule 11.8(a)(1) and (2). Rules 11.8(a)(1) and (2), in turn, provide that orders of Users shall be ranked and maintained in the EDGX Book based on the following priority: (i) The highest-priced order to buy (or lowest-priced order to sell) shall have priority over all other orders to buy (or orders to sell); (ii) where orders to buy (or sell) are made at the same price, the order clearly established as the first entered into the System at such particular price shall have precedence at that price, up to the number of shares of stock specified in the order. Commencing on the six month anniversary of {Insert Commission approval date of this rule filing}, the orders eligible for executing against Step-up orders shall be expanded to include User orders priced better but not outside the NBBO at the end of the Step-up Display Period (such orders, "Eligible Book Orders").

In effect, Step-up orders permit a Member to initiate a price auction of such orders by displaying order solicitation information to other Members simultaneously, provided such other Members have elected to receive such order information (each such Member, an "Electing Member.") After the passage of the Step-up Display Period, the Step-up orders are executed against responses and, commencing on the six month anniversary of {Insert Commission approval date of this rule filing}, Eligible Book Orders, on a price/time priority basis in accordance with Rule 11.8(a)(1) and (2). Responses are accumulated for the Step-up Display Period by the Exchange, rather than processed at arrival time. Eligible Book Orders will continue to be eligible for execution against the EDGX Book during the Step-up Display Period.

For example, assume the NBBO (national best bid/offer) is 10.10×10.12. If Member A enters a Step-up order to buy 500 shares of ABC security at the prevailing national best offer ($10.12) and such Step-up order cannot execute against the EDGX Book then Electing Members will receive a solicitation to sell 500 shares of ABC security at $10.12 or lower. If Electing Members X, Y, and Z transmit an order to sell 500 shares (or less) of ABC security at the prevailing national best offer or lower (*i.e,* $10.12 or lower), within the Step-up Display Period, they would all participate in a price auction, which would be awarded at the end of the Step-up Display Period on a price/time priority basis based on the prevailing NBBO at the end of such time period. Therefore, if EDGX receives an order to sell 500 shares at $10.11 from Electing Member X, then receives an order to sell 200 shares at $10.10 from Electing Member Y and lastly receives an order to sell 200 shares at $10.11 from Electing Member Z,

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 63336 (November 18, 2010), 75 FR 71781.

[4] In Amendment No. 1, the Exchange corrected an error in the purpose section of the original filing purpose section changing the current duration of the Step-Up Display Period from 25 milliseconds to 10 milliseconds.

[5] Amendment No. 2 replaces in its entirety the original filing and Amendment No. 1. In Amendment No. 2, the Exchange proposes to: (a) Change the Step-Up Display Period (as defined below) from 25 milliseconds to 10 milliseconds, and (b) eliminate the discretion in the rule to vary the Step-Up Display Period without a rule filing.

[6] Exchange Rule 11.9(b)(1) provides that (prior to display of an order to a User), an incoming order shall first attempt to be matched for execution against orders in the EDGX Book.

[7] Exchange Rule 1.5(cc) defines a User as any "any Member or Sponsored Participant who is authorized to obtain access to the System pursuant to Rule 11.3."

Electing Member Y would have priority over Electing Members X and Z based on price priority, assuming that such orders were received within the Step-up Display Period. As a result, Electing Member Y's order would execute against Member A's Step-up order for 200 shares at $10.10. The remaining 300 shares would be awarded to Electing Member X at $10.11, since Electing Member X has time priority over Electing Member Z. Following the six month anniversary of {Insert Commission approval date of this rule filing}, if non-electing Member W had an order to sell 500 shares at $10.11 that was entered before Electing Member X's order and it was not otherwise executed on the EDGX Book prior to the end of the Step-up Display Period, then the remaining 300 shares in the above example would be executed against Member W's order, since Member W would have time priority over both Electing Members X and Z.

The Exchange believes that this proposed amendment provides more transparency regarding the timing associated with the price auction.

The Exchange also proposes to amend Rule 11.5(c)(7) to allow Mid-Point Match orders that are entered in response to Step-up orders to be eligible for execution pursuant to Rule 11.9(b)(1)(C), as described above.

In response to the price auction described above, the Exchange will not accept orders priced in subpennies. The respondent User could enter a Mid-Point Match order, however, that would be eligible for execution at the midpoint of the prevailing NBBO at the end of the Step-up Display Period.

The Exchange believes the midpoint response described above will provide an additional pricing mechanism for the respondent User that is willing to offer price improvement, but is unwilling to cross the spread between the national best bid and offer to do so. By providing this option, the Exchange believes that a greater proportion of Step-up orders will receive price improvement. In addition, because the midpoint response will execute all trades at the midpoint of the NBBO, it will never execute a trade outside of the NBBO. If the national best bid for a security underlying a Step-up order equals or "locks" the national best offer for such security, a Mid-Point Match order response will execute all trades at the locked price.

The Step-up order process will not generate an execution if the national best bid (offer) for the security underlying a Step-up order is priced better than or "crosses" the national best offer (bid) for such security. In the event of a "crossed" market or an absence of responsive User orders at or within the NBBO and, commencing on the six month anniversary of {Insert Commission approval date of this rule filing}, Eligible Book Orders at the end of the Step-up Display Period, the Step-up process shall terminate and the Step-up order shall be cancelled or routed in accordance with the User's instructions.

2. Statutory Basis

The statutory basis for the proposed rule change is Section 6(b)(5) of the Act,[8] which requires the rules of an exchange 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. The proposed rule change also is designed to support the principles of Section 11A(a)(1)[9] of the Act in that it seeks to assure fair competition among brokers and dealers and among exchange markets. The Exchange believes that the proposed rule meets these requirements in that it seeks to promote the efficient execution of investor transactions, and thus investor confidence, over the long term by providing additional transparency relating to the execution of Step-up orders.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of the notice of the proposed rule change in the **Federal Register**[10] or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove such proposed rule change, as amended, or

(B) Institute proceedings to determine whether the proposed rule change, as amended, 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 e-mail to *rule-comments@sec.gov.* Please include File Number SR–EDGX–2010–17 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–EDGX–2010–17. This file number should be included on the subject line if e-mail 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,[11] all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing, as amended, also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the

[8] 15 U.S.C. 78f(b)(5).

[9] 15 U.S.C. 78k–1(a)(1).

[10] The Commission notes that the notice of the proposed rule change was first published in the **Federal Register** on November 24, 2010.

[11] The text of the proposed rule change, as amended, is available on the Commission's Web site at *http://www.sec.gov/rules/sro.shtml.*

Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–EDGX–2010–17 and should be submitted on or before January 13, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–32286 Filed 12–22–10; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63567; File No. SR–DTC–2010–14]

Self-Regulatory Organizations; The Depository Trust Company; Order Granting Approval of a Proposed Rule Change To Authorize Additional Shares of Preferred Stock and Designate Shares as Series A Preferred Stock

December 16, 2010.

I. Introduction

On October 22, 2010, The Depository Trust Company ("DTC") filed with the Securities and Exchange Commission ("Commission") proposed rule change SR–DTC–2010–11 pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act").[1] Notice of the proposal was published in the **Federal Register** on November 12, 2010.[2] The Commission received no comment letters. For the reasons discussed below, the Commission is granting approval of the proposed rule change.

II. Description

In 1999, DTC's Certificate of Organization was amended ("1999 Amendment") to provide for the authorization and issuance of 1,500,000 shares of preferred stock, par value $100 per share.[3] The 1999 Amendment also provided that the preferred stock could be issued in one or more classes having such designations, relative rights, preferences, or limitation as fixed by the Board of Directors of DTC at the time of issuance of any such preferred stock. DTC's Certificate of Organization has been amended three times since the 1999 Amendment to provide for the issuance of variable rate, noncumulative, nonvoting shares of Series A preferred stock, par value $100 per shares, which are preferred over DTC's common stock as to dividends and in the event of liquidation ("Series A Preferred Stock"). The first such amendment (filed in 2000) provided for the issuance of 750,000 shares of the Series A Preferred Stock.[4] The second amendment (filed in 2006) provided for the issuance of an additional 500,000 shares of Series A Preferred Stock.[5] The third amendment (filed in 2009) provided for the issuance of an additional 250,000 shares of Series A Preferred Stock.[6]

DTC participants are required to purchase and own shares of the Series A Preferred Stock in proportion to their use of DTC services. DTC treats the Series A Preferred Stock held by participants substantially the same as it treats the mandatory cash deposits made by participants to the Participants Fund for purposes of collateralizing securities transactions, limiting net debit positions, implementing default procedures, and allocating unrecovered losses.

In order to further increase its capital, DTC is amending its Certificate of Organization[7] to authorize an additional 1,750,000 shares of Series A Preferred stock with such rights, preferences, and limitations as currently provided in its Certificate of Organization.[8]

III. Discussion

Section 17A(b)(3)(F) of the Act requires that the rules of a clearing agency be designed to, among other things, assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible and to protect investors and the public interest.[9] The Commission believes that the rule change is consistent with DTC's obligations under the Exchange Act because the rule change will enable DTC to be "well capitalized" while not adversely affecting its ability to adequately safeguard the securities and funds in its custody or control or for which it is responsible.

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act and in particular with the requirements of Section 17A of the Act and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (File No. SR–DTC–2010–14) be and hereby is approved.

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[10]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–32225 Filed 12–22–10; 8:45 am]

BILLING CODE 8011–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #12418 and #12419]

U.S. Virgin Islands Disaster #VI–00006

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a notice of an Administrative declaration of a disaster for the U.S. Virgin Islands dated 12/15/2010.

Incident: Tropical Storm Tomas.

Incident Period: 11/08/2010 through 11/12/2010.

Effective Date: 12/15/2010.

Physical Loan Application Deadline Date: 02/14/2011.

Economic Injury (EIDL) Loan Application Deadline Date: 09/15/2011.

[12] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] Securities Exchange Act Release No. 63254 (November 5, 2010), 75 FR 69514 (November 12, 2010).

[3] The amendment was the subject of a DTC proposed rule change approved by the Commission. Securities Exchange Act No. 34–41529 (June 15, 1999), 64 FR 33333 (June 22, 1999) [File No. SR–DTC–1999–08]. The amendment was also approved by the New York State Superintendent of Banks.

[4] Securities Exchange Release No. 43197 (August 23, 2000), 65 FR 52459 (August 29, 2000) [File No. SR–DTC–2000–02].

[5] Securities Exchange Act Release No. 54775 (November 17, 2006), 71 FR 68662 (November 27, 2006) [SR–DTC–2006–14].

[6] Securities Exchange Act Release No. 59612 (March 20, 2009), 74 FR 13488 (March 27, 2009) [File No. SR–DTC–2009–06].

[7] On October 20, 2010, DTC's sole stockholder, The Depository Trust & Clearing Corporation, authorized DTC to amend its Certificate of Organization to increase the number of shares of authorized preferred stock, as required by Section 8003 of the Banking Law of the State of New York. DTC is also required to seek approval from the New York State Banking Department, which concurrent with the filing of this proposed rule change, it has done.

[8] DTC, as a member institution of the Federal Reserve System, is subject to capital guidelines issued by the Board of Governors of the Federal Reserve System. To be considered "well-capitalized" under these guidelines, DTC must, among other things, maintain a Total Risk-Based Capital Ratio of at least 10%, a Leverage Ratio of at least 5%, and a Tier 1 Risk-Based Capital Ratio of at least 6%.

The authorization and issuance of this additional 1,750,000 shares will increase the number of shares of Series A Preferred Stock to a total of 3,250,000 shares with a total par value of $325 million. This will enable DTC to continue to be "well capitalized" under the capital guidelines issued by the Board of Governors of the Federal Reserve System.

[9] 15 U.S.C. 78q–1(b)(3)(F).

[10] 17 CFR 200.30–3(a)(12).

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the Administrator's disaster declaration, applications for disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Island: Saint Croix.

The Interest Rates are:

	Percent
For Physical Damage:	
Homeowners With Credit Available Elsewhere	4.500
Homeowners Without Credit Available Elsewhere	2.250
Businesses With Credit Available Elsewhere	6.000
Businesses Without Credit Available Elsewhere	4.000
Non-Profit Organizations With Credit Available Elsewhere	3.250
Non-Profit Organizations Without Credit Available Elsewhere	3.000
For Economic Injury:	
Businesses & Small Agricultural Cooperatives Without Credit Available Elsewhere	4.000
Non-Profit Organizations Without Credit Available Elsewhere	3.000

The number assigned to this disaster for physical damage is 12418 B and for economic injury is 12419 0.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

The Island which received an EIDL Declaration # is Saint Croix.

Dated: December 15, 2010.

Karen G. Mills,

Administrator.

[FR Doc. 2010–32338 Filed 12–22–10; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF STATE

[Public Notice: 7273]

Bureau of Educational and Cultural Affairs (ECA) Request for Grant Proposals: English Language Materials Training and Development Program

Announcement Type: New Cooperative Agreement.

Funding Opportunity Number: ECA/A/L–11–02.

Catalog of Federal Domestic Assistance Number: 19.421.

Key Dates: Application Deadline: March 15, 2011.

Executive Summary: The Office of English Language Programs of the Bureau of Educational and Cultural Affairs (ECA/A/L) announces an open competition for the English Language Materials Training and Development Program, including a U.S. exchange component in summer, 2012. U.S. public and private universities with a graduate TEFL program meeting the provisions described in Internal Revenue Code section 26 U.S.C. 501(c)(3) may submit proposals to implement the program that will include the following: 1. A needs assessment for English language instructional materials abroad; 2. an rigorous, online academic program in materials development for 26 international participants; 3. a three-week, U.S. exchange program for the same 26 participants including materials development training; 4. the revision of at least three products/publications presently in the ECA/A/L materials catalogue and the development of at least three new products/publications. More detailed information about each of these four components of this cooperative agreement are detailed in the Program Objectives, Goals, and Implementation (POGI). Funding is pending the availability of FY–2011 funds.

For the needs assessment for English language instructional materials, the proposal should include a detailed plan for the recipient organization to perform a needs assessment among English language learners and instructors outside the U.S., including present and past participants in ECA/A/L programs as well as the Regional English Language Officers (RELOs), the corps of State Department Specialist Foreign Service Officers based around the world. The objective of the materials needs assessment will be to identify instructional materials preferences and needs of learners and instructors of English. This information will serve to inform the development and implementation of the other components of this program.

For the online program in materials development, proposals must outline and demonstrate an ability to produce an online program that blends various social media and web-based technologies to provide professional development opportunities on materials assessment, review, adaptation and development to approximately twenty-six foreign participants. The participants will be selected by ECA/A/L in consultation with the RELOs. Participants will be: citizens of the country in which they reside; university degree holders, preferably at the graduate level in the fields of TEFL or Applied Linguistics; employed in a position which includes substantive responsibilities in the area of materials assessment, adaptation, development, or closely related area; in positions of authority with regard to the adaptation, development and use of instructional materials at the institutional, regional, and/or national levels; and professionally proficient in English. The online program must commence at least ten weeks before the U.S. exchange and include at least five sessions after completion of the U.S. exchange. The program must also incorporate existing ECA/A/L materials, drafts of revised materials, and new products/publications as illustrations throughout the online program.

For the U.S. university-based Exchange component, the recipient will develop and implement a workshop in the U.S. for the twenty-six English language teaching professionals who have been participating in online program. The four-week U.S. Exchange should be implemented in July of 2012 and include an orientation to the U.S.; an intensive program on materials assessment, adaptation, review and development; cultural and community service activities; and a three day briefing in Washington, DC at the conclusion of the exchange component. The Washington, DC briefing should familiarize participants with ECA and other relevant bureaus within the State Department, allow participants to meet with English language materials developers from Washington, DC, and provide an opportunity for participants to share their materials development program development plans. Participants will be encouraged to develop a materials development program to implement in their home countries following the exchange program. The proposal should include a detailed plan for the content, administration, and implementation of the U.S. exchange.

For the materials revision and production component, the recipient will revise at least three current ECA/A/L products/publications and develop at least three new products/publications based on the findings of the materials needs analysis. The recipient will prepare revised drafts of existing ECA/A/L materials and new materials based on feedback from program participants garnered during the second and third components of this program and present at least three publishable revised ECA/A/L products/publications and at least three publishable new products/publications to ECA/A/L for review and future publication.

Applicant organizations should demonstrate a substantial track record of conducting substantive academic programs for EFL educators with a particular emphasis on materials assessment and development, conducting needs assessments internationally, developing and implementing training programs through virtual media, developing English language materials for teachers and learners in EFL settings, and managing logistical and administrative aspects of similar programs.

(I.) Funding Opportunity Description

Authority: Overall grant making authority for this program is contained in the Mutual Educational and Cultural Exchange Act of 1961, Public Law 87–256, as amended, also known as the Fulbright-Hays Act. The purpose of the Act is "to enable the Government of the United States to increase mutual understanding between the people of the United States and the people of other countries * * *; to strengthen the ties which unite us with other nations by demonstrating the educational and cultural interests, developments, and achievements of the people of the United States and other nations * * * and thus to assist in the development of friendly, sympathetic, and peaceful relations between the United States and the other countries of the world." The funding authority for the program above is provided through legislation.

Purpose: The purpose of the English Language Materials Training and Development Program is to develop high quality, diverse, and engaging materials for English teachers and learners globally and provide opportunities for professional development for educators involved in English language materials assessment, review, adaptation and/or development.

Overview: The online course in materials development and the U.S. based summer institute should provide participants with the skills and experience to review, assess and adapt/revise existing English language instructional materials and the ability to develop context appropriate new materials of their own. These programs should expose participants to drafts of revised ECA/A/L materials and new materials being developed for ECA/A/L, insights into the role of instructional materials in the teaching/learning process and approaches to developing learner-centered instructional materials. These programs should also include a substantive cultural/educational exchange experience in the United States.

Program Design: Participants will be selected by the Office of English Language Programs in consultation with Regional English Language Officers (RELOs) and Public Affairs Officers (PAOs) at U.S. embassies.

The program will focus on publications relevant and appropriate to ECA/A/L's ongoing English language programming efforts around the world. Activities should focus on updating existing materials and creating new materials (print, audio, and online) for ECA/A/L's current titles. Selection of titles to expand and revise will be made by the Office of English Language Programs in consultation with the recipient based on the results of the needs assessment carried out by the recipient.

The Department of State will retain full foreign ownership of the texts that are prepared including the right to print, publish, repurpose, and distribute these texts in all media including electronic media, and in all languages and editions.

The program should be designed as an intensive, academically rigorous online course and summer institute for an experienced group of graduate level educators from abroad. Both the online course and summer institute should be organized through an integrated series of lectures (virtual and in-person), readings, seminar discussions, and site (virtual and in-person) visits. Both the online course and summer institute should reflect the participants' previous education and experience and promote strategies for participants to share their knowledge with counterparts and with students in their home countries.

Syllabus: Proposals must include syllabi for both the online course and the summer institute that identify the subject matter for each thematic unit and specify dates, proposed speakers and/or trainers, proposed site visits (virtual or in-person), and proposed readings in ELT materials design and development. The syllabi must clearly show how assignments, readings, and speakers will advance the goals of the program. Overall, proposals will be reviewed on the basis of their responsiveness to RFGP criteria, coherence, clarity, and attention to detail. The accompanying Project Objectives, Goals, and Implementation (POGI) document provides program-specific guidelines that all proposals must address fully.

Program Dates: It is anticipated that the cooperative agreement will begin on or about May 1, 2011, and the recipient should complete all exchange activities by March 31, 2013. The exchange program will take place during June/July, 2012. Please refer to additional program specific guidelines in the Program Objectives, Goals, and Implementation (POGI) document.

Program Guidelines: Under the auspices of the Cooperative Agreement, the Bureau's Office of English Language Programs and U.S. embassies are substantially involved in the English Language Materials Training and Development Program. The Bureau provides overall program and policy design and direction, with substantial involvement at all levels of the program while U.S. embassies are responsible for the in-country aspects of the program. The roles and responsibilities of the Bureau include:

- Inviting RELOs to nominate program participants;
- Analyzing the prospective impact of program on the quality of instructional materials;
- Reviewing nominees and selecting participants for the program;
- Approval of ECA/A/L materials to adapt and of new materials to develop; and
- Providing feedback on the drafts of adapted and new materials and final approval of all draft materials.

Posts are responsible for:

- Identifying and nominating program participants from their countries/regions;
- Briefing program participants on all aspects of the program;
- Monitoring and supporting the online segment of the program;
- Monitoring and reporting to ECA/A/L on program impact;
- Facilitating communication between the recipient and program participants regarding exchange logistics (*e.g.* obtaining visas); and
- Conducting post-program follow-up opportunities as appropriate.

(II.) Award Information

Type of Award: Cooperative Agreement. ECA's level of involvement in this program is listed under number I above.

Fiscal Year Funds: FY 2011.

Approximate Total Funding: $750,000 (pending the availability of funds).

Approximate Number of Awards: One (1)

Approximate Average Award: One award of $750,000.

Anticipated Award Date: Pending availability of funds, May 1, 2011.

Anticipated Program Completion Date: March 31, 2013.

Additional Information: Pending successful implementation of this program and the availability of funds in subsequent fiscal years, it is ECA's intent to renew this cooperative agreement for two additional fiscal years, before openly competing it again.

(III.) Eligibility Information

III.1. Eligible applicants: Applications may be submitted by public and private U.S. colleges and universities with a graduate TEFL program meeting the provisions described in Internal Revenue Code section 26 U.S.C. 501(c)(3).

III.2. Cost Sharing or Matching Funds: There is no minimum or maximum percentage required for this competition. However, the Bureau encourages applicants to provide maximum levels of cost sharing and funding in support of its programs.

When cost sharing is offered, it is understood and agreed that the applicant must provide the amount of cost sharing as stipulated in its proposal and later included in an approved cooperative agreement. Cost sharing may be in the form of allowable direct or indirect costs. For accountability, you must maintain written records to support all costs which are claimed as your contribution, as well as costs to be paid by the Federal government. Such records are subject to audit. The basis for determining the value of cash and in-kind contributions must be in accordance with OMB Circular A–110, (Revised), Subpart C.23—Cost Sharing and Matching. In the event you do not provide the minimum amount of cost sharing as stipulated in the approved budget, ECA's contribution will be reduced in like proportion.

III.3. Other Eligibility Requirements: (a) Bureau grant guidelines require that organizations with fewer than four years experience in conducting international exchanges be limited to $60,000 in Bureau funding. ECA anticipates awarding one cooperative agreement, in an amount up to $750,000 to support program and administrative costs required to implement the English Language Materials Training and Development Program. Therefore, organizations with less than four years experience in conducting international exchanges are ineligible to apply under this competition. The Bureau encourages applicants to provide maximum levels of cost sharing and funding in support of its programs.

(IV.) Application and Submission Information

Note: Please read the complete **Federal Register** announcement before sending inquiries or submitting proposals. Once the RFGP deadline has passed, Bureau staff may not discuss this competition with applicants until the proposal review process has been completed.

IV.1. Contact Information To Request an Application Package:

Please contact Craig Dicker of the Office of English Language Programs, ECA/A/L, Room 4–B15, U.S. Department of State, SA–5, 2200 C Street, NW., Washington, DC 20037, telephone: (202) 632–9277, fax: (202) 632–9464, e-mail: *Dickercl@state.gov* to request a Solicitation Package. Please refer to the Funding Opportunity Number ECA/A/L–11–02 located at the top of this announcement when making your request.

Alternatively, an electronic application package may be obtained from grants.gov. Please see section IV.3f for further information.

The Solicitation Package contains the Proposal Submission Instruction (PSI) document which consists of required application forms, and standard guidelines for proposal preparation.

It also contains the Program Objectives, Goals and Implementation (POGI) document, which provides specific information, award criteria and budget instructions tailored to this competition.

Please specify Craig Dicker, telephone: (202) 632–9277, and refer to the Funding Opportunity Number ECA/A/L–11–02 located at the top of this announcement on all other inquiries and correspondence.

IV.2. To Download a Solicitation Package Via Internet: The entire Solicitation Package may be downloaded from the Bureau's Web site at *http://exchanges.state.gov/grants/open2.html* or from the Grants.gov Web site at *http://www.grants.gov.* Please read all information before downloading.

IV.3. Content and Form of Submission: Applicants must follow all instructions in the Solicitation Package. The original and seven copies of the application should be submitted per the instructions under IV.3f. "Application Deadline and Methods of Submission" section below.

IV.3a. You are required to have a Dun and Bradstreet Data Universal Numbering System (DUNS) number to apply for a grant or cooperative agreement from the U.S. Government. This number is a nine-digit identification number, which uniquely identifies business entities. Obtaining a DUNS number is easy and there is no charge. To obtain a DUNS number, access *http://www.dunandbradstreet.com* or call 1–866–705–5711. Please ensure that your DUNS number is included in the appropriate box of the SF–424 which is part of the formal application package.

IV.3b. All proposals must contain an executive summary, proposal narrative and budget.

Please Refer to the Solicitation Package. It contains the mandatory Proposal Submission Instructions (PSI) document and the Program Objectives, Goals and Implementation (POGI) document for additional formatting and technical requirements.

IV.3c. All Federal award recipients and sub-recipients must maintain current registrations in the Central Contractor Registration (CCR) database and have a Dun and Bradstreet Data Universal Numbering System (DUNS) number. Recipients and sub-recipients must maintain accurate and up-to-date information in the CCR until all program and financial activity and reporting have been completed. *All entities must review and update the information at least annually after the initial registration and more frequently if required information changes or another award is granted.*

You must have nonprofit status with the IRS at the time of application. **Please note:** Effective January 7, 2009, all applicants for ECA federal assistance awards must include in their application the names of directors and/or senior executives (current officers, trustees, and key employees, regardless of amount of compensation). In fulfilling this requirement, applicants must submit information in one of the following ways:

(1) Those who file Internal Revenue Service Form 990, "Return of Organization Exempt From Income Tax," must include a copy of relevant portions of this form.

(2) Those who do not file IRS Form 990 must submit information above in the format of their choice.

In addition to final program reporting requirements, award recipients will also be required to submit a one-page document, derived from their program reports, listing and describing their grant activities. For award recipients, the names of directors and/or senior

executives (current officers, trustees, and key employees), as well as the one-page description of grant activities, will be transmitted by the State Department to OMB, along with other information required by the Federal Funding Accountability and Transparency Act (FFATA), and will be made available to the public by the Office of Management and Budget on its *USASpending.gov* Web site as part of ECA's FFATA reporting requirements.

If your organization is a private nonprofit which has not received a grant or cooperative agreement from ECA in the past three years, or if your organization received nonprofit status from the IRS within the past four years, you must submit the necessary documentation to verify nonprofit status as directed in the PSI document. Failure to do so will cause your proposal to be declared technically ineligible.

IV.3d. Please take into consideration the following information when preparing your proposal narrative:

IV.3d.1. Adherence to All Regulations Governing the J Visa The Bureau of Educational and Cultural Affairs is placing renewed emphasis on the secure and proper administration of Exchange Visitor (J visa) Programs and adherence by grantees and sponsors to all regulations governing the J visa. Therefore, proposals should demonstrate the applicant's capacity to meet all requirements governing the administration of the Exchange Visitor Programs as set forth in 22 CFR part 62, including the oversight of Responsible Officers and Alternate Responsible Officers, screening and selection of program participants, provision of pre-arrival information and orientation to participants, monitoring of participants, proper maintenance and security of forms, record-keeping, reporting and other requirements.

The recipient will be responsible for issuing DS–2019 forms to participants in this program.

A copy of the complete regulations governing the administration of Exchange Visitor (J) programs is available at *http://exchanges.state.gov.*

Please refer to the Solicitation Package for further information.

IV.3d.2. Diversity, Freedom and Democracy Guidelines

Pursuant to the Bureau's authorizing legislation, programs must maintain a non-political character and should be balanced and representative of the diversity of American political, social, and cultural life. "Diversity" should be interpreted in the broadest sense and encompass differences including, but not limited to ethnicity, race, gender, religion, geographic location, socio-economic status, and disabilities. Applicants are strongly encouraged to adhere to the advancement of this principle both in program administration and in program content. Please refer to the review criteria under the 'Support for Diversity' section for specific suggestions on incorporating diversity into your proposal. Public Law 104–319 provides that "in carrying out programs of educational and cultural exchange in countries whose people do not fully enjoy freedom and democracy," the Bureau "shall take appropriate steps to provide opportunities for participation in such programs to human rights and democracy leaders of such countries." Public Law 106–113 requires that the governments of the countries described above do not have inappropriate influence in the selection process. Proposals should reflect advancement of these goals in their program contents, to the full extent deemed feasible.

IV.3d.3. Program Monitoring and Evaluation

Proposals must include a plan to monitor and evaluate the Program's success, both as the activities unfold and at the end of the program. The Bureau recommends that your proposal include a draft survey questionnaire or other technique plus a description of a methodology to use to link outcomes to original Program objectives. The Bureau expects that the recipient will track participants or partners and be able to respond to key evaluation questions, including satisfaction with the program, learning as a result of the program, changes in behavior as a result of the program, and effects of the program on institutions (institutions in which participants work or partner institutions). The evaluation plan should include indicators that measure gains in mutual understanding as well as substantive knowledge.

Successful monitoring and evaluation depend heavily on setting clear goals and outcomes at the outset of a program. Your evaluation plan should include a description of your Program's objectives, your anticipated Program outcomes, and how and when you intend to measure these outcomes (performance indicators). The more that outcomes are "smart" (specific, measurable, attainable, results-oriented, and placed in a reasonable time frame), the easier it will be to conduct the evaluation. You should also show how your Program objectives link to the goals of the program described in this RFGP.

Your monitoring and evaluation plan should clearly distinguish between program *outputs* and *outcomes. Outputs* are products and services delivered, often stated as an amount. Output information is important to show the scope or size of Program activities, but it cannot substitute for information about progress towards outcomes or the results achieved. Examples of outputs include the number of people trained or the number of seminars conducted. *Outcomes,* in contrast, represent specific results a Program is intended to achieve and is usually measured as an extent of change. Findings on outputs and outcomes should both be reported, but the focus should be on outcomes.

We encourage you to assess the following four levels of outcomes, as they relate to the program goals set out in the RFGP (listed here in increasing order of importance):

1. Participant satisfaction with the program and exchange experience.

2. Participant learning, such as increased knowledge, aptitude, skills, and changed understanding and attitude. Learning includes both substantive (subject-specific) learning and mutual understanding.

3. Participant behavior, concrete actions to apply knowledge in work or community; greater participation and responsibility in civic organizations; interpretation and explanation of experiences and new knowledge gained; continued contacts between participants, community members, and others.

4. Institutional changes, such as increased collaboration and partnerships, policy reforms, new programming, and organizational improvements.

Please note: Consideration should be given to the appropriate timing of data collection for each level of outcome. For example, satisfaction is usually captured as a short-term outcome, whereas behavior and institutional changes are normally considered longer-term outcomes.

Overall, the quality of your monitoring and evaluation plan will be judged on how well it (1) specifies intended outcomes; (2) gives clear descriptions of how each outcome will be measured; (3) identifies when particular outcomes will be measured; and (4) provides a clear description of the data collection strategies for each outcome (*i.e.,* surveys, interviews, or focus groups). (Please note that evaluation plans that deal only with the first level of outcomes [satisfaction] will be deemed less competitive under the present evaluation criteria.)

The recipient will be required to provide reports analyzing their evaluation findings to the Bureau in their regular program reports. All data

collected, including survey responses and contact information, must be maintained for a minimum of three years and provided to the Bureau upon request.

IV.3.d.4. Describe your plans for staffing: Please provide a staffing plan which outlines the responsibilities of each staff person and explains which staff member will be accountable for each program responsibility. The Office of English Programs requests that at least one member of the staff should be well versed in current methodology of teaching English as a foreign language preferably holding an advanced degree in Teaching English as a Foreign Language (TEFL), applied linguistics or a related field. In depth knowledge of best practices in the English language teaching (ELT) field is preferable. Wherever possible please streamline administrative processes.

IV.3e. Please take the following information into consideration when preparing your budget:

IV.3e.1. Applicants must submit SF–424A—"Budget Information—Non-Construction Programs" along with a comprehensive budget for the entire program. The budget should not exceed $750,000 including all administrative costs. There must be a summary budget as well as breakdowns reflecting both administrative and program budgets for host campus and foreign teacher involvement in the program. Applicants may provide separate sub-budgets for each program component, phase, location, or activity to provide clarification.

The summary and detailed administrative and program budgets should be accompanied by a narrative which provides a brief rationale for each line item including a methodology for estimating appropriate average maintenance allowance levels and tuition costs (as applicable) for the participants, and the number that can be accommodated at the levels proposed. The total administrative costs funded by the Bureau must be reasonable and appropriate.

IV.3e.2. Allowable costs for the program and additional budget guidance are outlined in detail in the POGI document. Please refer to the Solicitation Package for complete budget guidelines and formatting instructions.

IV.3f. Application Deadline and Methods of Submission:

Application Deadline Date: March 15, 2011.

Reference Number: ECA/A/L–11–02.

Methods of Submission: Applications may be submitted in one of two ways:

(1.) In hard-copy, via a nationally recognized overnight delivery service (*i.e.,* DHL, Federal Express, UPS, Airborne Express, or U.S. Postal Service Express Overnight Mail, etc.), or

(2.) Electronically through *http://www.grants.gov.*

Along with the Program Title, all applicants must enter the above Reference Number in Box 11 on the SF–424 contained in the mandatory Proposal Submission Instructions (PSI) of the solicitation document.

IV.3f.1 Submitting Printed Applications

Applications must be shipped no later than the above deadline. Delivery services used by applicants must have in-place, centralized shipping identification and tracking systems that may be accessed via the Internet and delivery people who are identifiable by commonly recognized uniforms and delivery vehicles. Proposals shipped on or before the above deadline but received at ECA more than seven days after the deadline will be ineligible for further consideration under this competition. Proposals shipped after the established deadlines are ineligible for consideration under this competition. ECA will *not* notify you upon receipt of application. It is each applicant's responsibility to ensure that each package is marked with a legible tracking number and to monitor/confirm delivery to ECA via the Internet. Delivery of proposal packages *may not* be made via local courier service or in person for this competition. Faxed documents will not be accepted at any time. Only proposals submitted as stated above will be considered.

Important note: When preparing your submission please make sure to include one extra copy of the completed SF–424 form and place it in an envelope addressed to "ECA/EX/PM".

The original and seven (7) copies of the application should be sent to: U.S. Department of State, Program Management Division, ECA–IIP/EX/PM, Ref.: ECA/A/L–11–02 SA–5, Floor 4, Department of State, 2200 C Street, NW., Washington, DC 20522–0504.

Applicants submitting hard-copy applications must also submit the "Executive Summary" and "Proposal Narrative" sections of the proposal in text (.txt) format on a PC-formatted disk.

IV.3f.2. Submitting Electronic Applications

Applicants have the option of submitting proposals electronically through Grants.gov (*http://www.grants.gov*). Complete solicitation packages are available at Grants.gov in the "Find" portion of the system. Please follow the instructions available in the 'Get Started' portion of the site (*http://www.grants.gov/GetStarted*).

Several of the steps in the Grants.gov registration process could take several weeks. Therefore, applicants should check with appropriate staff within their organizations immediately after reviewing this RFGP to confirm or determine their registration status with Grants.gov.

Once registered, the amount of time it can take to upload an application will vary depending on a variety of factors including the size of the application and the speed of your internet connection. Therefore, we strongly recommend that you not wait until the application deadline to begin the submission process through Grants.gov.

Direct all questions regarding Grants.gov registration and submission to: Grants.gov Customer Support, Contact Center Phone: 800 518–4726, Business Hours: Monday–Friday, 7 a.m.–9 p.m. Eastern Time, E-mail: *support@grants.gov.*

Applicants have until midnight (12 a.m.), Washington, DC time of the closing date to ensure that their entire application has been uploaded to the Grants.gov site. There are no exceptions to the above deadline. Applications uploaded to the site after midnight of the application deadline date will be automatically rejected by the grants.gov system, and will be technically ineligible.

Applicants will receive a confirmation e-mail from grants.gov upon the successful submission of an application. ECA will *not* notify you upon receipt of electronic applications.

It is the responsibility of all applicants submitting proposals via the Grants.gov Web portal to ensure that proposals have been received by Grants.gov in their entirety, and ECA bears no responsibility for data errors resulting from transmission or conversion processes.

IV.3g. Intergovernmental Review of Applications: Executive Order 12372 does not apply to this program.

(V.) Application Review Information

V.1. Review Process

The Bureau will review all proposals for technical eligibility. Proposals will be deemed ineligible if they do not fully adhere to the guidelines stated herein and in the Solicitation Package. All eligible proposals will be reviewed by the program office. Eligible proposals will be subject to compliance with Federal and Bureau regulations and guidelines and forwarded to Bureau grant panels for advisory review.

Proposals may also be reviewed by the Office of the Legal Adviser or by other Department elements. Final funding decisions are at the discretion of the Department of State's Assistant Secretary for Educational and Cultural Affairs. Final technical authority for assistance awards (cooperative agreements) resides with the Bureau's Grants Officer.

Review Criteria

Technically eligible applications will be competitively reviewed according to the criteria stated below. These criteria are not rank ordered and all carry equal weight in the proposal evaluation:

1. Quality of Program Plan and Ability to Achieve Program Objectives: Proposals should exhibit originality, substance, precision, and relevance to the Bureau's mission as well as the objectives of the English Language Materials Training and Development Program. It should include an effective, feasible plan and clearly demonstrate how the institution will meet the program's objectives. A detailed agenda and relevant work plan should demonstrate substantive undertakings and logistical capacity.

2. Multiplier effect/impact: The proposed program should strengthen long-term mutual understanding, including maximum sharing of information and establishment of long-term institutional and individual linkages.

3. Support for Diversity: Proposals should demonstrate substantive support of the Bureau's policy on diversity. Achievable and relevant features should be cited in both program administration (selection of speakers, program venue and program evaluation) and program content (orientation and wrap-up sessions, program meetings, resource materials and follow-up activities).

4. Institutional Capacity and Record: Proposals should demonstrate an institutional record of successful exchange programs, including responsible fiscal management and full compliance with all reporting requirements for past Bureau grants as determined by Bureau Grants Staff. The Bureau will consider the past performance of prior recipients and the demonstrated potential of new applicants. The successful proposal will demonstrate the organization's experience in international educational exchange and intensive programs, and an understanding of international differences of culture, religion, and system of education.

5. Follow-up and Follow-on Activities: Proposals should discuss provisions made for follow-up with returned participants as a means of establishing longer-term individual and institutional linkages. Proposals also should provide a plan for continued follow-on activity (without Bureau support) ensuring that the Bureau supported programs are not isolated events. Proposals also should include a plan for tracking and maintaining updated lists of all alumni. These lists should be made available to ECA/A/L and the Office of Alumni Affairs.

6. Program Evaluation: Proposals should discuss provisions to evaluate the program's success, both as the activities unfold and at the end of the program. A draft survey questionnaire or other technique plus description of a methodology to use to link outcomes to original program objectives is recommended.

7. Cost-effectiveness and Cost Sharing: The overhead and administrative components of the proposal, including salaries and honoraria, should be kept as low as possible. All other items should be necessary and appropriate. Proposals should maximize cost-sharing through other private sector support as well as institutional direct funding contributions.

(VI.) Award Administration Information

VI.1a. Award Notices

Final awards cannot be made until funds have been appropriated by Congress, allocated and committed through internal Bureau procedures. Successful applicants will receive an Federal Assistance Award (FAA) from the Bureau's Grants Office. The FAA and the original cooperative agreement proposal with subsequent modifications (if applicable) shall be the only binding authorizing document between the recipient and the U.S. Government. The FAA will be signed by an authorized Grants Officer, and mailed to the recipient's responsible officer identified in the application.

Unsuccessful applicants will receive notification of the results of the application review from the ECA program office coordinating this competition.

VI.2 Administrative and National Policy Requirements

Terms and Conditions for the Administration of ECA agreements include the following:

Office of Management and Budget Circular A–122, "Cost Principles for Nonprofit Organizations."

Office of Management and Budget Circular A–21, "Cost Principles for Educational Institutions."

OMB Circular A–87, "Cost Principles for State, Local and Indian Governments."

OMB Circular No. A–110 (Revised), Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and other Nonprofit Organizations.

OMB Circular No. A–102, Uniform Administrative Requirements for Grants-in-Aid to State and Local Governments.

OMB Circular No. A–133, Audits of States, Local Government, and Non-profit Organizations.

Please reference the following Web sites for additional information: *http://www.whitehouse.gov/omb/grants. http://exchanges.state.gov/education/grantsdiv/terms.htm#articleI.*

VI.3. Reporting Requirements: You must provide ECA with a hard copy original plus one copy of the following reports:

(1.) Quarterly program and financial reports;

(2.) A final program and financial report no more than 90 days after the expiration of the award;

(3.) A concise, one-page final program report summarizing program outcomes no more than 90 days after the expiration of the award. This one-page report will be transmitted to OMB, and be made available to the public via OMB's USAspending.gov Web site—as part of ECA's Federal Funding Accountability and Transparency Act (FFATA) reporting requirements;

(4.) A SF–PPR, "Performance Progress Report" Cover Sheet with all program reports.

The recipient will be required to provide reports analyzing their evaluation findings to the Bureau in their regular program reports. (Please refer to IV. Application and Submission Instructions (IV.3.d.3) above for Program Monitoring and Evaluation information.

All data collected, including survey responses and contact information, must be maintained for a minimum of three years and provided to the Bureau upon request.

All reports must be sent to the ECA Grants Officer and ECA Program Officer listed in the final Federal Assistance Award.

(VII.) Agency Contacts

For questions about this announcement, contact: Craig Dicker, Office of English Language Programs, ECA/A/L, Room 4–B015, ECA/A/L, U.S. Department of State, SA–5, 2200 C Street, NW., Washington, DC 20037, Tel: 202–632–9277; Fax: 202–632–9464, *DickerCL@state.gov.*

All correspondence with the Bureau concerning this RFGP should reference the above title and number ECA/A/L–11–02.

Please read the complete announcement before sending inquiries or submitting proposals. Once the RFGP deadline has passed, Bureau staff may not discuss this competition with applicants until the proposal review process has been completed.

(VIII.) Other Information

Notice: The terms and conditions published in this RFGP are binding and may not be modified by any Bureau representative. Explanatory information provided by the Bureau that contradicts published language will not be binding. Issuance of the RFGP does not constitute an award commitment on the part of the Government. The Bureau reserves the right to reduce, revise, or increase proposal budgets in accordance with the needs of the program and the availability of funds. Awards made will be subject to periodic reporting and evaluation requirements per section VI.3 above.

Dated: December 16, 2010.

Ann Stock,

Assistant Secretary for Educational and Cultural Affairs, Bureau of Educational and Cultural Affairs, U.S. Department of State.

[FR Doc. 2010–32272 Filed 12–22–10; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice 7275]

Culturally Significant Objects Imported for Exhibition Determinations: "Rooms With a View: The Open Window in the 19th Century"

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, and Delegation of Authority No. 236–3 of August 28, 2000, I hereby determine that the objects to be included in the exhibition "Rooms with a View: The Open Window in the 19th Century," imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners or custodians. I also determine that the exhibition or display of the exhibit objects at the Metropolitan Museum of Art, New York, New York, from on or about March 28, 2011, until on or about July 4, 2011, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these Determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Paul W. Manning, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (*telephone:* 202–632–6469). The mailing address is U.S. Department of State, SA–5, L/PD, Fifth Floor (Suite 5H03), Washington, DC 20522–0505.

Dated: December 15, 2010.

Ann Stock,

Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2010–32269 Filed 12–22–10; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice 7274]

Culturally Significant Objects Imported for Exhibition Determinations: "The Buddhist Heritage of Pakistan"

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, and Delegation of Authority No. 236–3 of August 28, 2000, I hereby determine that the objects to be included in the exhibition "The Buddhist Heritage of Pakistan," imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners or custodians. I also determine that the exhibition or display of the exhibit objects at the Asia Society, New York, New York, from on or about March 1, 2011, until on or about May 30, 2011, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these Determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Paul W. Manning, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (*telephone:* 202–632–6469). The mailing address is U.S. Department of State, SA–5, L/PD, Fifth Floor (Suite 5H03), Washington, DC 20522–0505.

Dated: December 15, 2010.

Ann Stock,

Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2010–32270 Filed 12–22–10; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Fifteenth Meeting: EUROCAE WG–72: RTCA Special Committee 216: Aeronautical Systems Security (Joint Meeting)

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of EUROCAE WG–72: RTCA Special Committee 216: Aeronautical Systems Security (Joint Meeting).

SUMMARY: The FAA is issuing this notice to advise the public of a meeting of EUROCAE WG–72: RTCA Special Committee 216: Aeronautical Systems Security (Joint Meeting).

DATES: The meeting will be held January 18–21, 2011 starting at 9 a.m. to 5 p.m.

ADDRESSES: The meeting will be held at The Westin Long Beach, 333 East Ocean Boulevard, Long Beach, CA. Telephone—(562) 499–2025, Host, Boeing Commercial Airplane Group.

FOR FURTHER INFORMATION CONTACT: RTCA Secretariat, 1828 L Street, NW., Suite 805, Washington, DC 20036; telephone (202) 833–9339; fax (202) 833–9434; Web site *http://www.rtca.org*.

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., Appendix 2), notice is hereby given for a EUROCAE WG–72: RTCA Special Committee 216: Aeronautical Systems Security (Joint Meeting) meeting.

Agenda

- Welcome/Introductions/ Administrative Remarks.
- Agenda Overview and Approval of the Summary of the 14th meeting held October 12–14th, 2010 (RTCA Paper No. 250–10/SC216–031).
- Report on the PMC/ICC action on SC 216 TOR.
- Publication Progress and Update.
- Subgroup and Action Item Reports.
- Plenary review of EUROCAE Council and RTCA PMC actions on ED–202 and SC–216 TOR.
- Continuation of Glossary Review.

• Publication Considerations of Glossary (Update).

• Subgroup Meetings/Breakouts.

• Subgroup Reports on Breakouts.

• Establish Dates, Location and Agenda for Next Meeting(s).

• Any Other Business.

Attendance is open to the interested public but limited to space availability. With the approval of the chairmen, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on December 16, 2010.

Robert L. Bostiga,

RTCA Advisory Committee.

[FR Doc. 2010–32247 Filed 12–22–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Third Meeting: RTCA Special Committee 224: Airport Security Access Control Systems

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of RTCA Special Committee 224 meeting: Airport Security Access Control Systems (Update to DO–230B).

SUMMARY: The FAA is issuing this notice to advise the public of a meeting of RTCA Special Committee 224: Airport Security Access Control Systems.

DATES: The meeting will be held January 13, 2011, from 10 a.m. to 5 p.m.

ADDRESSES: The meeting will be held at RTCA, Inc., 1828 L Street, NW., Suite 805, MacIntosh—NBAA Room and Hilton—ATA Room, Washington, DC 20036.

FOR FURTHER INFORMATION CONTACT: RTCA Secretariat, 1828 L Street, NW., Suite 805, Washington, DC 20036; telephone (202) 833–9339; fax (202) 833–9434; Web site *http://www.rtca.org.*

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a) (2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., Appendix 2), notice is hereby given for a Special Committee 224: Airport Security Access Control Systems (Update to DO–230B):

Agenda

January 13, 2011

• Welcome/Introductions/ Administrative Remarks.

• Review/Approve Summary—Second Meeting.

• Report on Security Construction Guidelines Process.

• Workgroup Reports.

• Credentialing.

• PACS.

• Biometrics.

• Communications.

• Video.

• Other Input from Members.

• Work Objectives for Next Plenary.

• Other Business.

• Establish Agenda for Next Meeting.

• Date and Place of Next Meeting.

Attendance is open to the interested public but limited to space availability. With the approval of the chairmen, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on December 16, 2010.

Robert L. Bostiga,

RTCA Advisory Committee.

[FR Doc. 2010–32245 Filed 12–22–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Ninth Meeting—RTCA Special Committee 220: Automatic Flight Guidance and Control

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of RTCA Special Committee 220: Automatic Flight Guidance and Control meeting.

SUMMARY: The FAA is issuing this notice to advise the public of a meeting of RTCA Special Committee 220: Automatic Flight Guidance and Control.

DATES: The meeting will be held February 15th–17th, 2011. February 15th and 16th, from 9 a.m. to 5 p.m. and February 17th from 9 a.m. to 2 p.m.

ADDRESSES: The meeting will be held at the Hilton, Clearwater Beach, 400 Mandalay Ave., Clearwater Beach, FL 33767, USA. telephone (727) 298–3222, Fax (727) 446–1583, e-mail: *Breanne.Kennedy@hilton.com.*

FOR FURTHER INFORMATION CONTACT: (1) RTCA Secretariat, 1828 L Street, NW., Suite 805, Washington, DC 20036; telephone (202) 833–9339; fax (202) 833–9434; Web site *http://www.rtca.org.*

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., Appendix 2), notice is hereby given for a Special Committee 220: Automatic Flight Guidance and Control meeting. The agenda will include:

• Welcome/Agenda Overview.

• Presentation of progress WG#2.

• Presentation of progress WG#3.

• Continue Development of Installation Guidance White Papers.

• Wrap-up and Review of Action Items.

• Establish Dates, Location, Agenda for Next Meeting.

• Other Business.

Attendance is open to the interested public but limited to space availability. With the approval of the chairmen, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on December 15, 2010.

Robert L. Bostiga,

RTCA Advisory Committee.

[FR Doc. 2010–32237 Filed 12–22–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2010–0382]

Agency Information Collection Activities; Revision of a Currently-Approved Information Collection Request: Hazardous Materials Safety Permits

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (PRA), 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. The FMCSA requests approval to revise and extend an ICR entitled, "*Hazardous Materials Safety Permits.*" This ICR requires companies holding permits to

develop communications plans that allows for the periodic tracking of the shipments. A record of the communications that includes the time of the call and location of the shipment may be kept by either the driver (*e.g.,* recorded in the log book) or the company. These records must be kept, either physically or electronically, for at least six months at the company's principal place of business or readily available to the employees at the company's principal place of business. This ICR is being revised due to an increase in the estimated number of annual trips in which permitted Hazardous Materials (HM) is transported resulting in a change to the total information collection burden for maintaining a daily communication record.

On September 9, 2010, FMCSA published a **Federal Register** notice allowing for a 60-day comment period on the ICR. No comment was received.

DATES: Please send your comments by January 24, 2011. OMB must receive your comments by this date in order to act quickly on the ICR.

ADDRESSES: All comments should reference Federal Docket Management System (FDMS) Docket Number FMCSA–2010–0382. Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the attention of the Desk Officer, Department of Transportation/Federal Motor Carrier Safety Administration, and sent via electronic mail to *oira_submission@omb.eop.gov,* or faxed to (202) 395–6974, or mailed to the Office of Information and Regulatory Affairs, Office of Management and Budget, Docket Library, Room 10102, 725 17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Mr. Paul Bomgardner, Hazardous Materials Division, Department of Transportation, Federal Motor Carrier Safety Administration, West Building 6th Floor, 1200 New Jersey Avenue, SE., Washington, DC 20590. *Telephone:* 202–493–0027; e-mail *paul.bomgardner@dot.gov.*

SUPPLEMENTARY INFORMATION:

Title: Hazardous Materials Safety Permits.

OMB Control Number: 2126–0030.

Type of Request: Revision of a currently-approved information collection.

Respondents: Motor carriers subject to the Hazardous Materials Safety Permit requirements in 49 CFR part 385, subpart E.

Estimated Number of Respondents: 1,425.

Estimated Number of Responses: 1,425 annually.

Estimated Time per Response: 5 minutes. The communication between motor carriers and their drivers must take place at least two times per day and it is estimated that it will take 5 minutes to maintain a daily communication record for each driver.

Expiration Date: February 28, 2011.

Frequency of Response: On occasion.

Estimated Total Annual Burden: 350,000 hours [4.2 million trips × 5 minutes/60 minutes per record = 350,000].

Background: The Secretary of Transportation (Secretary) is responsible for implementing regulations to issue safety permits for transporting certain HM in accordance with 49 U.S.C. 5101 *et seq.* The HM Safety Permit regulations (49 CFR part 385) require carriers to complete a "Combined Motor Carrier Identification Report and HM Permit Application" (Form MCS–150B). The HM Safety Permit regulations also require carriers to have a security program. As part of the HM Safety Permit regulations, carriers are required to develop and maintain route plans so that law enforcement officials can verify the correct location of the HM shipment. The FMCSA requires companies holding permits to develop a communications plan that allows for the periodic tracking of the shipment. This information covers the record of communications that includes the time of the call and location of the shipment. The records may be kept by either the driver (*e.g.,* recorded in the log book) or the company. These records must be kept, either physically or electronically, for at least six months at the company's principal place of business or be readily available to employees at the company's principal place of business.

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 5, 2010.

Kelly Leone,

Associate Administrator for Research and Information Technology.

[FR Doc. 2010–32239 Filed 12–22–10; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2004–19477; FMCSA–2002–12844]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of renewal of exemptions; request for comments.

SUMMARY: FMCSA announces its decision to renew the exemptions from the vision requirement in the Federal Motor Carrier Safety Regulations for 9 individuals. FMCSA has statutory authority to exempt individuals from the vision requirement if the exemptions granted will not compromise safety. The Agency has concluded that granting these exemption renewals will provide a level of safety that is equivalent to, or greater than, the level of safety maintained without the exemptions for these commercial motor vehicle (CMV) drivers.

DATES: This decision is effective January 17, 2011. Comments must be received on or before January 24, 2011.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) FMCSA–2004–19477; FMCSA–2002–12844, using any of the following methods.

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* 1–202–493–2251.

Instructions: Each submission must include the Agency name and the docket number for this notice. Note that DOT posts all comments received without change to *http://*

www.regulations.gov, including any personal information included in a comment. Please see the Privacy Act heading below.

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Federal Docket Management System (FDMS) is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Privacy Act: Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's Privacy Act Statement for the FDMS published in the **Federal Register** on January 17, 2008 (73 FR 3316), or you may visit *http://edocket.access.gpo.gov/2008/pdf/E8-785.pdf.*

FOR FURTHER INFORMATION CONTACT: Dr. Mary D. Gunnels, Director, Medical Programs, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue, SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m. Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may renew an exemption from the vision requirements in 49 CFR 391.41(b)(10), which applies to drivers of CMVs in interstate commerce, for a two-year period if it finds "such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption." The procedures for requesting an exemption (including renewals) are set out in 49 CFR part 381.

Exemption Decision

This notice addresses 9 individuals who have requested renewal of their exemptions in accordance with FMCSA procedures. FMCSA has evaluated these 9 applications for renewal on their merits and decided to extend each exemption for a renewable two-year period. They are:

Howard F. Breitkreutz, John E. Evenson, Steven C. Humke, Craig M. Landry, Joe L. Meredith, Jr., Richard E. Nordhausen, Jr., Andrew H. Rusk, Kenneth E. Vigue, Jr., Richard A. Winslow.

The exemptions are extended subject to the following conditions: (1) That each individual has a physical examination every year (a) by an ophthalmologist or optometrist who attests that the vision in the better eye continues to meet the standard in 49 CFR 391.41(b)(10), and (b) by a medical examiner who attests that the individual is otherwise physically qualified under 49 CFR 391.41; (2) that each individual provides a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (3) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file and retains a copy of the certification on his/her person while driving for presentation to a duly authorized Federal, State, or local enforcement official. Each exemption will be valid for two years unless rescinded earlier by FMCSA. The exemption will be rescinded if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315.

Basis for Renewing Exemptions

Under 49 U.S.C. 31315(b)(1), an exemption may be granted for no longer than two years from its approval date and may be renewed upon application for additional two year periods. In accordance with 49 U.S.C. 31136(e) and 31315, each of the 9 applicants has satisfied the entry conditions for obtaining an exemption from the vision requirements (67 FR 68719; 68 FR 10301; 68 FR 2629; 69 FR 64806; 69 FR 71100; 70 FR 2705; 72 FR 1053; 72 FR 1056; 73 FR 76440). Each of these 9 applicants has requested renewal of the exemption and has submitted evidence showing that the vision in the better eye continues to meet the standard specified at 49 CFR 391.41(b)(10) and that the vision impairment is stable. In addition, a review of each record of safety while driving with the respective vision deficiencies over the past two years indicates each applicant continues to meet the vision exemption standards. These factors provide an adequate basis for predicting each driver's ability to continue to drive safely in interstate commerce. Therefore, FMCSA concludes that extending the exemption for each renewal applicant for a period of two years is likely to achieve a level of safety equal to that existing without the exemption.

Request for Comments

FMCSA will review comments received at any time concerning a particular driver's safety record and determine if the continuation of the exemption is consistent with the requirements at 49 U.S.C. 31136(e) and 31315. However, FMCSA requests that interested parties with specific data concerning the safety records of these drivers submit comments by January 24, 2011.

FMCSA believes that the requirements for a renewal of an exemption under 49 U.S.C. 31136(e) and 31315 can be satisfied by initially granting the renewal and then requesting and evaluating, if needed, subsequent comments submitted by interested parties. As indicated above, the Agency previously published notices of final disposition announcing its decision to exempt these 9 individuals from the vision requirement in 49 CFR 391.41(b)(10). The final decision to grant an exemption to each of these individuals was made on the merits of each case and made only after careful consideration of the comments received to its notices of applications. The notices of applications stated in detail the qualifications, experience, and medical condition of each applicant for an exemption from the vision requirements. That information is available by consulting the above cited **Federal Register** publications.

Interested parties or organizations possessing information that would otherwise show that any, or all, of these drivers are not currently achieving the statutory level of safety should immediately notify FMCSA. The Agency will evaluate any adverse evidence submitted and, if safety is being compromised or if continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315, FMCSA will take immediate steps to revoke the exemption of a driver.

Issued on: December 16, 2010.

Larry W. Minor,

Associate Administrator, Office of Policy.

[FR Doc. 2010–32241 Filed 12–22–10; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2010–0414]

Qualification of Drivers; Exemption Applications; Diabetes Mellitus

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of applications for exemption from the diabetes mellitus standard; request for comments.

SUMMARY: FMCSA announces receipt of applications from 23 individuals for exemption from the prohibition against persons with insulin-treated diabetes mellitus (ITDM) operating commercial motor vehicles (CMVs) in interstate commerce. If granted, the exemptions would enable these individuals with ITDM to operate CMVs in interstate commerce.

DATES: Comments must be received on or before January 24, 2011.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) Docket No. FMCSA–2010–0414 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* 1–202–493–2251.

Instructions: Each submission must include the Agency name and the docket numbers for this notice. 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 for further information.

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Federal Docket Management System (FDMS) is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Privacy Act: Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's Privacy Act Statement for the FDMS published in the **Federal Register** on January 17, 2008 (73 FR 3316), or you may visit *http://edocket.access.gpo.gov/2008/pdf/E8–785.pdf.*

FOR FURTHER INFORMATION CONTACT: Dr. Mary D. Gunnels, Director, Medical Programs, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue, SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption from the Federal Motor Carrier Safety Regulations for a 2-year period if it finds "such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption." The statute also allows the Agency to renew exemptions at the end of the 2-year period. The 23 individuals listed in this notice have recently requested such an exemption from the diabetes prohibition in 49 CFR 391.41(b) (3), which applies to drivers of CMVs in interstate commerce. Accordingly, the Agency will evaluate the qualifications of each applicant to determine whether granting the exemption will achieve the required level of safety mandated by the statutes.

Qualifications of Applicants

Thomas H. Adams

Mr. Adams, age 35, has had ITDM since 2009. His endocrinologist examined him in 2010 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years; understands diabetes management and monitoring; has stable control of his diabetes using insulin; and is able to drive a CMV safely. Mr. Adams meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2010 and certified that he does not have diabetic retinopathy. He holds a Class A Commercial Drivers License from Pennsylvania.

Charlie A. Barner

Mr. Barner, 59, has had ITDM since 2009. His endocrinologist examined him in 2010 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years; understands diabetes management and monitoring; has stable control of his diabetes using insulin; and is able to drive a CMV safely. Mr. Barner meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2010 and certified that he has stable nonproliferative diabetic retinopathy. He holds a Class A CDL from Georgia.

Charles G. Beasley

Mr. Beasley, 38, has had ITDM since 2009. His endocrinologist examined him in 2010 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years; understands diabetes management and monitoring; has stable control of his diabetes using insulin; and is able to drive a CMV safely. Mr. Beasley meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2010 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Indiana.

Philip M. Carr

Mr. Carr, 51, has had ITDM since 1990. His endocrinologist examined him in 2010 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years; understands diabetes management and monitoring; has stable control of his diabetes using insulin; and is able to drive a CMV safely. Mr.

Carr meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2010 and certified that he does not have diabetic retinopathy. He holds an operator's license from Indiana.

Timothy D. Cochran

Mr. Cochran, 49, has had ITDM since 2007. His endocrinologist examined him in 2010 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years; understands diabetes management and monitoring; has stable control of his diabetes using insulin; and is able to drive a CMV safely. Mr. Cochran meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2010 and certified that he has stable nonproliferative diabetic retinopathy. He holds a Class D operator's license from Alaska.

John A. Curtis

Mr. Curtis, 47, has had ITDM since 2005. His endocrinologist examined him in 2010 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years; understands diabetes management and monitoring; has stable control of his diabetes using insulin; and is able to drive a CMV safely. Mr. Curtis meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2010 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Florida.

Robert M. Eggert

Mr. Eggert, 52, has had ITDM since 2010. His endocrinologist examined him in 2010 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years; understands diabetes management and monitoring; has stable control of his diabetes using insulin; and is able to drive a CMV safely. Mr. Eggert meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2010 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Wisconsin.

Christopher R. Everitt

Mr. Everitt, 43, has had ITDM since 2009. His endocrinologist examined him in 2010 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years; understands diabetes management and monitoring; has stable control of his diabetes using insulin; and is able to drive a CMV safely. Mr. Everitt meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2010 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Ohio.

Dustin J. Favor

Mr. Favor, 33, has had ITDM since 2010. His endocrinologist examined him in 2010 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years; understands diabetes management and monitoring; has stable control of his diabetes using insulin; and is able to drive a CMV safely. Mr. Favor meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2010 and certified that he does not have diabetic retinopathy. He holds a Class B CDL from Texas.

Scott J. Forsmann

Mr. Forsmann, 40, has had ITDM since 1990. His endocrinologist examined him in 2010 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years; understands diabetes management and monitoring; has stable control of his diabetes using insulin; and is able to drive a CMV safely. Mr. Forsmann meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2010 and certified that he has stable non-proliferative diabetic retinopathy. He holds a Class D operator's license from Idaho.

Joseph A. Griffin

Mr. Griffin, 47, has had ITDM since 2010. His endocrinologist examined him in 2010 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years; understands diabetes management and monitoring; has stable control of his diabetes using insulin; and is able to drive a CMV safely. Mr. Griffin meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2010 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from New York.

Paul R. Hollenbach

Mr. Hollenbach, 65, has had ITDM for approximately 10 years. His endocrinologist examined him in 2010 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years; understands diabetes management and monitoring; has stable control of his diabetes using insulin; and is able to drive a CMV safely. Mr. Hollenbach meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2010 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Pennsylvania.

Michael A. Holy

Mr. Holy, 52, has had ITDM since 1999. His endocrinologist examined him in 2010 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years; understands diabetes management and monitoring; has stable control of his diabetes using insulin; and is able to drive a CMV safely. Mr. Holy meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2010 and certified that he does not have

diabetic retinopathy. He holds a Chauffeur license from Michigan.

Victor M. Lewis

Mr. Lewis, 48, has had ITDM since 2007. His endocrinologist examined him in 2010 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years; understands diabetes management and monitoring; has stable control of his diabetes using insulin; and is able to drive a CMV safely. Mr. Lewis meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2010 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Tennessee.

William P. Miller, Jr.

Mr. Miller, 57, has had ITDM since 2010. His endocrinologist examined him in 2010 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years; understands diabetes management and monitoring; has stable control of his diabetes using insulin; and is able to drive a CMV safely. Mr. Miller meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2010 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Kentucky.

Floyd R. Plocher

Mr. Plocher, 55, has had ITDM for approximately 18 years. His endocrinologist examined him in 2010 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years; understands diabetes management and monitoring; has stable control of his diabetes using insulin; and is able to drive a CMV safely. Mr. Plocher meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2010 and certified that he has Non-stable proliferative diabetic retinopathy. He holds a Class D operator's license from Wisconsin.

Darwin D. Roberts

Mr. Roberts, 45, has had ITDM since 1986. His endocrinologist examined him in 2010 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years; understands diabetes management and monitoring; has stable control of his diabetes using insulin; and is able to drive a CMV safely. Mr. Roberts meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2010 and certified that he has stable nonproliferative diabetic retinopathy. He holds a Class B CDL from New Jersey.

Robert A. Roskamp

Mr. Roskamp, 72, has had ITDM since 2006. His endocrinologist examined him in 2010 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years; understands diabetes management and monitoring; has stable control of his diabetes using insulin; and is able to drive a CMV safely. Mr. Roskamp meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2010 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Iowa.

David N. Studebaker

Mr. Studebaker, 59, has had ITDM since 2007. His endocrinologist examined him in 2010 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years; understands diabetes management and monitoring; has stable control of his diabetes using insulin; and is able to drive a CMV safely. Mr. Studebaker meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2010 and certified that he does not have diabetic retinopathy. He holds a Class M CDL from Kansas.

Danny J. Watson

Mr. Watson, 47, has had ITDM since 1978. His endocrinologist examined him in 2010 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years; understands diabetes management and monitoring; has stable control of his diabetes using insulin; and is able to drive a CMV safely. Mr. Watson meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2010 and certified that he does not have diabetic retinopathy. He holds a Class D operator's license from Kentucky.

Robert L. Wenzel

Mr. Wenzel, 66, has had ITDM since 2010. His endocrinologist examined him in 2010 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years; understands diabetes management and monitoring; has stable control of his diabetes using insulin; and is able to drive a CMV safely. Mr. Wenzel meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2010 and certified that he does not have diabetic retinopathy. He holds a Class D operator's license from Arizona.

David A. Wiltse

Mr. Wiltse, 68, has had ITDM since 2010. His endocrinologist examined him in 2010 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years; understands diabetes management and monitoring; has stable control of his diabetes using insulin; and is able to drive a CMV safely. Mr. Wiltse meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2010 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from North Dakota.

Walter B. Wirth

Mr. Wirth, 54, has had ITDM since 2006. His endocrinologist examined him in 2010 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years; understands diabetes management and monitoring; has stable control of his diabetes using insulin; and is able to drive a CMV safely. Mr. Wirth meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2010 and certified that he has stable nonproliferative diabetic retinopathy. He holds a Class A CDL from Oregon.

Request for Comments

In accordance with 49 U.S.C. 31136(e) and 31315, FMCSA requests public comment from all interested persons on the exemption petitions described in this notice. We will consider all comments received before the close of business on the closing date indicated in the date section of the notice.

FMCSA notes that section 4129 of the Safe, Accountable, Flexible and Efficient Transportation Equity Act: A Legacy for Users requires the Secretary to revise its diabetes exemption program established on September 3, 2003 (68 FR 52441) [1]. The revision must provide for individual assessment of drivers with diabetes mellitus, and be consistent with the criteria described in section 4018 of the Transportation Equity Act for the 21st Century (49 U.S.C. 31305).

Section 4129 requires: (1) Elimination of the requirement for 3 years of experience operating CMVs while being treated with insulin; and (2) establishment of a specified minimum period of insulin use to demonstrate stable control of diabetes before being allowed to operate a CMV.

In response to section 4129, FMCSA made immediate revisions to the diabetes exemption program established by the September 3, 2003 notice. FMCSA discontinued use of the 3-year driving experience and fulfilled the requirements of section 4129 while continuing to ensure that operation of CMVs by drivers with ITDM will achieve the requisite level of safety required of all exemptions granted under 49 U.S.C. 31136 (e).

Section 4129(d) also directed FMCSA to ensure that drivers of CMVs with ITDM are not held to a higher standard than other drivers, with the exception of limited operating, monitoring and medical requirements that are deemed medically necessary. The FMCSA concluded that all of the operating, monitoring and medical requirements set out in the September 3, 2003 notice, except as modified, were in compliance with section 4129(d). Therefore, all of the requirements set out in the September 3, 2003 notice, except as modified by the notice in the **Federal Register** on November 8, 2005 (70 FR 67777), remain in effect.

Issued on: December 16, 2010.

Larry W. Minor,

Associate Administrator, Office of Policy.

[FR Doc. 2010–32240 Filed 12–22–10; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

Office of Hazardous Materials Safety; Notice of Applications for Modification of Special Permit

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: List of Applications for Modification of Special Permits.

SUMMARY: In accordance with the procedures governing the application for, and the processing of special permits from the Department of Transportation's Hazardous Material Regulations (49 CFR part 107, subpart B), notice is hereby given that the Office of Hazardous Materials Safety has received the applications described herein. This notice is abbreviated to expedite docketing and public notice. Because the sections affected, modes of transportation, and the nature of application have been shown in earlier **Federal Register** publications, they are not repeated here. Requests for modification of special permits (*e.g.* to provide for additional hazardous materials, packaging design changes, additional mode of transportation, etc.) are described in footnotes to the application number. Application numbers with the suffix "M" denote a modification request. These applications have been separated from the new application for special permits to facilitate processing.

DATES: Comments must be received on or before January 7, 2011.

Address Comments to: Record Center, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, Washington, DC 20590.

Comments should refer to the application number and be submitted in triplicate. If confirmation of receipt of comments is desired, include a self-addressed stamped postcard showing the special permit number.

FOR FURTHER INFORMATION CONTACT: Copies of the applications are available for inspection in the Records Center, East Building, PHH–30, 1200 New Jersey Avenue, SE., Washington DC or at *http://regulations.gov.*

This notice of receipt of applications for modification of special pennit is published in accordance with part 107 of the Federal hazardous materials transportation law (49 U.S.C. 5117(b); 49 CFR 1.53(b)).

Issued in Washington, DC, on December 16, 2010.

Donald Burger,

Chief, Special Permits and Approvals Branch.

Application No.	Docket No.	Applicant	Regulation(s) affected	Nature of special permit thereof
MODIFICATION SPECIAL PERMITS				
11803–M	.....	Chart, Inc. Distribution & Storage Group Prague, MN.	49 CFR 173.319; 179.401–1; 172.203(a); 173.26; 179.13.	To modify the special permit to authorize a longer period of time between vacuum testing and rupture disk replacement.
12818–M	.....	Standard Aero Augusta, GA ..	49 CFR 173.301(i); 173.302.	To modify the special permit to authorize additional cylinders.
12995–M	.....	Dow Chemical Company (3)(v) Midland, MI.	49 CFR 173.306(a)	To modify the special permit to reduce the sample size from 1 in 2,000 to 1 in 10,000

[1] Section 4129(a) refers to the 2003 notice as a "final rule." However, the 2003 notice did not issue a "final rule" but did establish the procedures and standards for issuing exemptions for drivers with ITDM.

Application No.	Docket No.	Applicant	Regulation(s) affected	Nature of special permit thereof
13336–M	.....	Renaissance Industries, Inc. Sharpsville Operations M–1102 Sharpsville, PA.	49 CFR 173.302(a)(1); 173.304; 175.3.	To modify the special permit to authorize additional Division 2.2 gases.
14728–M	.....	International Isotopes Inc. Idaho Falls, ID.	49 CFR 173.416(c)	To modify the special permit to authorize and increase in the number of times the packaging can be used.

[FR Doc. 2010–32093 Filed 12–22–10; 8:45 am]

BILLING CODE 4909–60–M

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

Office of Hazardous Materials Safety; Notice of Application for Special Permits

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: List of applications for special permits.

SUMMARY: In accordance with the procedures governing the application for, and the processing of, special permits from the Department of Transportations Hazardous Material Regulations (49 CFR part 107, subpart B), notice is hereby given that the Office of Hazardous Materials Safety has received the application described herein. Each mode of transportation for which a particular special permit is requested is indicated by a number in the "Nature of Application" portion of the table below as follows: 1—Motor vehicle, 2—Rail freight, 3—Cargo vessel, 4—Cargo aircraft only, 5—Passenger-carrying aircraft.

DATES: Comments must be received on or before January 24, 2011.

Address Comments to: Record Center, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, Washington, DC 20590.

Comments should refer to the application number and be submitted in triplicate. If confirmation of receipt of comments is desired, include a self-addressed stamped postcard showing the special permit number.

FOR FURTHER INFORMATION CONTACT: Copies of the applications are available for inspection in the Records Center, East Building, PHH–30, 1200 New Jersey Avenue, SE., Washington DC or at *http://regulations.gov.*

This notice of receipt of applications for special permit is published in accordance with part 107 of the Federal hazardous materials transportation law (49 U.S.C. 5117(b); 49 CFR 1.53(b)).

Issued in Washington, DC, on December 15, 2010.

Donald Burger,

Chief, Special Permits and Approvals Branch.

Application No.	Docket No.	Applicant	Regulation(s) affected	Nature of special permits thereof
NEW SPECIAL PERMITS				
15187–N	.....	Idaho Helicopters Inc., Boise, ID.	49 CFR 172.101, Column (9B), 172.204(c)(3), 173.27(b)(2) and 175.30(a)(1), 172.200, 172.300, 172.400.	To authorize the transportation in commerce of certain hazardous materials by cargo aircraft in remote areas of the U.S. only, without being subject to certain hazard communication requirements and quantity limitations. (mode 4).
15191–N	.....	Hendrix and Dail, Inc., Greenville, NC.	49 CFR 173.227(c)	To authorize the transportation in commerce of UN1H1 drums as single package for certain materials toxic by inhalation transported by motor vehicle. (mode 1).
15198–N	.....	Millennium Inorganic Chemicals, Inc., Hunt Valley, MD.	49 CFR Part 172 and 173	To authorize the transportation in commerce of titanium tetrachloride between locations of the same facility in non-DOT specification packaging and without hazard communication. (mode 1).
15199–N	.....	Polskie Linie Lotnicze LOT S.A. dba LOT Polish Airlines.	49 CFR 172.101 Column (9B), 172.204(c)(3), 173.27(b)(2)–(3).	To authorize the transportation in commerce of up to 20,000 pounds of Division 1.1E explosives to Poland to support the foreign military sales program. (mode 4).

[FR Doc. 2010–32091 Filed 12–22–10; 8:45 am]

BILLING CODE 4909–60–M

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. AB 384 (Sub-No. 3X)]

Delta Southern Railroad, Inc.—Abandonment Exemption—in Desha and Chicot Counties, Ark.

On December 6, 2010, Delta Southern Railroad, Inc. (DSR), filed with the Surface Transportation Board (Board) a petition under 49 U.S.C. 10502 for exemption from the provisions of 49 U.S.C. 10903 to abandon a 24.1-mile rail line between milepost 408.9 at or near McGehee and milepost 433.0 at or near Lake Village, in Desha and Chicot Counties, Ark. The line traverses United States Postal Service Zip Codes 71638, 71653, and 71654. There are no rail stations on the line.

The line does not contain federally granted rights-of-way. Any documentation in DSR's possession will be made available promptly to those requesting it.

The interest of railroad employees will be protected by the conditions set forth in *Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, In Bingham & Bonneville Counties, Idaho,* 360 I.C.C. 91 (1979).

By issuing this notice, the Board is instituting an exemption proceeding pursuant to 49 U.S.C. 10502(b). A final decision will be issued by March 25, 2011.

Any offer of financial assistance (OFA) under 49 CFR 1152.27(b)(2) will be due no later than 10 days after service of a decision granting the petition for exemption. Each OFA must be accompanied by a $1,500 filing fee. *See* 49 CFR 1002.2(f)(25).

All interested persons should be aware that, following abandonment of rail service and salvage of the line, the line may be suitable for other public use, including interim trail use. Any request for a public use condition under 49 CFR 1152.28 or for trail use/rail banking under 49 CFR 1152.29 will be due no later than January 12, 2011. Each trail use request must be accompanied by a $250 filing fee. *See* 49 CFR 1002.2(f)(27).

All filings in response to this notice must refer to Docket No. AB 384 (Sub-No. 3X), and must be sent to: (1) Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001; and (2) Thomas F. McFarland, 208 South LaSalle Street, Suite 1890, Chicago, IL 60604–1194. Replies to DSR's petition are due on or before January 12, 2011.

Persons seeking further information concerning abandonment procedures may contact the Board's Office of Public Assistance, Governmental Affairs, and Compliance at (202) 245–0238 or refer to the full abandonment or discontinuance regulations at 49 CFR part 1152. Questions concerning environmental issues may be directed to the Board's Office of Environmental Analysis (OEA) at (202) 245–0305. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.]

An environmental assessment (EA) (or environmental impact statement (EIS), if necessary) prepared by OEA will be served upon all parties of record and upon any agencies or other persons who commented during its preparation. Other interested persons may contact OEA to obtain a copy of the EA (or EIS). EAs in these abandonment proceedings normally will be made available within 60 days of the filing of the petition. The deadline for submission of comments on the EA will generally be within 30 days of its service.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: December 20, 2010.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Andrea Pope-Matheson,

Clearance Clerk.

[FR Doc. 2010–32281 Filed 12–22–10; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. FD 35452]

Wichita, Tillman & Jackson Railway Company—Lease Renewal Exemption—Union Pacific Railroad Company

Wichita, Tillman & Jackson Railway Company (WTJR) has filed a verified notice of exemption to renew its lease of approximately 40.48 miles of rail line consisting of two unconnected segments: [1] (1) The Western Branch, owned by Union Pacific Railroad Company (UP),[2] extending between milepost 0.99 at Wichita Falls, Tex., and approximately milepost 17.54 near Burkburnett, Tex., at the Texas-Oklahoma state line; and (2) the Walters Industrial Lead, owned by the Oklahoma Department of Transportation, extending between milepost 513.50 at Walters, Okla., and milepost 537.43 at Waurika, Okla. The current lease agreement is scheduled to expire on January 12, 2011.[3]

The transaction is related to a concurrently filed notice of exemption wherein WTJR seeks to renew its lease of 61.02 miles of the Western Branch in Oklahoma owned by the Oklahoma Department of Transportation. *Wichita, Tillman & Jackson Railway Company—Lease Renewal Exemption—Oklahoma Department of Transportation,* FD 35451.

This notice is filed under 49 CFR 1180.2(d)(4). If the verified notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

As a condition to the use of this exemption, any employees affected by this transaction will be protected by the conditions imposed in *Norfolk and Western Railway—Trackage Rights—Burlington Northern, Inc.,* 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Railway—Lease and Operate—California Western Railroad,* 360 I.C.C. 653 (1980).

An original and 10 copies of all pleadings, referring to Docket No. FD 35452, must be filed with the Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on Karl Morell, Suite 225, 1455 F Street, NW., Washington, DC 20005.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov*.

Decided: December 17, 2010.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Andrea Pope-Matheson,

Clearance Clerk.

[FR Doc. 2010–32290 Filed 12–22–10; 8:45 am]

BILLING CODE 4915–01–P

[1] WTJR was authorized to lease and operate the rail lines in *Wichita, Tillman & Jackson Railway Company—Lease and Operation Exemption—Missouri Pacific Railroad Company,* Docket No. FD 31787 (ICC served Jan. 8, 1991).

[2] The Western Branch was previously owned by Missouri Pacific Railroad Company (MP). Upon UP's acquisition of MP, UP assumed the lease agreement.

[3] According to WTJR, the current agreement provides for an automatic 20-year extension if applicant provides proper written notice. WTJR submitted a copy of a renewal of lease agreement which it has also forwarded to UP.

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. FD 35451]

Wichita, Tillman & Jackson Railway Company—Lease Renewal Exemption—Oklahoma Department of Transportation

Wichita, Tillman & Jackson Railway Company (WTJR), a Class III rail carrier, has filed a verified notice of exemption under 49 CFR 1150.41 to renew and supplement its lease of approximately 61.02 miles of rail line owned by the Oklahoma Department of Transportation (ODOT), referred to as the Western Branch. The Western Branch extends between milepost 17.54 at the Texas-Oklahoma State line near Burkburnett, Tex., and milepost 78.56 at Altus, Okla. WTJR has leased and operated the Western Branch since 1991.[1]

This transaction is related to a concurrently filed notice of exemption in *Wichita, Tillman & Jackson Railway Company—Lease Renewal Exemption—Union Pacific Railroad Company,* FD 35452, in which WTJR seeks to renew its lease of approximately 40.48 miles of rail line consisting of two unconnected segments in Texas and Oklahoma.

WTJR states that it and ODOT will shortly execute a lease renewal agreement renewing the 1991 Track Lease and Operating Agreement. The term of the lease renewal is 20 years, and the lease renewal will also include other changes beyond the extension of the lease term.

WTJR certifies that its projected annual revenues as a result of the transaction will not result in WTJR becoming a Class II or Class I rail carrier and further certifies that its projected annual revenues will not exceed $5 million.

The transaction is scheduled to be consummated on or after January 12, 2011.

If the verified notice contains false or misleading information, the exemption is void *ab initio.* Petitions to reopen the proceeding to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to Docket No. FD 35451, must be filed with the Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on Karl Morell, Ball Janik LLP, Suite 225, 1455 F Street, NW., Washington, DC 20005.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: December 17, 2010.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Andrea Pope-Matheson,

Clearance Clerk.

[FR Doc. 2010–32289 Filed 12–22–10; 8:45 am]

BILLING CODE 4915–01–P

[1] WTJR states that in its 1991 filing, it rounded up the milepost at Altus to 78.6, and stated the length of the line was 61.1 miles. *Wichita, Tillman & Jackson Ry.—Lease and Operation Exemption—State of Okla.,* FD 31788 (ICC served Jan. 8, 1991).

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. EP 290 (Sub-No. 5) (2011–1)]

Quarterly Rail Cost Adjustment Factor

AGENCY: Surface Transportation Board, DOT.

ACTION: Approval of rail cost adjustment factor.

SUMMARY: The Board has approved the first quarter 2011 Rail Cost Adjustment Factor (RCAF) and cost index filed by the Association of American Railroads. The first quarter 2011 RCAF (Unadjusted) is 1.093. The first quarter 2011 RCAF (Adjusted) is 0.488. The first quarter 2011 RCAF–5 is 0.462.

DATES: *Effective Date:* January 1, 2011.

FOR FURTHER INFORMATION CONTACT: Pedro Ramirez, (202) 245–0333. Federal Information Relay Service (FIRS) for the hearing impaired: (800) 877–8339.

SUPPLEMENTARY INFORMATION: Additional information is contained in the Board's decision, which is available on our Web site, *http://www.stb.dot.gov.* Copies of the decision may be purchased by contacting the Office of Public Assistance, Governmental Affairs, and Compliance at (202) 245–0235. Assistance for the hearing impaired is available through FIRS at (800) 877–8339.

This decision will not significantly affect the quality of the human environment or the conservation of energy resources.

Decided: December 20, 2010.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Nottingham.

Andrea Pope-Matheson,

Clearance Clerk.

[FR Doc. 2010–32366 Filed 12–22–10; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF THE TREASURY

Office of the Assistant Secretary for International Affairs; Survey of U.S. Ownership of Foreign Securities as of December 31, 2010

AGENCY: Departmental Offices, Department of the Treasury.

ACTION: Notice of reporting requirements.

SUMMARY: By this Notice and in accordance with 31 CFR part 129, the Department of the Treasury is informing the public that it is conducting a mandatory survey of U.S. ownership of foreign securities as of December 31, 2010. This Notice constitutes legal notification to all United States persons (defined below) who meet the reporting requirements set forth in this Notice that they must respond to, and comply with, this survey. Additional copies of the reporting form SHCA (2010) and instructions may be printed from the Internet at: *http://www.treasury.gov/resource-center/data-chart-center/tic/Pages/forms-sh.aspx.*

Definition: Pursuant to 22 U.S.C. 3102 a United States person is any individual, branch, partnership, associated group, association, estate, trust, corporation, or other organization (whether or not organized under the laws of any State), and any government (including a foreign government, the United States Government, a State or local government, and any agency, corporation, financial institution, or other entity or instrumentality thereof, including a government-sponsored agency), who resides in the United States or is subject to the jurisdiction of the United States.

Who Must Report: The panel for this survey is based upon the level of U.S. holdings of foreign securities reported on the December 2006 benchmark survey of U.S. holdings of foreign securities, and will consist primarily of the largest reporters on that survey. Entities required to report will be contacted individually by the Federal Reserve Bank of New York. Entities not contacted by the Federal Reserve Bank of New York have no reporting responsibilities.

What to Report: This report will collect information on holdings by U.S. residents of foreign securities, including equities, long-term debt securities, and short-term debt securities (including selected money market instruments).

How to Report: Copies of the survey forms and instructions, which contain complete information on reporting procedures and definitions, can be obtained at the Web site address given

above in the SUMMARY, or by contacting the survey staff of the Federal Reserve Bank of New York at (212) 720–6300, *e-mail: SHC.help@ny.frb.org.* The mailing address is: Federal Reserve Bank of New York, Statistics Function, 4th Floor, 33 Liberty Street, New York, NY 10045–0001. Inquiries can also be made to Dwight Wolkow at (202) 622–1276, *e-mail: comments2TIC@do.treas.gov.*

When to Report: Data must be submitted to the Federal Reserve Bank of New York, acting as fiscal agent for the Department of the Treasury, by March 4, 2011.

Paperwork Reduction Act Notice: This data collection has been approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act and assigned control number 1505–0146. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by OMB. The estimated average annual burden associated with this collection of information is 48 hours per respondent for end-investors and custodians that file Schedule 3 reports covering their securities entrusted to U.S. resident custodians, 145 hours per respondent for large end-investors filing Schedule 2 reports, and 700 hours per respondent for large custodians of securities filing Schedule 2 reports. Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be directed to the Department of the Treasury, Attention Administrator, International Portfolio Investment Data Reporting Systems, Room 5422, Washington, DC 20220, and to OMB, Attention Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503.

Dwight Wolkow,

Administrator, International Portfolio Investment Data Reporting Systems.

[FR Doc. 2010–32188 Filed 12–22–10; 8:45 am]

BILLING CODE 4810–25–P

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

Notice of Hiring or Indemnifying Senior Executive Officers or Directors

AGENCY: Office of Thrift Supervision (OTS), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to comment on proposed and continuing information collections, as required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3507. The Office of Thrift Supervision within the Department of the Treasury will submit the proposed information collection requirement described below to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. Today, OTS is soliciting public comments on its proposal to extend this information collection.

DATES: Submit written comments on or before February 22, 2011.

ADDRESSES: Send comments, referring to the collection by title of the proposal or by OMB approval number, to Information Collection Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552; send a facsimile transmission to (202) 906–6518; or send an e-mail to *infocollection.comments@ots.treas.gov.* OTS will post comments and the related index on the OTS Internet site at *http://www.ots.treas.gov.* In addition, interested persons may inspect comments at the Public Reading Room, 1700 G Street, NW. by appointment. To make an appointment, call (202) 906–5922, send an e-mail to *public.info@ots.treas.gov,* or send a facsimile transmission to (202) 906–7755.

FOR FURTHER INFORMATION CONTACT: You can request additional information about this proposed information collection from Donald W. Dwyer at (202) 906–6414, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION: OTS may not conduct or sponsor an information collection, and respondents are not required to respond to an information collection, unless the information collection displays a currently valid OMB control number. As part of the approval process, we invite comments on the following information collection.

Comments should address one or more of the following points:

a. Whether the proposed collection of information is necessary for the proper performance of the functions of OTS;

b. The accuracy of OTS's estimate of the burden of the proposed information collection;

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of the information collection on respondents, including through the use of information technology.

We will summarize the comments that we receive and include them in the OTS request for OMB approval. All comments will become a matter of public record. In this notice, OTS is soliciting comments concerning the following information collection.

Title of Proposal: Notice of Hiring or Indemnifying Senior Executive Officers or Directors.

OMB Number: 1550–0047.

Form Numbers: 1606; 1624.

Description: 12 U.S.C. 1831i requires OTS to make a determination as to the hiring or appointment of senior executive officers or directors at savings institutions or thrift holding companies. The OTS's determination must be based upon an evaluation of the individual's competence, experience, character, and integrity. The information required by the collection is necessary to make this determination. Without this information, the OTS cannot accomplish the statutory requirement designed to protect the interests of the Deposit Insurance Fund. The OTS has delegated the Regional Director, or his designee, at each Regional Office the authority to approve or deny these requests. They evaluate the individual's educational and professional experience to determine competence in the proposed position. An evaluation of the individual's proprietary interests identifies conflicts of interest that may render such person unsuitable for the position. Finally, information such as an individual's criminal offenses, lawsuits, and related disclosures enable further evaluation of the individual's integrity and character.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses or other for-profit.

Estimated Number of Respondents: 120.

Estimated Frequency of Response: On occasion.

Estimated Total Burden: 280 hours.

Dated: December 17, 2010.

Ira L. Mills,

Paperwork Clearance Officer, Office of Chief Counsel, Office of Thrift Supervision.

[FR Doc. 2010–32175 Filed 12–22–10; 8:45 am]

BILLING CODE 6720–01–P

Federal Register

Thursday,
December 23, 2010

Part II

Commodity Futures Trading Commission

17 CFR Part 49

Swap Data Repositories; Proposed Rule

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 49

RIN 3038–AD20

Swap Data Repositories

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Commodity Futures Trading Commission ("CFTC" or "Commission") is proposing rules to implement new statutory provisions introduced by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"). Section 728 of the Dodd-Frank Act amends the Commodity Exchange Act ("CEA" or the "Act") by adding new Section 21, which establishes registration requirements, statutory duties, core principles and certain compliance obligations for registered swap data repositories ("SDRs") and directs the Commission to adopt rules governing persons that are registered, as such, under this Section.

DATES: Comments must be received by February 22, 2011.

ADDRESSES: You may submit comments, identified by RIN 3038–AC20, by any of the following methods:

- *Agency Web site, via its Comments Online process: http://comments.cftc.gov.* Follow the instructions for submitting comments through the Web site.
- *Mail:* David A. Stawick, 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 the instructions for submitting comments.

Please submit your comments using only one method.

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 ("FOIA"),[1] a petition for confidential treatment of the exempt information may be submitted according to the established procedures in § 145.9 of the Commission's regulations.[2] 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 FOIA.

FOR FURTHER INFORMATION CONTACT: Jeffrey P. Burns, Assistant General Counsel, Office of the General Counsel, at (202) 418–5101, *jburns@cftc.gov;* Susan Nathan, Senior Special Counsel, Division of Market Oversight, at (202) 418–5133, *snathan@cftc.gov* and Adedayo Banwo, Counsel, Office of the General Counsel, at (202) 418–6249, *abanwo@cftc.gov,* Commodity Futures Trading Commission, Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background
II. The Proposed Regulations: Part 49
A. Requirements of Registration
B. Duties of Registered SDRs
1. Acceptance of Data
2. Confirmation of Data Accuracy
3. Recordkeeping Requirements
4. Direct Electronic Access by the Commission
5. Monitoring, Screening and Analyzing Swap Data
6. Maintenance of Data Privacy
7. Access to SDR Data
8. Emergency Procedures
C. Designation of Chief Compliance Officer
D. Core Principles Applicable to SDRs
1. Antitrust Considerations (Core Principle 1)
2. Introduction—Governance Arrangements (Core Principle 2) and Conflicts of Interest (Core Principle 3)
3. Governance Arrangements (Core Principle 2)
4. Conflicts of Interest (Core Principle 3)
E. Additional Duties
1. System Safeguards
2. Financial Resources
3. Disclosure Requirements of Swap Data Repositories
4. Non-Discriminatory Access and Fees
F. Real Time Reporting
G. Procedures for Implementing Swap Data Repository Rules
III. Effectiveness and Transition Period
IV. General Request for Comments
V. Related Matters
A. Paperwork Reduction Act
B. Cost-Benefit Analysis
C. Antitrust Considerations
D. Regulatory Flexibility Act
VI. List of Subjects

I. Background

On July 21, 2010, President Obama signed into law the Dodd-Frank Act.[3] Title VII of the Dodd-Frank Act[4] amended the CEA[5] to establish a comprehensive new regulatory framework for swaps and security-based swaps. The legislation was enacted to reduce risk, increase transparency, and promote market integrity within the financial system by, among other things: (1) Providing for the registration and comprehensive regulation of swap dealers ("SDs") and major swap participants ("MSPs"); (2) imposing clearing and trade execution requirements on standardized derivative products; (3) creating robust recordkeeping and real-time reporting regimes; and (4) enhancing the Commission's rulemaking and enforcement authorities with respect to, among others, all registered entities and intermediaries subject to the Commission's oversight.

To enhance transparency, promote standardization and reduce systemic risk, Section 728 of the Dodd-Frank Act establishes a newly-created registered entity—the SDR[6]—to collect and maintain data and information related to swap transactions as prescribed by the

[1] 5 U.S.C. 552.

[2] 17 CFR 145.9.

[3] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010), available at *http://www.cftc.gov/LawRegulation/OTCDERIVATIVES/index.htm.*

[4] Pursuant to Section 701 of the Dodd-Frank Act, Title VII may be cited as the "Wall Street Transparency and Accountability Act of 2010."

[5] 7 U.S.C. 1, *et seq.*

[6] Section 721 of the Dodd-Frank Act amends Section 1a of the CEA to add the definition of SDR. Section 1a provides that the term "swap data repository means any person that collects and maintains information or records with respect to transactions or positions in, or the terms and conditions of, swaps entered into by third parties for the purpose of providing a centralized recordkeeping facility for swaps." 7 U.S.C. 1a(48). Currently there are global trade repositories for credit, interest rate, and equity swaps. Since 2009, all G–14 dealers have submitted credit swap data to the Depository Trust & Clearing Corporation's ("DTCC") Trade Information Warehouse. In January 2010, TriOptima launched the Global OTC Derivatives Interest Rate Trade Reporting Repository after selection by the Rates Steering Committee of the International Swaps and Derivatives Association to provide a trade repository to collect information on trades in interest rate swaps. In August 2010, DTCC also launched the Equity Derivatives Reporting Repository for equity swaps and other equity derivatives. Other entities may also perform trade repository functions on a regional or more localized basis. In addition, a variety of firms also provide ancillary services and functions essential to the efficient operation of trade reporting of swaps. Trade repositories for other asset classes such as commodities and foreign currency have yet to be formally established but are expected to be developed in the near future in connection with the effective date of the Dodd-Frank Act.

Commission [7] and to make such data and information directly and electronically available to regulators. Section 2(a)(13)(G) of the CEA, adopted by Section 727 of the Dodd-Frank Act, requires all swaps—cleared or uncleared—to be reported to an SDR. Section 728 of the Dodd-Frank Act added to the CEA new Section 21 governing registration and regulation of SDRs, and directed the Commission to adopt regulations governing SDR duties and responsibilities specified in the legislation. Section 21 requires that SDRs be registered with the Commission,[8] allows a derivatives clearing organization ("DCO") to register as an SDR, and specifies that persons required to be registered as SDRs must register with the Commission whether or not they are also licensed as a bank or registered as a security-based swap data repository with the Securities and Exchange Commission ("SEC").[9] To register with the Commission and maintain registration, SDRs are required to comply with the duties and core principles set forth in Section 21 of the CEA as well as other requirements that the Commission may prescribed by rule.[10]

Pursuant to the specific duties outlined in Section 21(c) of the CEA, SDRs must (1) accept data; (2) confirm with both counterparties to the swap the accuracy of the data that was submitted; (3) maintain data according to standards prescribed by the Commission; (4) provide direct electronic access to the Commission or any designee of the Commission; (5) provide public reporting of swap data in the form and frequency as the Commission may require; (6) establish automated systems for monitoring and analyzing data (including the use of end-user clearing exemptions) at the direction of the Commission; (7) maintain user privacy; (8) on a confidential basis, pursuant to Section 8 of the CEA,[11] upon request and after notifying the Commission, make data available to other specified regulators; and (9) establish and maintain emergency procedures. As a separate matter, prior to sharing information with specified entities, the SDR must, pursuant to Section 21(d) of the CEA, receive a written agreement from each such entity stating that it will abide by the confidentiality provisions of Section 8 of the CEA and agree to indemnify the SDR and the Commission for any litigation expenses relating to information provided under Section 8.

Section 21(e) of the CEA requires that each SDR have a chief compliance officer ("CCO") and specifies the duties of the CCO. Section 21(f) of the CEA establishes four core principles for SDRs. First, an SDR is prohibited from adopting any rule or taking any action that results in any unreasonable restraint of trade or imposing any material anticompetitive burden on the trading, clearing or reporting of transactions. Second, each SDR must establish governance arrangements that are transparent to fulfill the public interest requirements and to support the objectives of the federal government, owners and participants. Third, each SDR must establish and enforce rules to minimize conflicts of interest in the SDR's decision-making processes and establish a process for resolving conflicts of interest. Lastly, a fourth core principle provides that the Commission must establish additional duties for registered SDRs to minimize conflicts of interest, protect data, ensure compliance and guarantee the safety and security of the SDR and may develop additional duties taking into account evolving standards of the United States and the international community.[12]

The Commission notes that in May 2010, a working group jointly established by the Committee on Payment and Settlement Systems ("CPPS") of the Bank of International Settlements ("BIS") and the Technical Committee of the International Organization of Securities Commissions ("IOSCO") published a consultative report entitled "Considerations for Trade Repositories in the OTC Derivatives Markets"("Working Group Report").[13] The Working Group Report presents a set of factors to consider in connection with the design, operation and regulation of SDRs. A significant consideration of the Working Group Report is access to SDR data by appropriate regulators. As noted in this Working Group Report, a trade repository "should support market transparency by making data available to relevant authorities and the public in line with their respective information needs." [14] The Commission believes that the Dodd-Frank Act and proposed part 49 of the Commission's Regulations are consistent with the goals of the Working Group Report. Unless inconsistent with the statutory framework set forth in Section 21 of the CEA and related provisions, the Commission proposes that SDRs will largely follow the recommendations in the Working Group Report to enhance transparency, promote standardization and reduce systemic risk in the swaps market.

Additionally, Section 752(a) of the Dodd-Frank Act directs the Commission to consult and coordinate with foreign regulatory authorities regarding the establishment of consistent international standards for the regulation of swaps and various "swap entities." [15] Consistent with this directive, the Commission believes that the data maintained by SDRs must be available to all appropriate foreign regulators consistent with their regulatory responsibilities and the Dodd-Frank Act. Accordingly, in support of its cooperative international approach to the regulation of SDRs, the Commission has consulted with various foreign regulatory authorities in promulgating the proposed rules.

The Commission also notes the recent issuance by the European Commission

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[7] Regulations governing the SDRs' data collection and recordkeeping responsibilities are the subject of a separate proposed rulemaking under part 45 of the Commission's regulations. *See* 17 CFR part 45.

[8] The Dodd-Frank Act mandates that the Commission promulgate rules to implement these provisions by July 15, 2011. *See* Section 712 of the Dodd-Frank Act.

[9] If a DCO so registers, then to the extent that final rules on governance and conflicts of interest, discussed *infra* Section II.D.2, differ between a DCO and an SDR, the DCO must meet the more stringent set of rules.

[10] Section 21(f)(4)(A) of the CEA, added by the Dodd-Frank Act, authorizes the Commission to develop one or more additional duties applicable to SDRs. 7 U.S.C. 24a(f)(4).

[11] Section 8 of the CEA, 7 U.S.C. 12(e), establishes among other things the conditions under which the Commission may furnish information obtained in connection with the administration of the CEA to any department or agency of the United States; such information shall not be disclosed by such department or agency except in any action or proceeding under the laws of the United States to which it, the Commission or the United States is a party. Similarly, the Commission may furnish such information to a foreign futures authority if the Commission is satisfied that the information will not be disclosed by such foreign futures authority except in connection with an adjudicatory action or proceeding brought under the laws of such foreign government or political subdivision, or foreign futures authority, is a party.

[12] *See* Section 21(f)(4) of the CEA, 7 U.S.C. 24a(f)(4).

[13] *See* CPSS–IOSCO Consultative Report, Considerations for Trade Repositories in the OTC Derivatives (May 2010), available at *http://www.bis.org/publ/cpss90.pdf.*

[14] *Id.*

[15] The Dodd-Frank Act provides:

In order to promote effective and consistent global regulation of swaps and security-based swaps, the Commodity Futures Trading Commission, the Securities and Exchange Commission, and the prudential regulators (as that term is defined in Section 1a(39) of the Commodity Exchange Act), as appropriate, shall consult and coordinate with foreign regulatory authorities on the establishment of consistent international standards with respect to the regulation (including fees) of swaps, security-based swaps, swap entities, and security-based swap entities and may agree to such information-sharing arrangements as may be deemed to be necessary or appropriate in the public interest or for the protection of investors, swap counterparties, and security-based swap counterparties.

Section 752(a) of the Dodd-Frank Act.

of its regulatory proposal related to OTC derivatives, central counterparties and trade depositories.[16] It is the Commission's intention to harmonize its approach with that of the European Commission to the extent possible consistent with the statutory provisions of Dodd-Frank Act relating to SDRs.

The Commission submits further that Section 21 of the CEA does not provide the Commission with the authority to exempt any entity performing the functions of an SDR from the registration requirements or any other regulatory duties established by the Dodd-Frank Act. However, swap activity that is strictly of a "non-U.S." nature would be excluded from Commission registration and regulation. Specifically, Section 2(i) of the CEA, as amended by Section 722 of the Dodd-Frank Act, excludes from U.S. jurisdiction all swap activity that does not have a "direct and significant connection with activities in, or effect on, commerce of the United States", or which contravene regulations necessary to prevent evasion.[17]

II. The Proposed Regulations: Part 49

As discussed above, part 49 will contain the provisions that apply to registration and regulation of SDRs. Proposed § 49.3 will establish the procedures and substantive requirements for registration as an SDR. Compliance with the statutory duties described in Section 21(c) of the CEA is described in proposed § 49.9 and detailed in proposed §§ 49.10 through 49.18. Core principles applicable to SDRs as outlined in Section 21(f) are set forth in proposed §§ 49.19 through 49.22. The additional duties promulgated pursuant to Section 21(f)(4) of the CEA (Core Principle 4) are set forth in proposed §§ 49.23 through 49.27.

A. Requirements of Registration

Proposed §§ 49.3–49.4 and 49.6–49.7 provide the substantive requirements and framework for SDR registration. The Proposed Regulations include provisions relating to: (1) Procedures for registration; (2) provisional registration; (3) an annual filing requirement; (4) withdrawal of application for registration; (5) reinstatement of dormant registration; (6) withdrawal of registration; (7) registration of successor entities; and (8) SDRs located in foreign jurisdictions. Each of the proposed Regulations is discussed below in turn.

1. Procedures for Registration—Proposed § 49.3

To implement the requirements of Section 21(a) of the CEA, as amended by Section 728 of the Dodd-Frank Act, and to ensure the Commission's ability to administer part 49 of the Commission's Regulations generally, the Commission proposes in § 49.3 to establish application and approval procedures for any entity seeking registration as a SDR. The Commission, in connection with proposed § 49.3, is proposing to require each SDR applicant to file for registration on proposed Form SDR.

(a) *Proposed Form SDR.* Proposed § 49.3(a) provides that applications for registration as an SDR must be filed electronically with the Commission on new Form SDR. Proposed Form SDR will be used for an initial or provisional registration as an SDR as well as any updates or amendments to registration. Each applicant will be required to provide the Commission with documents and descriptions pertaining to the (i) business organization, (ii) financial resources, (iii) technological capabilities and (iv) accessibility of services of the SDR.

SDR applicants will be required to provide documents describing the applicant's legal status, including a copy of the constitution, articles of incorporation or association with all amendments, existing by-laws, rules or instruments corresponding with, and a description of the organizational and governance structure. SDRs must also submit copies of any applicable rules and regulations (as defined in revised § 40.1),[18] disclose any affiliates along with a brief description of the nature of the affiliation, and submit copies of any agreements between the SDR and third parties that will assist the SDR in complying with the duties set forth in Section 21(c) and the core principles specified in Section 21(f). If the applicant is a foreign entity, the entity is required to certify and provide an opinion of counsel that the SDR, as a matter of law, is able to provide the Commission with prompt access to the books and records of the SDR and that the SDR can submit to onsite inspection and examination by the Commission.

Financial information filed as part of Form SDR would include (i) a balance sheet, (ii) statement of income and expenses, (iii) statement of sources and application of revenues and (iv) all notes or schedules, as of the most recent fiscal year. A balance sheet and an income and expense statement for each affiliate, as of the end of the most recent fiscal year, will also be required for those affiliates of the SDR that provide SDR regulatory services. If the applicant is a newly-created entity without sufficient time in operation, the applicant should provide pro forma financial statements for the most recent six months, or since inception of the entity, whichever occurs first. Except for pro forma financial statements prepared for newly-created entities, financial statements shall be prepared in conformity with generally accepted accounting principles ("GAAP") applied on a basis consistent with that of the preceding financial statement.

Applicants will be required to demonstrate operational capability through documentation such as technical manuals and/or third party service provider agreements that will be employed to provide services to the SDR. Applicants will also be required to set forth practices and procedures for accepting swap data and providing services to market participants. As required by proposed § 49.27, access must be fair, open and non-discriminatory.

(b) *180–Day Review Procedures.* An entity that seeks to register as a SDR is required to electronically file Form SDR with the Commission in accordance with the instructions contained in Form SDR. The Commission will review Form SDR and, at or prior to the conclusion of a 180-day period, by order either (i) grant registration; (ii) extend the 180-day review period for good cause; or (ii) deny the application for registration. If deemed appropriate, the Commission may grant registration as a SDR subject to conditions. The 180-day review period will commence once a completed submission on Form SDR is submitted to the Commission, as determined solely in the discretion of the Commission. If the Commission denies an application for registration, it will specify the grounds for such denial. In the event the Commission denies an applicant

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[16] *See* Proposal for a Regulation of the European Parliament and of the Council on OTC Derivatives, Central Counterparties, and Trade Depositories (the "European Commission Proposal"), COM (2010) 484/5.

[17] Section 2(i) of the CEA, as amended by Section 722(d) of the Dodd-Frank Act, provides:

(i) APPLICABILITY.—The provisions of this Act relating to swaps that were enacted by the Wall Street Transparency and Accountability Act of 2010 (including any rule prescribed or regulation promulgated under that Act), shall not apply to activities outside the United States unless those activities—

(1) have a direct and significant connection with activities in, or effect on, commerce of the United States; or

(2) contravene such rules or regulations as the Commission may prescribe or promulgate as are necessary or appropriate to prevent the evasion of any provision of this Act that was enacted by the Wall Street Transparency and Accountability Act of 2010.

7 U.S.C. 2(i)(1)–(2).

[18] *See* Commission, Notice of Proposed Rulemaking: Revisions to part 40 (Provisions Common to Registered Entities), 75 FR 67282 (Nov. 2, 2010).

registration, such person may request an opportunity for a hearing before the Commission.

(c) *Standard for Approval.* The Commission, in reviewing applications for SDR registration, will review whether SDR applicants are properly organized and have the capacity to assure the prompt, accurate and reliable performance of the SDR duties in Section 21(c), core principles in Section 21(f) and additional duties of Section 21(f)(4). Subject to the ability of the Commission to extend the 180-day period as noted above, the Commission would deny registration if it appears at the end of the 180-day period that the application (i) is materially incomplete; [19] (ii) fails in form or substance to meet the requirements of Section 21 of the CEA and proposed part 49 of the Commission's Regulations; [20] and/or (iii) is amended or supplemented in a manner that is inconsistent with proposed § 49.3. The Commission, in each instance of the denial of an application for registration, will provide notification setting forth the deficiencies in the application, or the manner in which the application fails to meet the requirements of proposed part 49 of the Commission's Regulations.[21]

(d) *Amendments and Annual Filing.* Proposed § 49.3(a)(3) provides that if any information reported on Form SDR or any subsequent amendment becomes inaccurate, the SDR is required to promptly file an amendment on Form SDR updating such information. This requirement is applicable regardless of whether the information becomes inaccurate before or after an application for registration has been granted. Proposed § 49.3(a)(3) also requires that each registered SDR annually file an amendment on Form SDR within 60 days after the end of each calendar year.

(e) *Service of Process.* The Commission is proposing in proposed § 49.3(a)(5) to require each SDR to designate and authorize on Form SDR an agent in the United States, other than a Commission official, to accept any notice or service of process, pleadings, or other documents in any action or proceedings against the SDR to enforce the CEA and related Regulations. If an SDR appoints another agent to accept such notice or service of process, then the SDR would be required to file promptly an amendment on Form SDR updating this information.[22] Proposed § 49.3(a)(5) is intended to conserve the Commission's resources and to minimize any logistical obstacles (*e.g.,* locating defendants or respondents abroad) that the Commission may encounter when attempting to effect service.

(f) *Provisional Registration.* Proposed § 49.3(b) permits the Commission, upon the request of an applicant, to grant a provisional registration of an SDR, if such applicant is in substantial compliance with the standards set forth in proposed § 49.3(a)(4). This application for provisional registration would be filed on proposed Form SDR. Such provisional registration will expire on the earlier of: (i) The date that the Commission grants or denies registration of the SDR; or (ii) the date that the Commission rescinds the provisional registration of the SDR. The Commission may rescind such provisional registration on the same grounds as those set forth in proposed § 49.3(a)(3).

The proposed provisional registration would enable an SDR to comply with the Dodd-Frank Act upon its effective date (*i.e.,* the later of 360 days after the date of its enactment or 60 days after publication of the final rule implementing Section 21 of the CEA). The provisional registration would also allow the Commission to implement the registration requirements of the Dodd-Frank Act for SDRs while providing the Commission sufficient time to fully review the application of an SDR. An SDR that is provisionally registered with the Commission would be subject to Section 21 of the CEA and related regulations during the period in which the Commission is reviewing the SDR's application of registration.

The Commission believes that the provisional registration should not be a permanent provision of part 49. Accordingly, proposed § 49.3(b) includes a "sunset" provision so that provisional registration would terminate 365 days from the effective date of proposed § 49.3(b).

Notwithstanding the availability of a provisional registration, the Commission encourages each SDR to apply for registration as soon as possible following the Commission's adoption of final part 49, to permit sufficient time for an SDR to answer any questions that the Commission staff may have and to provide additional information or documentation, if necessary. The Commission will review applications in the order in which they are received. Applications seeking provisional registration that are received close to the effective date of the SDR registration requirement may not be reviewed and approved by the effective date.

(g) *Withdrawal of Application for Registration.* Proposed § 49.3(c) permits an applicant for registration as an SDR to withdraw its application by filing a request with the Commission. Such a voluntary withdrawal by the applicant SDR will not affect any action taken or to be taken by the Commission based upon conduct occurring during the time that the application for registration was pending with the Commission.

(h) *Reinstatement of Dormant Registration.* Proposed § 49.3(d) provides that the Commission must affirmatively re-instate the registration of a dormant SDR (as defined in revised § 40.1 of the Commission's Regulations) [23] prior to such dormant SDR accepting or re-accepting swap data.

(i) *Delegation of Authority.* Proposed § 49.3(e) delegates authority to the Director of the Division of Market Oversight (or designee) with the consultation of the General Counsel of the Commission (or designee) for certain matters relating to the sufficiency of the application on Form SDR filed with the Commission. In particular, the Commission in this proposed Regulation delegates to the Director of the Division of Market Oversight or designee, with the consultation of the General Counsel or designee, the authority to notify an applicant for registration as an SDR under Section 21 of the CEA that such application for registration is materially incomplete and that the running of the 180-day period is stayed. This delegation of authority does not prohibit the Commission from otherwise exercising its authority that would be delegated under this proposed Regulation. The Director of the Division of Market Oversight may also submit to the Commission for its consideration any matter which has been delegated under this proposed Regulation.

2. Withdrawal From Registration—Proposed § 49.4

Consistent with Section 7 of the CEA, proposed § 49.4 permits a registered SDR to withdraw from registration by filing a notice of withdrawal with the Commission at least 90 days prior to the

[19] An SDR applicant that is denied registration based on an incomplete application would be permitted to re-file an application with the Commission.

[20] The Commission would deny the registration of a SDR applicant that is unable to demonstrate compliance with the statutory duties set forth in Section 21(c) of the CEA, 7 U.S.C. 24a(c) and proposed § 49.9 as well as the core principles set forth in Section 21(f) of the CEA, 7 U.S.C. 24a(f), and proposed § 49.19.

[21] This provision is comparable to the designated contract market ("DCM") and DCO applications set forth in Section 6 of the CEA, 7 U.S.C. 8.

[22] *See* proposed § 49.3(a)(5).

[23] *See* Provisions Common to Registered Entities, *supra* note 18.

named withdrawal date. As part of its notice of withdrawal, the SDR is required to: (1) Designate another SDR to serve as the custodian of the withdrawing SDR's books and records; (2) specify the location of the data and records; and (3) provide an opinion of counsel that the SDR is authorized to make such data and records available. Prior to the filing of a notice of withdrawal, a SDR must file an amended Form SDR to update any inaccurate information.

The withdrawal of a SDR's registration will be effective on the 60th day after receipt by the Commission of the notice of withdrawal, unless the Commission determines to extend or curtail the effectiveness of an SDR's registration by order, deemed necessary or appropriate and in the public interest.

Proposed § 49.4(c) provides that after an opportunity for hearing, the Commission may revoke the registration of a registered SDR if the Commission finds that any registered SDR has obtained its registration by making any false and misleading material statements or has violated or failed to comply with any provision of the CEA and Commission Regulations. Pending final determination of whether the registration of an SDR should be revoked, the Commission may suspend the registration of the SDR if it appears to the Commission, after notice and opportunity for hearing, to be necessary or appropriate in the public interest.

3. Equity Interest Transfer Notification—Proposed § 49.5

Proposed § 49.5 would require SDRs to file with the Commission a notice of the equity interest transfer of ten percent or more, no later than the business day, as defined in revised § 40.1,[24] following the date on which the SDR enters into a firm obligation to transfer the equity interest.[25] The notification must include and be accompanied by: (i) Any relevant agreement(s), including preliminary agreements; (ii) any associated changes to relevant corporate documents; (iii) a chart outlining any new ownership or corporate or organizational structure; (iv) a brief description of the purpose and any impact of the equity interest transfer; and (v) a representation from the registered SDR that it meets all of the requirements of Section 21 of the CEA and Commission regulations adopted thereunder. The SDR would also be required to amend any information that is no longer accurate on Form SDR consistent with the procedures set forth in proposed § 49.3.

The proposed Regulation requires that the registered SDR keep the Commission informed of the projected date that the transaction resulting in the equity interest transfer will be consummated, and provide to the Commission any new agreements or modifications to the original agreement(s) filed pursuant to this proposed Regulation. The registered SDR is required to notify the Commission of the consummation of the transaction on the business day in which it occurs. The proposed Regulation will enable Commission staff to consider whether any conditions contained in an equity transfer agreement(s) are inconsistent with the duties, responsibilities and core principles of a SDR.

Proposed § 49.5(c) would require the SDR upon a 10% or greater change in ownership to certify, within two business days following the date on which the change in ownership occurs, that such SDR meets all of the requirements of Section 21 of the CEA and proposed Regulations under Part 49 of the Commission's regulations. The proposed Regulation also requires that the SDR include as part of its certification whether any aspects of the SDR's operations will change as a result of the change in ownership, and if so, the SDR must provide a description of the changes. Proposed § 49.5(c) also provides that the certification may rely on, and be supported by, prior materials and information submitted as part of an application for registration or new filings if necessary to update its previous filings.

The Commission notes that there may be differences in notification procedures for transfers or changes in equity ownership of registered entities proposed by the Commission.

Request for Comment. The Commission requests comment regarding the proposed notification procedures as follows:

- Should there be uniformity or differentiation in procedures applied to different registered entities?

4. Registration of Successor Entities—Proposed § 49.6

Proposed § 49.6(a) sets forth the process of registering successor entities of an SDR as the result of corporate change of control or other similar events. Specifically, the proposed Regulation provides that in the event of a corporate reorganization, merger, acquisition, bankruptcy or other similar corporate event that creates a new entity, the SDR is required to request a transfer of its registration, rules, and other matters, within 30 days of the succession. The registration of the predecessor SDR entity will be deemed to remain effective as the registration of the successor if the successor, within 30 days after such succession, files an application for registration on Form SDR, and the predecessor files a request for withdrawal of registration. The proposed Regulation would further provide that the registration of the predecessor SDR shall cease to be effective 90 days after the application for registration on Form SDR is filed by the successor SDR.[26] In other words, the 90-day period would not begin to run until a complete Form SDR has been filed by the successor with the Commission.

The following are examples of the types of successions that would be required to be completed by filing an application: (1) An acquisition, through which an unregistered entity purchases or assumes substantially all of the assets and liabilities of the SDR and then operates the business of the SDR, (2) a consolidation of two or more registered entities, resulting in their conducting business through a new unregistered entity, which assumes substantially all of the assets and liabilities of the predecessor entities, and (3) dual successions, through which one registered entity subdivides its business into two or more new unregistered entities.

Proposed § 49.6(b) sets forth the process of registering successor entities of an SDR as the result of a change in the predecessor SDR's date or state of incorporation, form of organization, or composition of a partnership. In these cases, the successor SDR, within 30 days after the succession, must amend the registration of the predecessor SDR on Form SDR to reflect the changes. Such amendment would be deemed an application for registration filed by the predecessor and adopted by the successor. In all three types of successions, the predecessor must cease operating as an SDR. The Commission

[24] *See* Provisions Common to Registered Entities, *supra* note 18.

[25] The Commission is proposing a 10 percent threshold because it believes that a change in ownership of such magnitude may have an impact on the operations of the SDR. The Commission believes that such impact may be present even if the change in ownership does not constitute a change in control. Given the potential impact that a change in ownership might have on the operations of a SDR, the Commission believes that it is appropriate to require such SDR to certify after such change that it continues to comply with all obligations under the CEA and Commission regulations.

[26] *See* proposed § 49.6(a).

preliminarily believes that it is appropriate to allow a successor to file an amendment to the predecessor's Form SDR in these types of successions because such successions do not typically result in a change of control of the SDR. The purpose of proposed § 49.6 is to enable a successor SDR to operate without an interruption of business by relying for a limited period of time on the registration of the predecessor SDR until the successor's own registration becomes effective. The proposed Regulation is intended to facilitate the legitimate transfer of business between two or more SDRs and to be used only where there is a direct and substantial business nexus between the predecessor and the successor SDR. The proposed Regulation would not allow a registered SDR to sell its registration, eliminate substantial liabilities, spin off personnel, or facilitate the transfer of the registration of a "shell" organization that does not conduct any business. No entity would be permitted to rely on proposed § 49.6 unless it is acquiring or assuming substantially all of the assets and liabilities of the predecessor's SDR business.

Proposed § 49.6 would not apply to reorganizations that involve only registered SDRs. In those situations, the registered SDRs can continue to rely on their existing registrations. The proposed rule would also not apply to situations in which the predecessor intends to continue to engage in SDR activities. Otherwise, confusion may result as to the identities and registration statuses of the parties.

5. Swap Data Repositories Located in Foreign Jurisdictions—Proposed § 49.7

Proposed § 49.7 relates to those SDR applicants that are located outside of the United States. This proposed Regulation is intended to enable the Commission to obtain necessary swap data and related books and records maintained by a SDR located outside of the United States. Proposed § 49.7 would require each SDR located outside of the United States to provide an opinion of counsel that the SDR can, as a matter of law, provide the Commission with prompt access to its books and records and submit to onsite inspection and examination by the Commission. The Commission notes that each jurisdiction may have a different legal framework that may limit or restrict the Commission's ability to receive information from an SDR. An opinion of counsel regarding prompt access to books and records and onsite inspection and examination will allow the Commission to better evaluate an SDR's capability to meet the requirements of registration and ongoing supervision. Failure to provide an opinion of counsel may be a basis for the Commission to deny an application for registration.

Request for Comment. The Commission requests comment on the questions set forth below regarding registration.

(1) Are the instructions in proposed Form SDR clear? If not, identify any instructions that should be clarified and, if possible, offer alternatives.

(2) Would any of the requested information on proposed Form SDR be burdensome for an SDR to supply? If so, explain.

(3) Should the Commission require any additional information on proposed Form SDR? If so, what information and why?

(4) Are there any items on proposed Form SDR that the Commission should not request? If so, which items and why?

(5) Is the Commission's proposed registration process appropriate and sufficiently clear? If not, why not and what would be a better alternative?

(6) If a SDR located outside of the United States is registered, should the registration process for the foreign SDR be any different than the Commission's proposed registration process?

(7) Are there any factors that the Commission should take into consideration to ensure that a SDR located outside the United States seeking to register as an SDR can, in compliance with applicable foreign laws, provide the Commission with access to the SDR's books and records that are required pursuant to proposed § 49.7 and can submit to onsite inspection and examination by the Commission?

(8) Should the Commission consider any other factors relating to a SDR located outside of the United States with respect to the Commission's registration rules or in general?

(9) Is the Commission's proposed rule regarding provisional registration appropriate? If not, why not?

(10) What conditions should apply to the granting of a provisional registration? What criteria should the Commission consider for approving provisional registration applications?

(11) Are the timeframes in the proposed registration process appropriate? If not, why not and what would be more appropriate timeframes?

(12) Are the proposed factors in determining whether the Commission should grant or deny an application for registration appropriate and sufficiently clear? If not, why not? Should the Commission take into consideration any other factors in determining whether to grant or deny an SDR's application for registration?

B. Duties of Registered SDRs

Section 21(c) of the CEA sets forth the minimum duties that a SDR is required to perform to become registered and to maintain registration. These statutory duties require that SDRs (i) accept swap data as prescribed by the Commission; (ii) confirm with both counterparties to a swap the accuracy of the data; (iii) maintain the data submitted; (iv) provide the Commission or its designee with direct electronic access to the swap data; (v) provide the necessary information as prescribed by the Commission to comply with the public reporting requirements set forth in Section 2(a)(13) of the CEA; (vi) establish automated systems for monitoring, screening, and analyzing swap data; (vii) maintain the privacy or confidentiality of any and all swap data that the SDR receives; (viii) provide access to the swap data to certain "appropriate" domestic and foreign regulators; and (ix) adopt and implement emergency procedures. In addition, the Commission pursuant to its authority under Sections 21(f)(4) and 8a(5) [27] of the CEA also proposes to add by regulation four additional duties which would require that registered SDRs (i) adopt and implement system safeguards, including business continuity and disaster recovery ("BC–DR") plans; (ii) maintain sufficient financial resources; (iii) furnish market participant with a disclosure document setting forth the risks and costs associated with using the services of the SDR; and (iv) provide fair and open access and fees and charges that are equitable and non-discriminatory.

The following subsections describe in detail the Regulations proposed by the Commission to implement SDR statutory duties set forth in Section 21(c) of the CEA.

1. Acceptance of Data—Section 21(c)(1) of the CEA

The Commission in a companion release [28] is proposing in new part 45 to

[27] Section 8a(5) of the CEA, 7 U.S.C. 12a(5), authorizes the Commission to promulgate such rules and regulations as, in the judgment of the Commission, are reasonably necessary to effectuate any of the provisions or accomplish any of the purposes of the CEA. In connection with SDRs, Section 21(a)(3)(A)(ii), 7 U.S.C. 24a(a)(3)(A)(ii) specifically requires that a SDR to be registered and maintain its registration must comply with any requirement that the Commission may impose by rule or regulation pursuant to Section 8a(5) of the CEA.

[28] *See* Commission, Notice of Proposed Rulemaking: Swap Data Recordkeeping and

Continued

the Commission's Regulations the data elements that must be reported and applicable to DCMs, DCOs, swap execution facilities ("SEFs"), foreign boards of trade ("FBOTs"),[29] SDs, MSPs and/or end-users in connection with the reporting of such swap data to SDRs.[30] These data elements and standards would include the reporting of continuation data throughout the life of the swap.[31] In addition, the Data NPRM provides specific requirements for SDRs relating to (i) determining which counterparty must report to the SDR; [32] (ii) third party facilitation of swap data reporting; [33] (iii) reporting to a single SDR in connection with the reporting of swap data; [34] (iv) required data standards; and (v) the reporting of errors and omissions.

As part of proposed § 49.10, market participants will be required to fulfill their reporting obligations to SDRs in a reliable, secure, and efficient manner. Proposed § 49.10 specifically requires that SDRs adopt policies and procedures that will enable the SDR to electronically accept data and other regulatory information.[35] These policies and procedures must provide specific technological protocols for market participants in submitting swaps data to the SDR.

Proposed § 49.10 will also require SDRs to accept all swaps in an asset classes for which they have registered. The requirement is intended to minimize the number of swaps that are not accepted by any SDR by enabling market participants to easily identify a SDR that accepts particular asset classes. As described in proposed § 49.3 relating to registration, each SDR applying for registration on Form SDR will be required to specify the specific asset classes for which it will accept swap data. Proposed § 49.2(a)(2) defines the term "asset class" as those swaps in a particular broad category of goods, services or commodities underlying a swap. The asset classes include credit, equity, interest rates, currency,[36] other commodities and such other asset classes as may be determined by the Commission.[37] In proposing these five major asset categories, the Commission considered market statistics that distinguish between those general types of underlying instruments, as well as market infrastructures that have been established for these five types of instruments. The first category would encompass the underlying of any swap which is based, in whole or in part, on one or more reference rates, such as swaps of payments determined by fixed and floating rates. The second category would encompass the underlying of any swap that is based, in whole or in part, on rates of exchange between different currencies, changes in such rates or other aspects of such rates, including a foreign exchange option. The currency asset class includes foreign exchange swaps, as defined in Section 1a(25) of the CEA. The third category would encompass the underlying of any swap that is based, in whole or in part, on one or more broad-based indices related to instruments of indebtedness, including but not limited to any swap that is an index credit default swap or a total return swap on one or more indices of debt instruments.[38] The fourth category would encompass the underlying of any swap that is based, in whole or in part, on one or more broad-based indices of equity securities, such as a total return swap on one or more equity indices. The fifth category would encompass the underlying of any swap not included in the interest rate, currency, credit or equity asset class categories, including, without limitation, any swap for which the primary underlying notional item is a physical commodity or the price or any other aspect of a physical commodity.

In addition, part 43 of the Commission's proposed regulations states that SDRs acting as "real-time disseminators" for the purposes of real-time reporting may require additional information to (1) match the real-time swap transaction and pricing data to data reported to the SDR; and/or (2) confirm that parties to a swap have reported in a timely manner pursuant to Section 2(a)(13)(F) of the CEA. Such additional information requested by an SDR acting as a real-time disseminator may include a transaction identification

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Reporting Requirements, 75 FR 76574 (Dec. 8, 2010) (the "Data NPRM").

[29] Proposed § 48.1 defines a FBOT as "any board of trade, exchange or market located outside of the United States, its territories or possessions, whether incorporated or unincorporated, where foreign agreements, contracts or transactions are entered into." *See* Commission, Notice of Proposed Rulemaking: Registration of Foreign Boards of Trade, 75 FR 70974 (Nov. 19, 2010) (expected to be codified at 17 CFR part 48). Since 1996, FBOT requests to provide direct access to their electronic trading and order matching systems (trading systems) from within the U.S. have been addressed by Commission staff via the no-action process set forth in Commission Regulation 140.99. *See, e.g.,* Deutsche Terminborse, CFTC No-Action Letter, 1994–1996 Transfer Binder], Comm. Fut. L. Rep. (CCH) ¶ 26,669 (Feb. 29, 1996), available at *http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/96-28.pdf.*

[30] As detailed in the Data NPRM, SDRs will also be required by proposed § 45.4(a) to issue unique swap identifiers ("USIs"), used to identify each particular swap transaction, when both counterparties to a swap are not SDs or MSPs. The SDR would be required to transmit the USI to each counterparty and DCO (if applicable) involved in the swap as soon as technologically practicable.

[31] *See* proposed § 45.3(b) detailed in the Data NPRM, *supra* note 28.

[32] Proposed § 45.5 establishes a mechanism for counterparties to follow in choosing the counterparty to report in situations where both counterparties have the same hierarchical status, in order to prevent confusion or delay concerning this choice. Where both counterparties are SDs, or both are MSPs, or both are non-SD/MSP counterparties, the proposed regulations require the counterparties to agree as one term of their swap transaction which counterparty will fulfill reporting obligations with respect to that swap. In addition, and notwithstanding the other provisions in proposed § 45.5, where only one counterparty to a swap is a U.S. person, the proposed Regulation would require the U.S. person to be the reporting counterparty.

[33] The Commission in proposed § 45.6 permits registered entities and counterparties to contract with third-party service providers to facilitate their reporting obligations. However, registered entities and counterparties remain fully responsible for their reporting obligations.

[34] Proposed § 45.7 would require that all swap data for a given swap must be reported to the SDR to which required primary economic terms data for that swap is first reported. The SDR receiving the initial report must transmit its own identity, together with the USI for the swap to each counterparty to the swap, to the SEF or DCM, if any, on which the swap was executed, and to the DCO, if any, to which the swap is submitted for clearing. Thereafter, the proposed Regulation requires that all data reported for the swap by any registered entity or any counterparty to the swap, and all corrections of errors and omissions in previously reported data, must be reported to that same SDR (or to its successor in the event that it ceases to operate).

[35] *See* Section 21(c)(1) of the CEA, 7 U.S.C. 24a(c)(1).

[36] Section 1a(47)(iii) of the CEA states:

Notwithstanding a written determination by the Secretary under clause (i), all foreign exchange swaps and foreign exchange forwards shall be reported to either a swap data repository, or, if there is no swap data repository that would accept such swaps or forwards, to the Commission pursuant to section 4r within such time period as the Commission may by rule or regulation prescribe.

7 U.S.C. 1a(47)(E)(iii). Clause (i) of Section 1a(47)(E) provides:

Foreign exchange swaps and foreign exchange forwards shall be considered swaps under this paragraph unless the Secretary makes a written determination under section 1b that either foreign exchange swaps or foreign exchange forwards or both—

(I) should be not be regulated as swaps under this Act; and

(II) are not structured to evade the Dodd-Frank Wall Street Reform and Consumer Protection Act in violation of any rule promulgated by the Commission pursuant to section 721(c) of that Act.

7 U.S.C. 1a(47)(E)(iii).

See also, Department of the Treasury, Notice and Request for Comments: Determination of Foreign Exchange Swaps and Forwards, 75 FR 66829 (Oct. 29, 2010) and 75 FR 66426 (Oct. 28, 2010).

[37] As detailed in proposed § 49.27, SDRs would be required to provide fair and open access to their services. The Commission submits that SDRs would not be permitted to discriminate in connection with the access to their services. As a result, market participants with sufficient technology resources for connectivity and the payment of fees would be granted access to the services of the SDR.

[38] This category does not encompass the underlying of a derivatives contract that is based on an instrument of indebtedness solely in connection with the swap's financing leg.

code, the names of the parties to the swap, or such other additional information as may be necessary.[39] Additionally, part 43 of the Commission's proposed regulations will also require registered SDRs to calculate the appropriate minimum block size for swaps for purposes of real-time reporting.

Proposed § 49.10(c) would also require an SDR to establish sufficient policies and procedures to prevent a valid swap from being invalidated, altered or modified through the confirmation or recording process of the SDR. The Commission is concerned that a validly executed swap may, through contractual provisions or other practices of an SDR, be improperly invalidated. To this end, the Commission submits that SDRs should not be in a position to alter, amend or invalidate otherwise valid swaps of counterparties through the reporting process. In addition, proposed § 49.10(d) would also require SDRs to establish procedures and provide facilities for effectively resolving disputes over the accuracy of the swap data and positions that are recorded in the SDR. In this manner, disputes can be resolved quickly and efficiently so that the integrity and reliability of SDR data reporting and recordkeeping is facilitated.

Request for Comment. The Commission requests comment on the question set forth below on acceptance of data:

(1) Should the Commission require an SDR to accept all swaps of a given asset class? If not, what other mechanism should the Commission use to prevent "orphaned" swaps (*i.e.,* those swaps not accepted by an SDR)?

(2) How should the Commission address swaps that do not clearly belong to a particular asset class or that could arguably belong to more than one asset class? Should the Commission allow an SDR that accepts swaps in one asset class to accept any swap that arguably belongs to that asset class, but which could also belong to a second asset class, without requiring the SDR to then accept all swaps in the second asset class?

(3) Are there any circumstances under which a validly, executed swap should be modified or altered other than by the express agreement of the counterparties? What should be the role of the SDR in these circumstances? Should the SDR be able to alter or modify an existing swap based on a contractual arrangement with a reporting party?

2. Confirmation of Data Accuracy—Section 21(c)(2) of the CEA

Section 21(c)(2) of the CEA, as adopted by Section 728 of the Dodd-Frank Act, requires SDRs to "confirm with both counterparties to the swap the accuracy of the data that was submitted."[40] Proposed § 49.11 provides that an SDR must establish and adopt policies and procedures to ensure the accuracy of swap data that is reported to an SDR by DCMs, DCOs, SEFs, FBOTs, SDs, MSPs and/or end-users or certain third party service providers such as confirmation or matching service providers acting on their behalf. The specific form and content of the swaps data will be established by the Commission in proposed part 45 of the Commission's regulations relating to data elements and standards. In particular, proposed § 49.11 requires that the SDR confirm with both counterparties to the swap the accuracy of the data and information submitted.[41]

Proposed § 49.11 provides that in connection with the required confirmation, the SDR must confirm with each counterparty to the swap and receive acknowledgement of all data submitted as well as corrections of any errors.[42] The acknowledgement and correction of errors must pertain to all information submitted by either counterparty or entity that has been delegated the reporting obligation. The SDR must keep a record of corrected errors and make that record available upon request to the Commission. Confirmation is unnecessary when the reporting obligation is borne by a SEF, DCM, DCO or a confirmation or matching service provider to whom the swap counterparty has delegated its reporting obligation. In these situations, the SDR must still ensure that the data and information it receives from such entity is accurate.

In addition, proposed part 43 of the Commission's regulations relating to real-time reporting requires that registered SDRs which accept and publicly disseminate swap transaction and pricing data to also disseminate any cancellations and corrections to such data.[43]

3. Recordkeeping Requirements—Section 21(c)(3) of the CEA

Proposed § 49.12, which implements Section 21(c)(3) of the CEA, requires SDRs to, in accordance with the requirements of proposed § 45.2(f), maintain the books and records of all activity and data relating to swaps reported to the SDR.[44] Proposed § 45.2(f), relating to swap data recordkeeping requirements, requires that SDRs maintain reported swap data, consistent with the data elements described in proposed § 45.9, throughout the life of such swap transaction plus an additional five year period, during which time the swap data must be readily accessible by the SDR and available to the Commission via real-time electronic access. In addition, proposed § 45.2(f) would also require the SDR to provide subsequent archival storage.[45] This archival storage would require the SDR to be able to retrieve such swap data within three business days.

Consistent with proposed § 45.2(g), proposed § 49.12(c) would also require the books and records maintained by a SDR to be open to inspection upon request by any representative of the Commission, the United States Department of Justice, the SEC or by any representative of a prudential regulator as authorized by the Commission. The SDR would be required to provide copies to the Commission, either by electronic means, in hard copy, or both, as requested by the Commission.

Proposed § 49.12(d) would require each SDR that publicly disseminates swap data in real time to comply with the real time public reporting and recordkeeping requirements prescribed in part 43. In connection with real-time reporting, proposed § 49.2(a)(9) defines "position" to mean the gross and net notional amounts of open swap transactions aggregated by one or more attributes, including, but not limited to, the (i) underlying instrument, index, or reference entity; (ii) counterparty; (iii) asset class; (iv) long risk of the underlying instrument, index, or reference entity; and (v) short risk of the underlying instrument, index, or reference entity. Position data is required to be provided by SDRs to certain entities pursuant to Section

[39] *See* proposed § 43.4(c) set forth in Notice of Proposed Rulemaking: Real Time Public Reporting of Swap Transaction Data, 75 FR 76140 (Dec. 7, 2010) (the "Real Time NPRM").

[40] Section 21(c)(2) of the CEA, 7 U.S.C. 24a(c)(2).

[41] The Data NPRM details and defines "confirmation" and "confirmation data." The term confirmation is proposed in § 45.1(b) to mean "the full, signed legal confirmation by the counterparties of all of the terms of a swap." The term "confirmation data" is proposed in § 45.1(c) to mean "all of the terms of a swap matched and agreed upon by the counterparties in confirming the swap." *See* Data NPRM, *supra* note 28.

[42] This requirement does not apply to real-time public reporting. *See* proposed § 43.3(f), *supra* note 39.

[43] *See* proposed Regulations 43.3(f)(3)–(4), *supra* note 39.

[44] *See* Data NPRM, *supra* note 28.

[45] The Commission in the Data NPRM is requesting comment relating to the time period in which an SDR should be required to maintain archival storage of swap data records.

2(a)(13) of the CEA.[46] The proposed term is designed to be sufficiently specific so that SDRs are aware of the types of positions that regulators may require an SDR to provide, while at the same time, provide enough flexibility to encompass the types of positions that regulators and the industry will find important as new types of swaps are developed.

The Dodd-Frank Act specifically directs the Commission to issue regulations to limit the amount of positions, other than bona fide hedge positions, that may be held by any person with respect to commodity futures and option contracts in exempt and agricultural commodities.[47] The Data NPRM accordingly has proposed data reporting requirements that would require all persons reporting to SDRs to include futures contract equivalents for each swap transaction.[48] As set forth below, the Commission requests comment on position data and how it should be maintained and monitored.

Request for Comment. The Commission requests comment on the questions set forth below on data maintenance:

(1) Is the appropriate time period for readily accessible access to the transaction data the life of the particular swap plus at least five years after expiration of the swap? Should the Commission provide different recordkeeping requirements for transaction data and position data? For transaction data, would ten years after expiration of the applicable swap be more appropriate and why? What would be the benefits and burdens associated with each of these time periods? Are there other retention periods that would be more appropriate?

(2) What is the appropriate time period for archival storage of SDR data and records?

(3) What are the costs/benefits of requiring longer data retention requirements?

(4) Should position data be maintained and monitored by SDRs? If not, in what manner should the Commission monitor speculative position limits that may include swaps? What would be the proper role of an SDR? What entity or entities should have the responsibility to aggregate and maintain the position data for regulatory purposes?

(5) Should the Commission specify particular standards or procedures for calculating positions?

4. Direct Electronic Access to SDR by the Commission—Section 21(c)(4) of the CEA

A critical function and responsibility of an SDR as set forth in Section 21(c)(4)(A) of the CEA is to provide "direct electronic access" to the Commission or its designee, which could include another registered entity.[49] For purposes of proposed § 49.17, "direct electronic access" is defined as "an electronic system, platform or framework that provides internet or web-based access to real-time swap transaction data."[50]

Proposed § 49.17 provides for two requirements in connection with "direct electronic access" that each SDR must develop. First, proposed § 49.17 would require a SDR to provide the Commission or its designee with connectivity and access to the SDR's database of swap data and web-based services. Connectivity access and web-based services will allow the Commission or its designee to receive any and all information regarding a swap transaction that may be required for regulatory, examination and/or enforcement purposes on a real-time basis. Second, proposed § 49.17 would also require the SDR to electronically deliver to the Commission or its designee, certain data in the form and manner prescribed by the Commission.

Section 21(c)(5) of the CEA requires a registered SDR, at the direction of the Commission, to establish automated systems for monitoring, screening, and analyzing swap data. Pursuant to proposed § 49.17,[51] registered SDRs in connection with providing "direct electronic access" will also be required to provide the Commission with monitoring tools, capable of screening and analyzing swap data, identical to those provided to compliance staff and the CCO of the registered SDR, including, but not limited to, access to the staff of the registered SDR and/or third party service providers or agents familiar with the operations of the registered SDR, who can provide assistance to the Commission regarding data structure and content, web-based services and various software.

Proposed § 49.17 further provides that the swap data provided to the Commission by a registered SDR will be accessible only by authorized persons. The Commission will provide registered SDRs with a list of authorized users on a quarterly basis so that proper security protocols may be efficiently implemented.

Request for Comment. The Commission requests comment on the following issues related to swap data access.

(1) What are the advantages and disadvantages of requiring SDRs to provide a direct streaming of the data to the Commission or its designee? Should the Commission require periodic electronic transfer of data as an alternative? If so, how often should such transfer occur (*e.g.,* hourly, a few times a day, every few days, once a week)?

(2) What are the advantages and disadvantages of requiring SDRs to provide a user interface that permits the Commission or its designee access to the data maintained by the SDR and that provides the Commission or its designee with the ability to query or analyze the data in the same manner that is available to the SDR?

(3) What would be the most feasible and cost-effective method for an SDR to provide direct electronic access to the Commission or its designee?

(4) Are there other methods of providing direct electronic access to the Commission or its designee that the Commission should consider?

(5) Are there specific reports or sets of data that the Commission should consider obtaining from SDRs to monitor risk exposures of individual counterparties to swap transactions, to monitor concentrations of risk exposures, or for other purposes?

(6) In addition to the data already subject to the Commission's request, are there additional reports or sets of data that the Commission should consider obtaining from SDRs to evaluate systemic risk or that could be used for prudential supervision?

(7) Are there any other reports or sets of data that the Commission should consider obtaining from SDRs?

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[46] *See* Section 727 of the Dodd-Frank Act.

[47] *See* Commission, Notice of Proposed Rulemaking: Position Reports for Physical Commodity Swaps, 75 FR 67258 (November 2, 2010). The Commission in this proposal would require position data for not only futures and option contracts but also for economically equivalent swaps.

[48] *See* Data NPRM, *supra* note 28.

[49] The term "registered entity" is defined in Section 1a(40) of the CEA to include (i) a board of trade designated as a contract market under Section 5 of the CEA; (ii) a DCO registered under Section 5b of the CEA; (iii) a SEF registered under Section 5h of the CEA; (iv) a SDR registered under Section 21 of the CEA; and (v) with respect to a contract that the Commission determines is a significant price discovery contract, any electronic trading facility on which the contract is executed or traded. 7 U.S.C. 1a(40).

[50] *See* proposed § 49.17(b)(3).

[51] Section 21(c)(5) of the CEA reads: "A swap data repository shall— * * * at the direction of the Commission, establish automated systems for monitoring, screening, and analyzing swap data, including compliance and frequency of end user clearing exemption claims by individual and affiliated entities."

7 U.S.C. 24a(c)(5).

5. Monitoring, Screening and Analyzing Swap Data—Section 21(c)(5) of the CEA

Section 21(c)(5) of the CEA, as amended by Section 728 of the Dodd Frank Act, requires SDRs to implement such automated systems for "monitoring, screening, and analyzing swap data" as the Commission may direct. In addition, Section 21(c)(5) also requires SDRs to establish automated systems to monitor, screen, and analyze data for end-user clearing exemption claims by individuals and affiliated entities." The Commission proposes to implement the requirements of Section 21(c)(5) through proposed §§ 49.13 and 49.14, which closely resembles the statutory text, by requiring SDRs to monitor, screen, and analyze swap data in their possession, as directed by the Commission, including data related to end-user clearing exemptions claims.[52] Proposed § 49.13 also requires SDRs to establish and maintain sufficient information technology, staff, and other resources to fulfill these tasks. Section 21 of the CEA reflects SDRs' significant responsibilities in the new swaps market regulatory structure established by the Dodd-Frank Act. SDRs will function not only as warehouses for all swap transaction data, but also as potential sources of regulatory information for the Commission and other appropriate regulators.

By its terms, Section 21(c)(5), requires that such automated systems be established "at the direction of the Commission," but does not provide for specific functions which SDRs should undertake with respect to the swap transaction data in their possession.[53] Similarly, while suggesting a role for SDRs in monitoring end-user clearing exemption claims, the only specific requirement of Section 21(c)(5) is that SDRs have systems in place capable of fulfilling such requirements as the Commission may assign. The Commission proposes to implement the requirements of Section 21(c)(5) via proposed § 49.13 which, as summarized below, requires that SDRs: (1) Monitor, screen, and analyze all swap data in their possession as the Commission may require; (2) develop systems and resources as necessary to execute any monitoring, screening, or analyzing functions assigned by the Commission; and (3) monitor, screen, and analyze swap transactions which are reported to the SDR as exempt from clearing pursuant to Section 2(h)(7) of the CEA (*i.e.,* end-user clearing exemption).

(a) Proposed § 49.13(a)

Proposed § 49.13(a) requires SDRs to monitor, screen, and analyze all swap data in their possession in such a manner as the Commission may require. An SDR's duties in this respect include routine monitoring, screening, and analysis to accomplish any swap surveillance objectives established by the Commission, and specific monitoring, screening, and analysis tasks based on *ad hoc* requests by the Commission. The Commission expects that SDRs will be required to compile, extract, filter, and report information necessary to assist the Commission in the fulfillment of its regulatory obligations with respect to swap markets. However proposed § 49.13(b) only requires that SDRs undertake these functions at the Commission's request. The Commission will consider specific tasks to be performed by SDRs at a later date, as its knowledge of the regulatory oversight needs with respect to the swap markets increases.

(b) Proposed § 49.13(b)

Proposed § 49.13(b) obligates SDRs to maintain sufficient information technology, staff, and other resources as necessary to fulfill any requirements that may arise through proposed § 49.13(a). It also requires SDRs to monitor their resources at least annually, and to make adjustments as needed to remain in regulatory compliance. Proposed § 49.13(b) is modeled on existing and proposed Commission requirements applicable to other registered entities. For example, part 38 of the Commission's Regulations requires DCMs to have "arrangements and resources for effective trade practice surveillance" and "arrangements, resources and authority for effective rule enforcement."[54] With respect to SDRs, the Commission also recognizes the necessity for adequate resource requirements given its expectation that SDRs may play a significant role in assisting the Commission to fulfill its regulatory mandate.

(c) Proposed § 49.14

Pursuant to Section 2(h)(7) of the CEA, the Dodd-Frank Act creates a framework by which certain swap transactions may be exempt from the mandatory clearing requirement.[55] Swap transactions may be exempt from clearing if one of the counterparties to a swap is (i) not a financial entity;[56] (ii) is using swaps to hedge or mitigate commercial risk;[57] and (iii) notifies the Commission as to how it generally meets its financial obligations associated with entering into non-cleared swaps (the so-called "end-user" clearing exemption).[58] The Commission is expected in a subsequent proposed rulemaking to require that swap counterparties claiming the clearing exemption submit supplemental information along with transaction data and notification for any swap transaction claimed under the clearing exception. Counterparties may be required to answer entity-related identification questions, identify how they generally expect to meet their financial obligations associated with the non-cleared swaps, identify whether the swap claimed under the exemption is being used to hedge or mitigate commercial risk, and identify whether the transaction was approved by a governing body of the entity.

Section 2(h)(7) of the CEA—and more specifically Section 2(h)(7)(F) of the CEA—also enables the Commission to monitor the use of clearing exemption claims and to prevent abuses by prescribing rules, issuing interpretations, or requesting information from persons claiming the clearing exemption.[59] Although exempt from clearing, counterparties claiming the clearing exemption must nonetheless report the swap transaction to an SDR, and must provide the notification required pursuant to Section 2(h)(7)(A)(iii) of the CEA, including information regarding how the counterparty generally meets its financial obligations associated with non-cleared swaps, and any additional information which the Commission deems necessary to prevent abuse pursuant to Section 2(h)(7)(F) of the CEA.

Proposed § 49.14 is designed to implement the Commission's program

[52] Section 2(h)(7) of the CEA, 7 U.S.C. 2(h)(7) provides that the clearing requirement of Section 2(h)(1)(A) shall not apply to a swap if one of the counterparties (i) is not a financial entity; (ii) is using swaps to hedge or mitigate commercial risk; and (iii) notifies the Commission, in a manner set forth by the Commission, how it generally meets the financial obligations associated with entering into non-cleared swaps.

[53] *Id.*

[54] *See* 17 CFR 38, Appendix B, Core Principle 2(a)(1)–(2). *See also* Notice of Proposed Rulemaking Relating to Core Principle and Other Requirements for Designated Contract Markets approved for publication by the Commission at an open meeting on Dec. 1, 2010 and expected to be published shortly in the **Federal Register** (to be codified at 17 CFR part 38).

[55] *See* Section 2(h)(1)(A) of the CEA, 7 U.S.C. 2(h)(1)(A).

[56] *See* Section 2(h)(7)(A)(i) of the CEA, 7 U.S.C. 2(h)(7)(A)(i).

[57] *See* Section 2(h)(7)(A)(ii) of the CEA, 7 U.S.C. 2(h)(7)(A)(ii).

[58] *See* Section 2(h)(7)(A)(iii) of the CEA., 7 U.S.C. 2(h)(7)(A)(iii).

[59] *See* Section 2(h)(7)(F) of the CEA, 7 U.S.C. 2(h)(7)(F).

to monitor and prevent abuse of end-user clearing exemption claims. It requires SDRs to have automated systems capable of identifying, aggregating, sorting and filtering all swap transactions reported to an SDR that are exempt from clearing pursuant to Section 2(h)(7) of the CEA. Such systems are also required for information provided by end-users to the SDR regarding how an end-user meets the requirements of Sections 2(h)(7)(A)(i)–(iii) of the CEA and any regulations promulgated by the Commission thereunder. The Commission believes it is important to monitor the use and claims of end user exemptions to prevent abuse and assure compliance with the required disclosures. At this time the Commission is only requiring that SDRs establish the infrastructure to fulfill the requirements of this rule, and any requirements for specific data processing will be set forth at a later time.

Request for Comment. The Commission requests comment on the following issue relating to the monitoring of margin.

• Should the Commission require SDRs to establish automated systems for monitoring, screening, and analyzing the reporting of margin required, and of margin on deposit, as proposed in new part 23 of the Commissions Regulations? [60]

6. Maintenance of Data Privacy—Section 21(c)(6) of the CEA

Proposed § 49.16 would implement the statutory requirements of Section 21(c)(6) of the CEA as adopted by Section 728 of the Dodd-Frank Act to maintain the privacy and confidentiality of swap data provided to the SDR. In particular, Section 21(c)(6) of the CEA provides that an SDR shall "maintain the privacy of any and all swap transaction information that the swap data repository receives from a SD, counterparty, or any other registered entity".[61] Proposed § 49.16 would also partially implement Section 21(f)(3) of the CEA, as adopted by Section 728 of the Dodd-Frank Act.[62] Such section sets forth a conflicts of interest "core principle" applicable to an SDR.[63] As detailed further below, the Commission has identified certain conflicts that may implicate access, disclosure, or use of SDR Information.[64] SDR Information includes any information that an SDR receives from a reporting entity (*i.e.,* the submitter(s) of the data, including, without limitation, market participants [65] such as DCMs, DCOs, SEFs, SDs, MSPs, end-users and/or any other counterparties). The Commission emphasizes that SDRs will receive two separate "streams" of data: (i) data related to real-time public reporting which by its nature is publicly available and (ii) core data that is intended for use by the Commission and other regulators which is subject to statutory confidential treatment. Accordingly, pursuant to Sections 21(c)(6) and 21(f)(3) (Core Principle 3—Conflicts of Interest) of the CEA, SDR information that is not subject to real-time public reporting should be treated as non-public and strictly confidential, so that it may not be accessed, disclosed, or used for purposes not related to SDR responsibilities under the CEA or the regulations thereunder, unless such use is explicitly agreed to by the reporting entities (*i.e.,* the submitter(s) of the data). However, aggregated data that cannot be attributed to individual transactions or market participants may be made publicly available by SDRs.

Request for Comment. The Commission requests comment on the questions set forth below regarding the limitations on the use of SDR Information.

(1) Has the Proposal correctly defined "SDR Information"?

(2) Are there any other concerns regarding the use of SDR Information that the Commission should consider?

(3) Would public availability of aggregated swap data be consistent with an SDR's obligation to keep swap data confidential?

Proposed § 49.16 would require the SDR to establish, maintain, and enforce specific policies and procedures to protect the privacy or confidentiality of any and all SDR Information. This would also include privacy or confidentiality policies and procedures for the sharing of SDR Information with SDR affiliates [66] as well as certain non-affiliated third parties.[67] As noted above, swap data that is publicly disseminated in real-time by SDRs pursuant to proposed part 43 of the Commission's Regulation would not be subject to the privacy and confidentiality requirements set forth in proposed § 49.16.

Proposed § 49.16 would also require the SDR to establish and maintain safeguards, policies, and procedures that would, at a minimum, address the misappropriation or misuse of swap data that the Commission is prohibited (save for limited exceptions) from disclosing pursuant to Section 8 of the CEA ("Section 8 Material").[68] Section 8 Material is that information or material described in Section 8(a) of the CEA that the Commission is prohibited from publishing if it "would separately disclose the business transactions or market positions of any person and trade secrets or names of customers." [69]

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[60] *See* Commission, Notice of Proposed Rulemaking: Regulations Establishing and Governing Duties of Swap Dealers and Major Swap Participants, 75 FR 71397 (Nov. 23, 2010).

[61] *See* Section 21(c)(6) of the CEA, 7 U.S.C. 24a(c)(6).

[62] *See* Section 21(f)(3) of the CEA, 7 U.S.C. 24a(f)(3).

[63] According to such "core principle," each SDR shall "establish and enforce rules to minimize conflicts of interest in [its] decision-making process * * *" and "establish a process for resolving conflicts of interest * * *" *Id.*

[64] The term "SDR Information" is defined in proposed § 49.2(a)(15) to mean "any information that the swap data repository maintains." Proposed § 49.17(f) and (g) contain more specific prohibitions on access or use of SDR Information.

[65] The term "market participant" is defined in proposed § 49.2(a)(6) to mean any person participating in the swap market, including, but not limited to, DCMs, DCOs, SEFs, SDs, MSPs, and any other counterparties to a swap transaction.

[66] The term "affiliate" is defined in proposed § 49.2(a)(1) to mean a person that "directly, or indirectly, controls, is controlled by, or is under common control with, the swap data repository."

[67] The term "non-affiliated third party" is defined in proposed § 49.2(a)(7) to mean "any person except (i) swap data repository, (ii) the swap data repository's affiliate, or (iii) a person employed by a swap data repository and any entity that is not the swap data repository's affiliate (and "non-affiliated third party" includes such entity that jointly employs the person)."

[68] The term "Section 8 Material" is defined in proposed § 49.2(a)(13) as "the business transactions, trade data, or market positions of any person and trade secrets or names of customers." The legislative history of Section 8 of the CEA reflects substantial Congressional concern with protecting the legitimate interests of certain market participants. In particular, Congressional members were concerned that "bona fide hedging transactions" and "legitimate" or "necessary" speculative transactions would be impracticable if disclosure of positions or transactions was permitted. Congress was also concerned that publication of the names and market positions of large traders would facilitate manipulation and place traders at a competitive disadvantage. Section 8(e) generally provides that "upon request," the CFTC may furnish "any information" in its possession. 7 U.S.C. 12(e). *See generally* 61 Cong. Rec. 1321 (1921); Regulation of Grain Exchanges, Hearing on H.R. 8829 Before the H. Comm. on Agriculture, 73rd Cong. (1934).

[69] Section 8(a) of the CEA outlines the scope and authority of the Commission to publish or otherwise publicly disclose information that is gathered in the course of its investigative and market surveillance activities. While the Section authorizes the Commission to publish or disclose the information obtained through the use of its powers, it expressly provides that, except in specifically prescribed circumstances, the Commission may not lawfully:

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).

The statutory bar to disclosure of "business transactions, market positions and trade secrets" is qualified by several narrowly-defined exceptions set forth in Section 8(e) of the CEA. 7 U.S.C. 12(e). Section 8(e) generally provides that "upon request,"

Such information would typically include trade data, position data, business transactions, trade secrets and any other non-public personal information about a market participant or any of its customers. Moreover, proposed § 49.16 would require an SDR to also protect SDR information that is not Section 8 Material as well as intellectual property that may include trading strategies.

The Commission submits that the abovementioned SDR safeguards, policies, and procedures addressing privacy and confidentiality—as well as misuse and misappropriation—of data should provide (i) limitations on access related to Section 8 Material and other SDR Information; (ii) standards related to controlling persons associated with the SDR trading for their personal benefit or the benefit of others; and (iii) adequate oversight to ensure SDR compliance with proposed § 49.17. As set forth in proposed § 49.17 discussed below in the section entitled "Access to SDR Data," the SDR may share swap data and information with certain appropriate domestic and foreign regulators. Commercial use of the data maintained by an SDR—exclusive of real-time reporting data—would be strictly circumscribed as provided in proposed § 49.17.

7. Access to SDR Data—Section 21(c)(7) of the CEA

Section 21(c)(7) [70] of the CEA requires a registered SDR, on a confidential basis pursuant to Section 8 of the CEA, upon request and after notifying the Commission, to make available all data [71] obtained by the registered SDR, to "Appropriate Domestic Regulators" and "Appropriate Foreign Regulators."

(a) *Appropriate Domestic Regulator.* An "Appropriate Domestic Regulator" is defined in proposed § 49.17 as (i) the SEC; (ii) each prudential regulator identified in Section 1a(39) of the CEA with respect to requests related to any of such regulator's statutory authorities, without limitation to the activities listed for each regulator in Section 1a(39); (iii) the Financial Stability Oversight Council ("FSOC"); [72] (iv) the Department of Justice; (v) the Federal Reserve Bank of New York ("FRBNY"); (vi) the Office of Financial Research ("OFR") [73] and (vii) any other person the Commission deems appropriate.[74]

Although Section 21(c)(7) of the CEA does not specifically provide for the sharing of information between an SDR and the FRBNY or OFR, the Commission in proposed § 49.17 is proposing to deem the FRBNY and OFR as "appropriate" persons under Section 21(c)(7) of the CEA. The FRBNY is one of 12 regional Federal Reserve Banks, which together with the Board of Governors of the Federal Reserve System comprise the Federal Reserve System. Each of the Federal Reserve Banks has features and/or characteristics of private corporations and quasi-public federal agencies.[75] OFR will be an office within the Department of the Treasury with the primary function to support the FSOC in the monitoring and containment of systemic risk. OFR will also be a resource for the FSOC and all of its member agencies. In particular, OFR will support the agencies in their efforts to supervise financial institutions and the financial system as well as in their work to implement the Act. In addition, regulatory agencies will have access to new data collected by the OFR, which will improve regulators' ability to monitor risks within their respective focus areas.

(b) *Appropriate Foreign Regulator.* An "Appropriate Foreign Regulator" is defined in proposed § 49.17 and contains a two-part analysis. First, proposed § 49.17 defines as an Appropriate Foreign Regulator as those "foreign regulators" [76] with an existing memorandum of understanding ("MOU") or other similar type of information sharing arrangement executed with the Commission. Second, proposed § 49.17 provides that foreign regulators without an MOU with the Commission may be deemed "Appropriate Foreign Regulators" as determined on a case-by-case basis by the Commission.

Proposed § 49.17 details the filing procedures for foreign regulators who do not currently have an MOU with the Commission to obtain the status of an "Appropriate Foreign Regulator." The foreign regulator in its application [77] filed with the Commission is required to provide sufficient facts and details to permit the Commission to analyze whether the foreign regulator has appropriate confidentiality procedures and whether the foreign regulator is otherwise subject to local laws, regulations and/or customs that would require disclosure of information in contravention of the CEA.

In its review of applications filed by foreign regulators seeking the status of an "Appropriate Regulator" under proposed § 49.17, the Commission must

the CFTC may furnish "any information" in its possession "obtained in connection with its administration of the [CEA]" to another U.S. government department or agency, individual states, foreign futures authorities and foreign governments and any committee of the U.S. Congress that is "acting within the scope of its jurisdiction." *Id.* In addition, Section 8(e) also provides an exception for information that was previously disclosed publicly and Section 8(b) permits disclosure of Section 8 Material in connection with congressional, administrative or judicial proceedings. *Id.*

[70] Section 21(c)(7) of the CEA reads:

A swap data repository shall— * * * on a confidential basis pursuant to Section 8, upon request, and after notifying the Commission of the request, make available all data obtained by the swap data repository, including individual counterparty trade and position data, to—(A) each appropriate prudential regulator; (B) the Financial Stability Oversight Council; (C) the Securities and Exchange Commission; (D) the Department of Justice; and (E) any other person that the Commission determines to be appropriate * * *.

7 U.S.C. 24a(c)(7). Included in the definition of Appropriate Domestic Regulators are all domestic entities listed in Section 21(c)(7) and other persons that the Commission has determined to be appropriate.

[71] The sharing of data with an Appropriate Domestic Regulator by a registered SDR is subject to the confidentiality and indemnification restrictions in Section 21(d) of the CEA, 7 U.S.C. 24a(d).

[72] FSOC consists of the Department of the Treasury ("Treasury"), the Board of Governors of the Federal Reserve System (the "Fed"), the Office of the Comptroller of the Currency ("OCC"), the Bureau of Consumer Financial Protection, the SEC, the Commission, the Federal Deposit Insurance Corporation ("FDIC"), the Federal Housing Financial Agency, National Credit Union Administration Board and an independent member appointed by the President, by and with the advice and consent of the Senate, having insurance expertise.

[73] Under Section 152 of the Dodd-Frank Act, OFR will be established within the Department of the Treasury. OFR is intended to help facilitate improved financial market data gathering and analyses for financial regulators, including the new FSOC, which is responsible for monitoring the financial system as a whole in order to promote financial stability. OFR will support the FSOC and its member agencies by providing them with better financial data, information, and analysis so that policymakers and market participants have a more complete understanding of risk in the financial system. The data and analysis provided by the OFR will enhance the ability to identify emerging threats in financial markets, and will help ensure that the government has the information and analytical tools it needs to respond appropriately to future crises.

[74] The definition of "Appropriate Domestic Regulator" set forth above specifically includes those federal agencies or departments that are identified as prudential regulators in Section 1a(39) of the CEA. Each prudential regulator will have access to all data related to any of its statutory authorities, without limitation to the activities listed for each regulator in Section 1a(39).

[75] The FRBNY oversees the Second Federal Reserve District, which includes the state of New York, the 12 northern counties of the state of New Jersey, Fairfield County in the state of Connecticut, Puerto Rico and the U.S. Virgin Islands. Though it serves a geographically small area compared with those of other Federal Reserve Banks, the FRBNY is the largest Reserve Bank as measured by assets and volume of activity.

[76] The term "foreign regulator" is defined in proposed § 49.2(a)(4) to mean "a foreign futures authority as defined in Section 1a(26) of the Commodity Exchange Act, foreign financial supervisors, foreign central banks and foreign ministries."

[77] The form and manner of this filing will be prescribed by the Commission.

be satisfied that any information potentially provided by a registered SDR will not be disclosed except in limited circumstances such as an adjudicatory action or proceeding involving the foreign regulator.[78] In addition, the Commission on an ongoing basis, reserves the right in connection with any determination of an "Appropriate Foreign Regulator" to revisit or reassess a prior determination consistent with the CEA.

(c) *Procedure for Gaining Access to an SDR.* Pursuant to proposed § 49.17, an Appropriate Domestic Regulator or Appropriate Foreign Regulator will be required to request access with the registered SDR. The request will set forth in sufficient detail the basis for such request. The Appropriate Domestic Regulator or Appropriate Foreign Regulator must also certify (i) its statutory authority and (ii) that it is acting within the scope of its jurisdiction.

A registered SDR must notify the Commission promptly by electronic means of any request received from an Appropriate Domestic Regulator or Appropriate Foreign Regulator. The registered SDR will then provide access to the requested swap data if satisfied that the Appropriate Domestic or Appropriate Foreign Regulator is acting within the scope of its authority.

Request for Comment. The Commission requests the following comments relating to regulator access of data maintained by SDRs.

(1) What mechanisms or other processes should the Commission consider in connection with Appropriate Domestic Regulators and/or Appropriate Foreign Regulators access to the data maintained by SDRs?

(2) Should the Commission provide that Appropriate Domestic Regulators and Appropriate Foreign Regulators specifically request access from an SDR for each individual data request? Or, should the Commission provide for a single prospective data access request to SDRs by Appropriate Domestic and Foreign Regulators followed up by a certification at intervals determined by the Commission? For each specific instance of access or regulatory use of an SDR's data by Appropriate Domestic Regulators and Appropriate Foreign Regulators, should the Commission be notified in each case by the SDR?

(3) Given the regulatory outlines set forth by the Dodd-Frank Act, what would be an appropriate way for regulators to access the swap data held by SDRs for the purpose of fulfilling their regulatory responsibilities?

(d) *Confidentiality and Indemnification Agreement.* Consistent with proposed § 49.18, the Appropriate Domestic Regulator or Appropriate Foreign Regulator prior to receipt of any requested data or information from a registered SDR must execute a "Confidentiality and Indemnification Agreement" with the registered SDR. This requirement is mandated by Section 21(d) of the CEA and applies to those entities set forth in Section 21(c)(7) of the CEA. Upon execution of a Confidentiality and Indemnification Agreement with a registered SDR, the Appropriate Domestic Regulator or Appropriate Foreign Regulator is required to notify and provide a copy of the Confidentiality and Indemnification Agreement to the Commission.

The specific entities identified in Section 21(c)(7) include: (i) Each appropriate prudential regulator specified in Section 1a(39) of the; (ii) FSOC; (iii) SEC; (iv) Department of Justice; and (v) any other person the Commission deems appropriate, including foreign financial supervisors, foreign central banks and foreign ministries. Pursuant to the general authority of the Commission as set forth in Section 21(c)(7)(E) of the CEA to deem any other person "appropriate," the Commission proposes, for purposes of this Regulation, to deem "appropriate" the FRBNY, OFR and those foreign regulators with an existing MOU or other similar type of information sharing arrangement executed with the Commission.[79]

Proposed § 49.18 implementing Section 21(d) of the CEA requires that the Confidentiality and Indemnification Agreement executed with each Appropriate Domestic Regulator and/or Appropriate Foreign Regulator provide that such entity abide by the confidentiality requirements set forth in Section 8 of the CEA relating to the swap data that is to be provided by the registered SDR. Moreover, the Confidentiality and Indemnification Agreement must also provide that each Section 21(c)(7) entity agree to indemnify the registered SDR and the Commission for any expenses arising from litigation relating to the information provided under Section 8 of the CEA.

The Commission is mindful of the potential difficulty that certain domestic and foreign regulators may have in executing a Confidentiality and Indemnification Agreement with an SDR pursuant to Section 21(d) of the CEA[80] due to various statutory laws, regulations and/or customs. This provision could have the unintended effect of inhibiting access to the data maintained by SDRs, and, possibly hindering the ability of certain foreign regulators to fulfill their corresponding statutory mandates. To promote and ensure international harmonization as envisioned in Section 752 of the Dodd-Frank Act, the Commission continues to coordinate with its foreign regulatory counterparts on pending and proposed regulatory initiatives. To the extent consistent with the regulatory framework set forth in the Dodd-Frank Act, and the CEA generally, the Commission will endeavor to provide sufficient access to SDR data to appropriate domestic and foreign regulatory authorities.

The Commission believes that access to the swap data maintained by SDR will assist regulators to, among other things, monitor risk exposures of individual counterparties to swap and swap transactions, monitor concentrations of risk exposures, and evaluate systemic risks. The Commission notes that, pursuant to Section 8(e) of the CEA, the Commission may share confidential information in its possession obtained in connection with its administration of the CEA to "any foreign futures authority, department or agency of any foreign government or any political subdivision thereof" acting within the scope of their jurisdiction.[81]

Request for Comment: The Commission requests comment from those regulators that may be affected by Section 21(d) of the CEA and the proposed related Regulations. In particular, the Commission requests comment on the following questions:

- Are the proposed time frames for Commission response relating to access to swap data maintained by a SDR by Appropriate Domestic and Appropriate Foreign Regulators reasonable? Should the Commission provide for an expedited or emergency procedure?

[78] *See supra* text accompanying note 69.

[79] Any other Foreign Regulator that would require access to SDR data would need to be specifically approved and deemed "appropriate" by the Commission as set forth in proposed § 49.17.

[80] Section 21(d) of the CEA provides:

Before the swap data repository may share information with any entity described in subsection (c)(7)–(1) the swap data repository shall receive a written agreement from each entity stating that the entity shall abide by the confidentiality requirements described in Section 8 relating to the information on swap transactions that is provided; and (2) each entity shall agree to indemnify the swap data repository and the Commission for any expenses arising from litigation related to the information provided under section 8.

See 7 U.S.C. 24a(d).

[81] *See* 7 U.S.C. 12(e).

(e) *Access to SDRs by Third Party Service Providers.* Section 21(c)(3) [82] of the CEA directs registered SDRs to maintain data in such form and manner as may be required by the Commission. Section 21(c)(6) [83] of the CEA requires registered SDRs to maintain the privacy of any and all swap data that the registered SDR receives from a SD, counterparty, or any other registered entity. The operations of registered SDRs may require them to provide occasional access to data and information to third party service providers for the purpose of obtaining certain technology and SDR infrastructure services. Proposed § 49.17 permits such access provided these third party service providers have implemented strict confidentiality procedures that protect data and information from improper disclosure. Prior to swap data access, third party service providers will be required to execute a "Confidentiality Agreement" setting forth minimum confidentiality procedures and permissible uses of data received.

(f) *Access to SDRs by Market Participants.* Section 21(c)(6) of the CEA requires registered SDRs to maintain the privacy and confidentiality of any and all swap transaction information that the registered SDR receives from a SD, counterparty, or any other registered entity. As mentioned above, Section 21(f)(3) [84] of the CEA requires an SDR to establish and enforce rules to mitigate conflicts of interest, among other things. As detailed further below, the Commission has identified certain conflicts that may implicate access to SDR Information. Consequently, in partial implementation of Sections 21(c)(6) and 21(f)(3) of the CEA, proposed § 49.17 generally prohibits access to swaps data maintained by a registered SDR by market participants, such as commercial end-users, SDs and MSPs *unless* the specific data was originally submitted by such party.

(g) *Commercial Use of Data Maintained by the SDR.* As outlined by Sections 21(c)(6) and (c)(7) of the CEA, Congress in the Dodd-Frank Act was concerned with maintaining the confidentiality of information provided to registered SDRs by SDs, counterparties or any other Commission-registered entity.[85] Furthermore, as outlined in Section 21(f)(3) of the CEA, Congress in the Dodd-Frank Act was concerned that conflicts of interest may affect SDR operations. As detailed below, the Commission has identified certain conflicts of interest that may implicate commercial use of SDR Information (other than swap data subject to real-time public dissemination). In response to concerns reflected in Sections 21(c)(6), 21(c)(7), and 21(f)(3), the Commission believes that "commercial use" of any data submitted and maintained by an SDR must be severely restricted. The privacy and confidentiality concerns set forth in Section 21(c)(6) of the CEA do not apply to the swap data subject to proposed part 43 of the Commission's Regulations, which set forth the requirements for real-time public reporting of swap data by SDRs.

Therefore, in partial implementation of Sections 21(c)(6), 21(c)(7), and 21(f)(3), proposed § 49.17 generally provides that SDR Information (as defined in proposed § 49.2(a)(13)) may not be used for commercial or business purposes by the registered SDR or any of its affiliated entities. In connection with its obligation to maintain the privacy and confidentiality of SDR Information as outlined in Sections 21(c)(6), 21(c)(7), and 21(f)(3) of the CEA, registered SDRs are required to adopt and implement adequate "firewalls" to protect the swaps data required to be maintained under proposed § 45.2 [86] and Section 21(c)(3) of the CEA from any improper, commercial use.

Proposed § 49.17 permits a limited exception to the commercial use restrictions for market participants, such as end-users, SDs and MSPs, who submit SDR Information maintained by the registered SDR. The exception requires that the registered SDR must receive the express written consent of the counterparties to the swap. The Commission is concerned that a registered SDR may attempt to use this limited "commercial use" exception as a condition for the reporting of end-users, SDs and/or MSPs swap transactions. Accordingly, in proposed § 49.27 the Commission submits that a registered SDR must be equitable and must not discriminate against submitters of data regardless of whether such a submitter has agreed to any "commercial use" of its data.

8. Emergency Procedures—Section 21(c)(8) of the CEA

Section 21(c)(8) of the CEA, as amended by Section 728 of the Dodd-Frank Act, provides that a "swap data repository shall establish and maintain emergency procedures, backup facilities, and a plan for disaster recovery that allows for the timely recovery and resumption of operations and the fulfillment of the responsibilities and obligations of the organization." [87] Section 21(c)(8) of the CEA reflects SDRs' critical role as central storehouses of information in the new swap market structure established by the Dodd-Frank Act. In particular, it recognizes that SDRs must be available to meet their statutory obligations in all circumstances, and that swap data must be readily accessible to the Commission and other regulators even in emergency situations. To effectuate the purposes of Section 21(c)(8) of the CEA, the Commission proposes § 49.23, which requires SDRs to adopt specific policies and procedures for the responsible exercise of emergency authority in the event of natural, man-made, information technology, and other, emergencies.

While SDRs are a new type of registered entity created by Dodd-Frank, proposed § 49.23 applies existing emergency procedure concepts borrowed from analogues in the Commission's regulatory experience. For example, prior to the enactment of the Dodd-Frank Act, DCMs were subject to former DCM Core Principle 6, which contemplated exigent circumstances that might justify the exercise of emergency authority by a DCM.[88] The application guidance for former DCM Core Principle 6 set forth the Commission's requirements for emergency procedures. It stated, in part, that a DCM "should have clear procedures and guidelines for contract market decision-making regarding emergency intervention in the market, including procedures and guidelines to avoid conflicts of interest while carrying out such decision making." [89] The application guidance also stated that a DCM's procedures and guidelines for the exercise of emergency authority should include "notifying the Commission of the exercise of [emergency authority], explaining how conflicts of interest are minimized, and documenting the contract market's decision-making process and the

[82] Section 21(c)(3) reads: "A swap data repository shall— * * * maintain the data described in paragraph (1) in such form, in such manner, and for such period as may be required by the Commission." 7 U.S.C. 24a(c)(3).

[83] Section 21(c)(6) reads: "A swap data repository shall— * * * maintain the privacy of any and all swap transaction information that the swap data repository receives from a swap dealer, counterparty, or any other registered entity." 7 U.S.C. 24a(c)(6).

[84] *See supra* text accompanying notes 62–63.

[85] 7 U.S.C. 24a(c)(6)–(7).

[86] *See* Data NPRM, *supra* note 28.

[87] Section 21(c)(8) of the CEA. 7 U.S.C. 24a(c)(8).

[88] Former Section 5(d)(6) of the CEA, 7 U.S.C. 7(d)(6).

[89] 17 CFR part 38, App. B, Application Guidance for former Core Principle 6.

reasons for using its emergency authority."[90]

The Commission has generally found that procedures implemented by DCMs in response to former DCM Core Principle 6 allowed for adequate responses in the event of emergencies.[91] Accordingly, the Commission is proposing new application guidance and acceptable practices to implement emergency procedures core principles for both DCMs and SEFs that are modeled on former DCM Core Principle 6 and its application guidance.[92] Similarly, the Commission's proposed § 49.23 for SDR emergency procedures is modeled on relevant provisions of the statutory text, application guidance, and acceptable practices, as applicable, for the former and current DCM and SEF emergency procedures core principles.

(a) Emergency Policies and Procedures Required—Proposed § 49.23(a)

Proposed § 49.23(a) requires that an SDR establish policies and procedures for the exercise of emergency authority in the event of any emergency, including but not limited to, natural, man-made, and information technology emergencies. Proposed § 49.23(a) will mirror language in the application guidance for former DCM Core Principle 6, which states that DCMs must "have clear procedures and guidelines for contract market decision-making regarding emergency intervention. * * *" Similar language is also proposed in the guidance and acceptable practices for new DCM Core Principle 6 and new SEF Core Principle 8. Proposed § 49.23(a) and the new DCM Core Principle 6 and new SEF Core Principle 8 reflect the Commission's view that these policies must be transparent to the Commission and to market participants whose transaction data resides at the SDR.

(b) Invocation of Emergency Authority—Proposed § 49.23(b)

Proposed § 49.23(b) requires an SDR to enumerate the circumstances under which it is authorized to invoke its emergency authority, and the procedures that it must follow to declare an emergency. Such policies and procedures must also address the range of measures that an SDR is authorized to take when exercising emergency authority.

Proposed § 49.23(b) helps ensure that an SDR can respond quickly to an emergency but reduces the possibility that SDRs will exercise such authority arbitrarily. Similar to the Commission's view on the development of emergency policies and procedures, proposed § 49.23(b) reflects the Commission's view that the use of emergency authority should be governed by transparent standards and be predictable to the Commission and to swap market participants.

(c) Designation of Persons Authorized to Act in an Emergency—Proposed § 49.23(c)

Proposed § 49.23(c) requires an SDR to designate, and notify the Commission of, one or more persons authorized to exercise emergency authority on its behalf. In the event that such designated persons are unavailable, an SDR must also establish a chain of command. The Commission believes that the proposed regulation reduces the possibility that emergency situations will be exacerbated by a lack of leadership and inadequate line of decisional authority.

(d) Conflicts of Interest—Proposed § 49.23(d)

Proposed § 49.23(d) requires that SDR policies and procedures include provisions to avoid conflicts of interest in any decision made pursuant to emergency authority. SDR policies and procedures must also require that the SDR's CCO be consulted in any emergency decision that may raise potential conflicts of interest.[93] The Commission believes that specific policies and procedures designed to avoid conflicts in the exercise of emergency authority will focus SDR decision-makers' attention and guide their decisions in ways that minimize the risk for actual or perceived conflicts of interest.

(e) Notification to the Commission—Proposed § 49.23(e)

Proposed § 49.23(e) requires that an SDR's policies and procedures include provisions for the exercise of emergency authority to notify the Commission as soon as reasonably practicable regarding any invocation of emergency authority by the SDR. When notifying the Commission of an exercise of emergency authority, an SDR must explain the reasons for taking such emergency action, explain how conflicts of interest were minimized, and document the decision-making process. In addition, any underlying documentation must be made available to the Commission upon request. These proposed provisions will help keep the Commission informed of emergency situations, allow the Commission to participate as necessary, and facilitate any review that the Commission may wish to conduct at a later date.

Request for Comment. The Commission requests comment on the questions set forth below on SDR duties:

(1) Should the Commission impose any additional duties on SDRs? For example, should SDRs be required to provide downstream processing services or ancillary services (*e.g.,* managing life-cycle events and asset servicing)?

(2) Should the Commission establish more specific requirements to avoid contract invalidation by an SDR?

C. Designation of Chief Compliance Officer

Section 21(e) of the CEA, as amended by Section 728 of the Dodd-Frank Act, creates an internal regulatory framework for all SDRs, with the position of CCO serving as a focal point for compliance with the CEA and applicable Commission Regulations. The three-part structure of Section 21(e) requires, first, that every SDR designate an individual to serve as CCO.[94] Second, it enumerates specific duties for CCOs and establishes their responsibilities within an SDR.[95] Third, it outlines the

[90] *Id.*

[91] The Commission notes that former DCM Core Principle 6, and its successor Core Principle 6 pursuant to Section 735 of the Dodd-Frank Act, both incorporate market-specific emergencies and responses into their statutory requirements. For example, under both core principles, a DCM's emergency authority must include the authority to liquidate or transfer open positions in any contract; the authority to suspend or curtail trading in any contract; and the authority to require market participants in any contract to meet special margin requirements. The emergency policies and procedures required of SDRs pursuant to proposed § 49.23 do not incorporate these market-specific concepts as they are not relevant to SDRs.

[92] The new DCM emergency procedures core principle is also enumerated as DCM Core Principle 6 and codified in Section 5(d)(6) of the CEA, 7 U.S.C. 7(d)(6); it is substantively similar to its predecessor. The new SEF emergency procedures core principle is enumerated as SEF Core Principle 8 and codified in Section 5h(f)(8) of the CEA, 7 U.S.C. 7b–3(f)(8).

[93] Section 21(e) of the CEA, 7 U.S.C. 24a(e) creates the position of CCO and prescribes detailed responsibilities to CCOs. Section 21(e)(2)(C) tasks CCOs with "resolv[ing] any conflicts of interest that may arise" in consultation with the SDR's board of directors, a body performing a similar function as the board, or the senior officer of the SDR. Proposed § 49.26 specifically implements new Section 21(e). 7 U.S.C. 24a(2)(C).

[94] *See* Section 21(e)(1) of the CEA, 7 U.S.C. 24a(e)(1).

[95] *See* Section 21(e)(2) of the CEA, adopted as part of the Dodd-Frank Act, providing that a CCO shall:

(A) report directly to the board or to the senior officer of the swap data repository; (B) review the compliance of the swap data repository with respect to the requirements and core principles described in this section; (C) in consultation with the board of the swap data repository, a body performing a function similar to the board of the swap data repository, or the senior officer of the swap data repository, resolve any conflicts of interest that may arise; (D) be responsible for administering each policy and procedure that is required to be established pursuant to this section; (E) ensure

requirements of a mandatory annual report from SDRs to the Commission, which must be prepared and signed by an SDR's CCO.[96] The Commission proposes to implement Section 21(e) of the CEA through proposed § 49.22, which further develops the already robust CCO requirements enacted by the Dodd-Frank Act. Section 21(e) of the CEA and proposed § 49.22 are summarized below.

The first provision of Section 21(e)–21(e)(1)—provides only for the self-explanatory requirement that each SDR designate an individual to serve as its CCO. The second provision of Section 21(e) offers a detailed description of a CCO's role within an SDR. Specifically, Section 21(e)(2) includes seven enumerated duties incumbent upon all CCOs, and thereby outlines the internal regulatory structure of an SDR as contemplated by the Dodd-Frank Act. The enumerated duties of CCOs include: (1) Reporting directly to the SDR's board of directors or to its senior officer; (2) reviewing an SDR's compliance with the requirements and core principles described in Section 21; (3) resolving any conflicts of interest that may arise, in consultation with the board of directors or the senior officer of the SDR; (4) administering any policy or procedure that is required to be established by an SDR pursuant to Section 21; (5) ensuring compliance with the CEA and Commission Regulations as they pertain to agreements, contracts, or transactions entered into by an SDR; (6) establishing procedures for the remediation of noncompliance issues identified by the CCO; and (7) establishing and following appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues.[97]

Finally, the third provision of Section 21(e)–21(e)(3)—requires CCOs to prepare and sign annual compliance reports on behalf of their SDRs. The annual compliance reports must describe an SDR's compliance with the CEA and Commission Regulations. They must also describe the policies and procedures of the SDR, including the code of ethics and conflict of interest policies. In addition, the annual compliance reports must include "a certification that, under penalty of law, the report is accurate and complete."[98] The annual compliance report must be furnished to the Commission as it may prescribe.

Proposed § 49.22 develops each of these statutory provisions in greater detail and grants CCOs the regulatory authority necessary to fulfill responsibilities in each regard.

1. Definition of Board of Directors—Proposed § 49.22(a)

Proposed § 49.22(a) defines "board of directors" as "the board of directors of a swap data repository or for those swap data repositories whose organizational structure does not include a board of directors, a body performing a function similar to a board of directors." The proposed definition reflects the various forms of business associations which an SDR could conceivably take, including forms which do not include a corporate board of directors. It also reflects the flexibility in Section 728 of the Dodd-Frank Act, which refers, for example, to "a body performing a function similar to a board" in discussing the duties of a CCO pursuant to Section 21(e)(2)(C) of the CEA.

Request for Comment. The Commission requests comment on the following.

(1) Should the Commission develop additional rules around the types of bodies which may perform board-like functions at an SDR, depending on their business form?

(2) Should the proposed definition of board of directors appropriately address issues related to parent companies, subsidiaries, affiliates, and SDRs located in foreign jurisdictions? Does the proposed rule allow for sufficient flexibility with regard to an SDR's business structure?

2. Designation and qualifications of Chief Compliance Officer—Proposed § 49.22(b)

Proposed § 49.22(b)(1) requires an SDR to establish the position of CCO, designate an individual to serve in that capacity and provide that individual with the authority and resources to develop and enforce policies and procedures necessary to fulfill the duties set forth for CCOs in the Dodd-Frank Act and Commission regulations. In addition, proposed § 49.22(b)(1) provides that CCOs must have supervisory authority over all staff acting in furtherance of the CCO's statutory and regulatory obligations. In short, proposed § 49.22(b)(1) establishes CCOs as the focal-point of an SDR's regulatory compliance functions.

Proposed § 49.22(b)(2) details minimum competency standards for CCOs. It requires that CCOs have the background and skills necessary to fulfill the responsibilities of the position, and prohibits anyone who would be disqualified from registration under Sections 8a(2) or 8a(3) of the CEA from serving as a CCO. Although the CCO would not be required to register with the Commission, as the primary individual with responsibility for ensuring an SDR's legal compliance, the Commission believes that CCOs should meet the same standard as those individuals who are required to register, as set forth in the list of statutory disqualifications under Sections 8a(2) and (3) of the CEA. These standards largely consist of a high degree of responsibility and requirements relating to integrity and honesty in financial and business dealings.

The Commission is seeking comment on whether additional limitations should be placed on persons who may be designated as a CCO. For example, the function of the CCO and in-house or general counsel may have inherent tension between, for example, the duty to defend the swap data repository and duties as a CCO.

Request for Comment.

(1) The Commission requests comment on whether the provisions of proposed § 49.22(b)(1) are sufficient to ensure that a CCO has the authority and resources necessary to fulfill his or her statutory and regulatory obligations.

(2) The Commission also requests comment regarding the qualifications that should be required of a CCO, and whether the requirements expressed in proposed § 49.22(b)(2) are sufficient.

(3) Should there be additional restrictions placed on who is qualified to be designated as a CCO? The Commission requests comment on

compliance with this Act (including regulations) relating to agreements, contracts, or transactions, including each rule prescribed by the Commission under this section; (F) establish procedures for the remediation of noncompliance issues identified by the chief compliance officer through any—(i) compliance office review; (ii) look-back; (iii) internal or external audit finding; (iv) self-reported error; or (v) validated complaint; and (G) establish and follow appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues.

7 U.S.C. 24a(e)(2).

[96] *See* Section 21(e)(3)(A) of the CEA, adopted as part of the Dodd-Frank Act, providing that a CCO shall:[A]nnually prepare and sign a report that contains a description of—(i) the compliance of the swap data repository of the chief compliance officer with respect to this Act (including regulations); and (ii) each policy and procedure of the swap data repository of the chief compliance officer (including the code of ethics and conflict of interest policies of the swap data repository). (B) REQUIREMENTS.—A compliance report under subparagraph (A) shall—(i) accompany each appropriate financial report of the swap data repository that is required to be furnished to the Commission pursuant to this section; and (ii) include a certification that, under penalty of law, the compliance report is accurate and complete.

7 U.S.C. 24a(e)(3)(A)–(B).

[97] 7 U.S.C. 24a(e)(2).

[98] 7 U.S.C. 24a(e)(3)(B)(ii).

whether restricting a CCO from serving as the General Counsel or other attorney within the legal department of a SDR would address conflict of interest concerns.

3. Appointment, Supervision, and Removal of Chief Compliance Officer—Proposed § 49.22(c)

Taken together, proposed §§ 49.22(c)(1), 49.22(c)(2), and 49.22(c)(3) provide the supervisory regime applicable to CCOs. Proposed § 49.22(c)(1) requires that a CCO be appointed by a majority of the SDR's board of directors or senior officer, and that a majority of the board or senior officer be responsible for approving the CCO's compensation. An SDR must notify the Commission within two business days of appointing a new CCO. The proposed regulation also requires the CCO to meet at least annually with the board of directors to discuss the effectiveness of the CCO's administration of the compliance policies adopted by the registrant. The meeting or meetings would create an opportunity for a CCO and the directors to speak freely about any sensitive issues of concern to any of them, including any reservations about the cooperativeness or compliance practices of the registrant's management. Finally, proposed § 49.22(c)(1) also provides that the senior officer of a SDR may assume responsibility for appointing the CCO and approving his or her compensation.

Proposed § 49.22(c)(2) addresses routine oversight of an SDR's CCO. It allows an SDR with a board of directors to grant oversight authority to either its board or to its senior officer. The proposed regulation is modeled on the terms of Section 21(e)(2)(A) of the CEA, which requires a CCO to "report directly to the board or to the senior officer of the swap data repository."

Request for Comment. The Commission requests comment regarding the appropriate reporting relationship for the CCO of an SDR that has both a senior officer and a board of directors.

(1) In such cases, should a CCO report to the SDR's board rather than to its senior officer?

(2) What potential conflicts of interest might arise if a CCO reports to the senior officer rather than to the board, and how might those conflicts be mitigated?

(3) In addition, the Commission requests comment regarding whether "senior officer" of an SDR should be a defined term, and if so, how the term should be defined.

4. Removal of CCO—Proposed § 49.22(c)(3)

Proposed § 49.22(c)(3) requires approval of a majority of an SDR's board of directors to remove a CCO. The Commission believes that these removal provisions will help insulate CCOs and their decision-making from day-to-day commercial pressures that they may otherwise experience. If an SDR does not have a board, the proposed regulation provides that the CCO may be removed by its senior officer. Proposed § 49.22(c)(3) also requires an SDR to notify the Commission in writing within two business days of the removal or voluntary departure of its CCO by providing a statement describing the circumstances surrounding his or her departure.[99] The Commission believes that this provision will help protect CCOs from undue influence or retaliatory termination by the board or the senior officer of the SDR.

Proposed §§ 49.22(c)(1) and 49.22(c)(3) seek to provide an SDR's CCO with a measure of independence from management in the performance of his or her duties, and to ensure that such duties are executed in the most effective and impartial manner possible.

Request for Comment. The Commission requests comment on any additional measures that should be required to adequately protect CCOs from undue influence in the performance of their duties. The Commission is particularly interested in how it might offer such protection to a CCO who reports to his or her senior officer, either at the SDR's choosing or because the SDR does not have a board of directors. In addition, the Commission also requests comment on whether the provision that would require a majority of a board of directors to remove the CCO is sufficiently specific.

5. Duties of the Chief Compliance Officer—Proposed § 49.22(d)

Proposed § 49.22(d) details the duties of a CCO, as well as his or her authority within an SDR. The proposed regulation codifies and expands upon the CCO duties already set forth in Section 21(e)(2) of the CEA. These duties include overseeing and reviewing compliance with the CEA and Commission regulations, as well as resolving, in consultation with the board of directors or the senior officer, any conflicts of interest that may arise. The proposed Regulation also lists a number of potential conflicts that may confront a CCO. The list of conflicts of interest indicates the types of conflicts that the Commission believes an SDR's CCOs should be aware of, but it is not exhaustive.

Proposed § 49.22(d) also requires that the CCO establish and administer a written code of ethics and policies and procedures designed to prevent violations of the CEA and Commission regulations. The Commission believes that such written documentation will serve as a useful guide for the SDR's management and staff, as well as for swap participants who will be submitting data to the SDR. It will also help the Commission to evaluate the SDR's compliance and adherence to its own internal standards. Finally, proposed § 49.22(d) requires that a CCO establish and follow procedures for the remediation and closing of any noncompliance issues that are identified. To assist the CCO in meeting this responsibility, proposed § 49.22(b)(1), summarized above, grants a CCO oversight authority over all compliance functions and staff acting in furtherance of those compliance functions. The CCO's authority would also extend to any activities performed by the SDR to verify that other entities are in compliance with applicable laws and regulations, such as the verification of the timeliness of certain swap data, pursuant to proposed § 49.15. The Commission recognizes that the staff that assists a CCO may not be dedicated to the CCO full-time; however, the proposed regulation would ensure that a CCO has authority over any staff and resources while they are acting in furtherance of compliance functions.

Request for Comment. The Commission requests comment regarding proposed § 49.22(d). Comments should address any additional CCO duties which the Commission should include in the proposed regulation. In addition, they should specifically address a CCO's role in managing conflicts of interest within an SDR, the types of conflicts which commenters believe might arise within an SDR, and how and by whom those conflicts should be resolved.

6. Preparation and Submission of Annual Compliance Report—Proposed §§ 49.22(e) and 49.22(f)

Section 21(e)(3) of the CEA requires a CCO to prepare an annual compliance report. As discussed above, the Commission believes that this annual compliance report should give the Commission a complete and accurate picture of an SDR's compliance

[99] Upon the removal or voluntary departure of a CCO, proposed § 49.22(c)(3) requires and SDR to appoint an interim CCO immediately and a permanent replacement as soon as practicable. *See* proposed § 49.22(c)(3).

program. Proposed § 49.22(e) details the information that must be included in the annual compliance report. The report must include: (i) A description of the SDR's written policies and procedures, code of ethics and conflicts of interest policies; (ii) a detailed review of the SDR compliance with Section 21 of the CEA, including an assessment by the CCO of the effectiveness of the SDR's policies and procedures in ensuring compliance with Section 21 of the CEA and a discussion of areas for improvement; (iii) a description of any material changes to the policies and procedures that were made to these since the last annual compliance report; (iv) a description of the financial, managerial, operational, and staffing resources set aside for the SDR's compliance program; (v) a description of any material compliance matters, including instances of noncompliance, that were identified in the year prior to the filing of the report; and (vi) any objections to the annual compliance report by the board or senior officer of the SDR. In addition to the above information, proposed § 49.22(e) also requires the annual report to include a certification by the CCO that, under penalty of law, the compliance report is accurate and complete.

Proposed § 49.22(f)(1) sets forth the procedures for the review of the annual compliance report by the board of directors of the SDR or senior officer, prior to submission to the Commission. While the board or senior officer has a chance to review the annual compliance report before submission, the report is not subject to their approval. Proposed § 49.22(f)(1) explicitly prohibits the board or senior officer from forcing the CCO to make any material changes to the report. The purpose of this review is to permit the members of the board or the senior officer to provide the Commission with any objections they might have to the report. The Commission believes that the prohibition against the board and senior officer making changes to the annual compliance report will allow the CCO to make a complete and accurate assessment of the SDR's compliance program.

Proposed § 49.22(f)(2) describes the process for submission of the report to the Commission. The proposed Regulation requires that the annual compliance report be electronically provided to the Commission not more than 60 days after the end of the calendar year. If a CCO determines that an annual compliance report filed with the Commission has a material error or if material non-compliance is identified after filing, proposed § 49.22(f)(3) would require a SDR to promptly file an amended report. This amended report must also include the certification by the CCO as to the accuracy and completeness made in the initial submission of the report. If a CCO is unable to file an annual compliance report within 60 days of the end of the calendar year, proposed § 49.22(f)(4) would permit a CCO to request the Commission to grant an extension of time to file its compliance report based on substantial undue hardship. Extensions for the filing deadline would be granted at the discretion of the Commission. Additionally, to protect the trade secrets of the SDR and the security of the data held by the SDR, the proposed Regulation requires that annual compliance reports filed pursuant to § 49.22 be treated as exempt from mandatory public disclosure for purposes of FOIA [100] and the Sunshine Act [101] and parts 145 and 147 of Commission Regulations.

Request for Comment. The Commission request comment on its proposed regulations regarding the preparation and submission of an SDR's annual compliance report.

(1) Should the annual compliance report contain additional content beyond what is proposed in § 49.22(e)? Are additional provisions necessary to ensure that an SDR's board of directors cannot adversely influence the content of an annual compliance report as drafted by the CCO?

(2) In the alternative, are additional provisions necessary to insure that individual directors or other SDR employees have an adequate opportunity to register any concerns or objections they might have to the contents of an annual compliance report?

The Commission also requests comment relating to insulating an SDR's CCO from undue influence or coercion.

(1) Should the Commission adopt a regulation that prohibits an officer, director or employee of the SDR or related person to coerce, manipulate, mislead, or fraudulently influence the CCO in performing his or her duties?

(2) Is it necessary to adopt regulations to address potential conflicts between and among an SDR's compliance, commercial, and ownership interests?

(3) If so, what should such regulations entail, and what specific conflicts of interest should they address?

7. Recordkeeping—Proposed § 49.22(g)

Proposed § 49.22(g) details SDRs' recordkeeping requirements for records relating to a CCO's areas of responsibility. This proposed regulation requires an SDR to maintain: (i) A copy of its written policies and procedures, including its code of ethics and conflicts of interest policies; (ii) copies of all materials, including written reports provided to the board of directors in connection with review of the annual report, as well as the board minutes or other similar written records, that record the submission of the annual compliance report to an SDR's board of directors or its senior officer; and (iii) any other records relevant to an SDR's annual report. The records required to be maintained pursuant to this section are designed to provide Commission staff with a basis to determine whether an SDR has complied with the CEA and applicable Commission Regulations. The Commission also wants to preserve its ability to reconstruct why certain information was included or excluded in an annual report, in the event that such reconstruction becomes necessary under a future audit or investigation.

The SDR would be required to maintain these records in accordance with § 1.31 of the Commission's Regulations. Following § 1.31, all records must be kept for a period of five years.

Request for Comment. The Commission requests comment regarding whether the requirements of proposed § 49.22(g) are sufficient to create a complete and easily auditable record of a board of directors' or senior officer's review of an annual compliance report to ensure that the report, as drafted by the CCO, was not altered.

D. Core Principles Applicable to SDRs

Section 21(f) of the CEA details the "core principles" that are applicable to SDRs. These core principles include (i) antitrust considerations; (ii) governance arrangements; and (iii) conflicts of interest.[102]

Registered SDRs will be required to comply with the core principles as described in proposed § 49.19. Unless otherwise determined by the Commission by order, rule or regulation, an SDR would have reasonable discretion in establishing the manner in which it complies with the core principles described in proposed § 49.19. The following subsections describe in detail the Regulations

[100] *See* 5 U.S.C. 552.

[101] *See* 5 U.S.C. 552b(b).

[102] Section 21(f)(4), 7 U.S.C. 24a(f)(4), establishes a fourth core principle which authorizes the Commission to establish additional duties for registered SDRs. The Commission is proposing to add several additional duties pursuant to this authority; these proposed duties are discussed in Section E, below.

proposed by the Commission to implement the "core principles."

1. Antitrust Considerations (Core Principle 1)

Consistent with Section 15(a) of the CEA,[103] the Commission in proposing § 49.19 believes that an SDR should (unless necessary or appropriate to achieve the purposes of the CEA) avoid adopting any rule, regulation or policy, or taking any action that results in an unreasonable restraint of trade or imposing any material anticompetitive burden on the trading, clearing, reporting and/or processing of swaps ("Core Principle 1").

2. Introduction—Governance Arrangements (Core Principle 2) and Conflicts of Interest (Core Principle 3)

Section 21(f)(2) of the CEA requires that each SDR establish governance arrangements that are transparent to fulfill public interest requirements and to support the objectives of the Federal Government, owners, and participants ("Core Principle 2").[104] Section 21(f)(3) of the CEA provides that each SDR must establish and enforce rules to minimize conflicts of interest in the decision-making process of the SDR and to establish a process for resolving such conflicts ("Core Principle 3").[105] In many respects, Core Principles 2 and 3 are interrelated, although each provides a separate source of authority for the Commission.[106]

In order to ensure proper implementation of Core Principles 2 and 3, respectively, the Commission proposes regulations regarding (i) the transparency of SDR governance arrangements and (ii) SDR identification and mitigation of existing and potential conflicts of interest.[107] The proposed rules reflect consultation with staff of the following agencies: (i) The SEC; (ii) the Fed; (iii) OCC; (iv) FDIC; and (v) the Treasury Department. Additionally, the proposed rules were informed by: (1) The joint public roundtable that Commission and SEC staff conducted on September 14, 2010 (the "SDR Roundtable");[108] and (2) answers to a survey that the Commission informally circulated to existing trade repositories[109] and other companies that may be interested in registering as SDRs in the future (the "SDR Survey").[110] Finally, mindful of the importance of international harmonization, the proposed rules incorporate certain elements of the European Commission Proposal[111] and the Working Group Report.[112] The Commission intends for the proposed rules, as well as the final rules, to meet or exceed the standards set forth by the Working Group Report relating to trade repositories.[113]

3. Governance Arrangements (Core Principle 2)

In addition to proposed Regulations discussed in sections II.B.6, II.B.7 and II.E.4,[114] the Commission proposes to impose, pursuant to proposed § 49.20 (implementing Core Principle 2), certain minimum standards for the transparency of SDR governance arrangements.

(a) Transparency of Governance Arrangements

The Commission proposes to mandate minimum standards for the transparency of SDR governance arrangements.[115] Pursuant to such standards, an SDR must:

- Include a statement in its charter documents regarding the transparency of its governance arrangements, and the manner in which such transparency supports the objectives of the Federal Government;
- Make available certain information to the public and relevant authorities;[116]
- Ensure that the information made available is current, accurate, clear and readily accessible; and
- Disclose summaries of significant decisions in a sufficiently comprehensive and detailed fashion so

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[103] Section 15(b) of the CEA provides:

The Commission shall take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the objectives of this chapter, as well as the policies and purposes of this chapter, in issuing any order or adopting any Commission rule or regulation (including any exemption under Section 6(c) or 6c(b) of this title), or in requiring or approving any bylaw, rule, or regulation of a contract market or registered futures association established pursuant to Section 21 of this title.

7 U.S.C. 19.

[104] *See* Section 21(f)(2) of the CEA, 7 U.S.C. 24a(f)(2) as added by Section 728 of the Dodd-Frank Act.

[105] *See* Section 21(f)(3) of the CEA, 7 U.S.C. 24a(f)(3) as added by Section 728 of the Dodd-Frank Act.

[106] In Section 4(a), the Commission identifies potential conflicts of interest in the operation of a registered SDR. Such conflicts may implicate (i) SDR access, pricing, and provision of services and (ii) disclosure or use of SDR Information. As further discussed, such conflicts of interest may originate in the control of an SDR by one reporting entity or a small subset of reporting entities (a "control group"). Such control may result from representation on SDR governing bodies, whether through (i) ownership of voting equity or the exercise of voting rights or (ii) other direct or indirect means. The existence of such conflicts may frustrate the public interest, as well as the objectives of the Federal Government, certain owners, and participants, in facilitating the reporting of swap transactions. Therefore, in establishing governance arrangements that are transparent as to (i) the sources of such control and (ii) the decisions resulting from such control, the SDR may be satisfying Core Principles 2 and 3 simultaneously.

[107] The Commission notes that entities dually registered with the Commission and the SEC would be required to comply with both sets of rules.

[108] *See* Press Release, Commission, CFTC, SEC Announce Panelists, Room Update and Webcast Address for September 15 Public Roundtable to Discuss Swap Execution Facilities and Security-Based Swap Execution Facilities (Sept. 14, 2010), *http://www.cftc.gov/PressRoom/PressReleases/pr5895–10.html;* Press Release, Commission, CFTC, SEC Announce Panelists for September 14 Public Roundtable to Discuss Swap and Security-Based Swap Data, Swap and Security-Based Swap Data Repositories and Real Time Reporting (Sept. 13, 2010), *http://www.cftc.gov/PressRoom/PressReleases/pr5892–10.html;* Press Release, Commission, CFTC, SEC to host public roundtable to discuss swap data, swap data repositories and real time reporting (Sept. 7, 2010), available at *http://www.cftc.gov/PressRoom/PressReleases/pr5886–10.html. See also* Transcript, Public Roundtable to Discuss Swap Data, Swap Data Repositories and Real Time Reporting (Sept. 14, 2010), available at *http://www.cftc.gov/ucm/groups/public/@swaps/documents/file/derivative18sub091410.pdf* (the "SDR Roundtable Tr.").

[109] Although SDRs are new entities created pursuant to the Dodd-Frank Act, similarly-functioning entities called trade repositories have been in existence for quite some time.

[110] Commission staff circulated the informal survey to five entities and received answers to certain questions. *See http://www.cftc.gov/LawRegulation/DoddFrankAct/OTC_9_DCOGovernance.html* (last visited Nov. 1, 2010).

[111] *See* European Commission Proposal, *supra* note 16.

[112] *See* Working Group Report, *supra* note 13.

[113] *Id.*

[114] *See* proposed §§ 49.16 regarding maintenance of data privacy, discussed in section II.B.6 of this proposed rulemaking; 49.17 regarding access to SDR data, discussed in section II.B.7. of this proposed rulemaking; and 49.27 regarding equitable and non-discriminatory access and fees, discussed in section II.E.4 of this proposed rulemaking.

[115] In addition, the Commission proposes to require each registered SDR to establish governance arrangements that are well defined and include a clear organizational structure with consistent lines of responsibility and effective internal controls. As the SDR must have such arrangements to (i) properly identify the sources of potential conflicts of interest and (ii) establish an appropriate process for resolving such conflicts, such arrangements also satisfy Core Principle 3.

[116] Such information includes: (i) The registered SDR mission statement; (ii) the mission statement and/or charter of the registered SDR Board of Directors and certain committees; (iii) the board of directors nominations process of the registered SDR, as well as the process for assigning members of the board of directors or other persons to certain committees; (iv) names of all members of (a) the board of directors and (b) certain committees; (v) a description of how the board of directors and certain committees consider an independent perspective in their decision-making processes; (vi) the lines of responsibility and accountability for each operational unit of the registered SDR; and (vii) summaries of significant decisions implicating the public interest, the rationale for such decisions, and the process for reaching such decisions. These significant decisions include decisions relating to pricing of repository services, the offering of ancillary services, access to data, and the use of SDR Information.

that the public and relevant authorities would have the ability to discern the SDR policies or procedures implicated and the manner in which SDR decisions implement or amend such policies or procedures.

In addition, although a registered SDR is not required to disclose minutes of board of directors or committee meetings to the public, it must furnish this information to the Commission upon request.

Request for Comment. The Commission requests comment on the questions set forth below.

(1) Are the requirements described above sufficiently clear? If not, why not? What would be a better alternative?

(2) Should the Commission require the SDR to make any other information available to the public? To the relevant authorities? Conversely, should the Commission permit the SDR to maintain the confidentiality of any information that the Commission currently contemplates making public?

(3) Should the Commission prescribe more detailed standards on the manner in which an SDR must ensure that its information is "current, accurate, clear, and readily accessible"? If so, which standards?

(4) Should the Commission require the SDR to disclose summaries of significant decisions? Why or why not? Has the Commission correctly identified which decisions should be considered significant? It not, what would be a better alternative? In what manner should these decisions be disclosed?

(5) Are the requirements described above necessary or appropriate to implement Core Principle 2? If not, why not?

(6) What other measures should the Commission consider to implement Core Principle 2? Should such measures supplement or replace the requirements described above? Why?

(b) *Consideration of an Independent Perspective*

Proposed § 49.20(c) would require each registered SDR to establish, maintain, and enforce policies and procedures to ensure that (i) its board of directors, as well as (ii) any SDR committee that has the authority to (A) act on behalf of the board of directors or (B) amend or constrain the action thereof, adequately considers a perspective independent of competitive, commercial, or industry interests in its deliberations.[117] The Commission believes that the board of directors, as well as each abovementioned committee, would be more likely to contemplate the manner in which a decision might affect all constituencies, and less likely to concentrate on the manner in which a decision affects the interests of the control group, if it integrates an independent perspective in its deliberations. Hence, in counterbalancing the perspective of certain reporting entities controlling an SDR, the integration of an independent perspective would aid in addressing the conflicts of interest identified herein. The Commission believes that it is particularly important for an independent perspective to be reflected in the nominations process for the board of directors, as well as the process for assigning members of the board of directors or other persons to the abovementioned committees. Therefore, proposed § 49.20(c) would also require each registered SDR to establish, maintain, and enforce policies and procedures to ensure that such nominations and assignment processes adequately incorporates an independent perspective.

Along with the requirements noted above, the Commission is proposing that a registered SDR meet certain reporting requirements relating to its board of directors, as well as each SDR committee that has the authority to (i) act on behalf of its board of directors or (ii) amend or constrain the action thereof. Specifically, the Commission proposes to require an SDR to submit the following within thirty (30) days after an election of the board of directors: (i) For the board of directors, as well as each such committee, a list of all members; (ii) a description of the relationship, if any, between such members and the SDR or its affiliates; and (iii) any amendments to the policies and procedures that the SDR maintains with respect to consideration of the independent perspective. The Commission believes that such disclosure promotes the transparency of governance arrangements and improves the detection and prevention of conflicts of interest, and which may actually deter such conflicts in the first instance.

Request for Comment. The Commission requests comment on the questions set forth below.

Consideration of an Independent Perspective

(1) To ensure the consideration of an independent perspective, should the Commission require a registered SDR to have public directors on (i) its board of directors and (ii) any committee that has the authority to (A) act on behalf of the board of directors or (B) amend or constrain the action of the board of directors?

a. If not, why not and what would be a better alternative to improve governance and mitigate conflicts of interest?

b. If so, what should be the required composition of the board of directors and each such committee? Should there be a minimum requirement on the number or percentage of public directors? If so, what should the minimum requirement be and why?

c. How should the Commission define "public director" for registered SDRs?

d. Would providing for fair representation on an SDR board of directors and each such committee be preferable to, or complementary to, mandating a specific number or percentage of public directors?

(2) Should the Commission require a registered SDR to establish a nominating committee? Is the nominating committee necessary or appropriate for the mitigation of the conflicts of interest identified herein, or of any other conflict of interest? If not, why not and what would be a better alternative? If so, should the nominating committee have a certain percentage, minimum number, or be comprised solely of public directors? Why?

(3) Should the Commission require a registered SDR to establish any other committees to mitigate conflicts of interest? If so, what would be the responsibilities of such a committee? Should the Commission require such a committee to have a certain percentage, a minimum number, or be comprised solely of public directors? Why?

Limitations on Ownership of Voting Equity and the Exercise of Voting Rights

(4) Should the Commission impose limitations on the ownership of voting or non-voting equity and the exercise of voting rights on reporting entities or other market participants? If so, what should the required ownership and voting limitations be? Are such limits necessary or appropriate for mitigating the conflicts of interest identified herein, or any other conflicts of interest?

(5) Would SDR compositional requirements be more or less effective than ownership or voting limitations at addressing conflicts of interest? Would SDR compositional requirements, on their own, be sufficient to address conflicts of interest concerns (assuming that such restrictions are necessary for this purpose) or are both restrictions on governance and ownership needed?

(6) If the Commission were to require ownership and voting limitations, should the Commission permit the SDR board of directors to waive the

[117] *See* 75 FR 63732, 63737–38 (Oct. 18, 2010) (regarding the importance of the independent perspective in mitigating conflicts of interest).

limitations for a person who is not an SDR participant (and its related persons) provided that certain conditions are met? If so, under what conditions? Should the waiver be subject to the review of the Commission?

(7) Would an aggregate limit on the ownership of voting equity and the exercise of voting rights be appropriate for SDRs? If so, should such aggregate limit be applied only to reporting entities? Which reporting entities? What should such aggregate limit be? Why?

(8) Should any ownership and voting limitations be extended to the parent company of an SDR?

(9) If the Commission were to impose ownership or voting limitations, should the Commission require remediation by an SDR of any interest that a reporting entity or a related person holds or exercises in excess of the limitations?

(10) If the Commission were to impose ownership or voting limits, should the limitations be phased-in for SDRs to provide a grace period for those entities that would not meet the limits at the outset, but that could potentially meet them at a later date, *e.g.,* one or two years after SDR registration with the Commission?

(11) If the Commission were to impose ownership and voting limitations, how might such limitations influence the competitive dynamics of the SDR market?

(12) If the Commission were to impose ownership or voting limitations, how might such limitations address changes in conflicts of interest resulting from the evolution of the regulated swaps market?

(13) Are there potential ways to more narrowly target voting and ownership limitations?

(14) Should the Commission require parent companies of SDRs to comply with the substantive requirements applicable to SDR boards of directors?

(15) Should the Commission require parent companies' officers, directors, employees and agents to be subject to Commission authority?

(16) Should the Commission require that the books and records of SDR parent companies be open to inspection by the Commission?

(c) Substantive Requirements for SDR Boards of Directors (and Certain *SDR Committees*)

(i) Expertise

The Commission is proposing a number of substantive requirements for SDR boards of directors and certain SDR committees to mitigate existing and potential conflicts of interest. Proposed § 49.20(c)(5) would require that the SDR board of directors, SDR senior management, and members of any SDR committee that has the authority to (i) act on behalf of the board of directors or (ii) amend or constrain the actions thereof, in each case, have (A) sufficiently good reputations, (B) the requisite skills and expertise to fulfill their responsibilities in the management and governance of the registered SDR, (C) a clear understanding of such responsibilities, and (D) the ability to exercise sound judgment about SDR affairs.

(ii) Other Substantive Requirements

In addition to the expertise requirement, the Commission in proposed § 49.20(c) proposes the following requirements, which aim to enhance the accountability of SDR boards of directors to the Commission, with respect to the manner in which such boards of directors cause the registered SDRs to discharge all statutory and regulatory responsibilities[118] under the Dodd-Frank Act, as it amends the CEA:

- The roles and responsibilities of SDR boards of directors must be clearly articulated, especially in respect of the manner in which each such board of directors ensures that the registered SDR complies with all statutory and regulatory responsibilities under the Dodd-Frank Act, as it amends the CEA.
- Each SDR board of directors shall review its performance and that of its individual members annually. It should consider periodically using external facilitators for such reviews.
- A registered SDR must have procedures to remove a member from its board of directors, where the conduct of such member is likely to be prejudicial to the sound and prudent management of the SDR.

Request for Comment. The Commission requests comment on the questions set forth below.

(1) Are the proposed substantive requirements for board of directors (and certain SDR committees) necessary or appropriate to mitigate SDR conflicts of interest, in light of the proposed minimum standards on (A) transparency, (B) identification and resolution of conflicts of interest, and (C) access, use, or disclosure of SDR Information? If not, why not?

(2) How might the proposed substantive requirements influence the competitive dynamics of the SDR market?

(3) How might the proposed substantive requirements address changes in conflicts of interest resulting from the evolution of the regulated swaps market?

(4) What other substantive requirements should the Commission consider imposing on an SDR board of directors? How might such requirements affect the competitive dynamics of the SDR market?

(5) Should the Commission focus on ensuring fair representation? If so, should the Commission view fair representation as complementing or replacing an independent perspective? What entities should be included in fair representation? Would the value of fair representation differ depending on the organizational structure of the SDR (*e.g.,* an at-cost utility or a for-profit entity)? The Commission particularly welcomes factual examples.

(6) If the Commission decides to focus on ensuring fair representation as either an alternative to, or a complement of, an independent perspective, what changes should the Commission make to the proposed substantive requirements?

(7) In what ways can a SDR board of directors incorporate an independent perspective into its decision-making process?

(8) Should the nominations process require the right to petition for alternative candidates? If so, to whom should such right be granted (*e.g.,* certain groups of market participants)?

4. Conflicts of Interest (Core Principle 3)

(a) Conflicts of Interest

Based on discussions at the SDR Roundtable, as well as answers to the SDR Survey, the Commission has identified several potential conflicts of interest, including but not limited to, discrimination against certain reporting entities and unfair or anticompetitive disclosure. A control group may compete with other reporting entities in the execution or clearing of swap transactions and may have an incentive to leverage its influence over the registered SDR to gain a competitive advantage in relation to other reporting entities. Additionally, because the Dodd-Frank Act requires all swaps (whether cleared or uncleared) to be reported to a registered SDR,[119] swap data[120] and SDR analyses of SDR

[118] *See* proposed §§ 49.16, 49.17 and 49.27.

[119] *See* Section 2(a)(13)(G) of the CEA, as amended by Section 727 of the Dodd-Frank Act.

[120] For example, such data would enable regulatory authorities, such as the Commission, to ascertain the exposure of reporting entities and their counterparties to swap transactions. *See generally* 7 U.S.C. 24a(c)(7). *See also* SDR Roundtable Tr., *supra* note108, at 55–56 (Comments from Jiro Okochi, CEO and Co-Founder, Reval, stating "In terms of the actual data itself, I think one of the goals of the reform is to allow more transparency and efficiency in the marketplace * * *").

Information could have great commercial value.[121] A control group may have an incentive to (i) limit or burden access to such analyses on a discriminatory basis or (ii) disclose or use the data of other reporting entities for its own competitive purposes (*e.g.,* front-running). The control group may also have an incentive to cause the SDR to provide such data to an affiliate for derivative applications or ancillary services (especially if such applications or services are bundled).

Request for Comment. The Commission requests comment on the questions set forth below on potential conflicts of interest.

(1) Has the Proposal correctly identified the conflicts of interest that a registered SDR may confront? Has the Proposal accurately specified the possible effects of such conflicts of interest on SDR operations? What are other possible effects?

(2) What other conflicts of interest may exist? What are the effects of such conflicts?

(3) How might conflicts of interest change as registered SDRs become more established?

(4) How might conflicts of interest change as the swaps market evolves under regulation?

(b) Mitigation of Conflicts of Interest

To mitigate conflicts of interest, the Commission proposes to mandate, pursuant to proposed § 49.21, that each registered SDR maintain and enforce rules (i) that would identify, on an ongoing basis, existing and potential conflicts of interest, and (ii) that would enable the SDR to make decisions if a conflict exists. Such rules would complement the abovementioned provisions.

(c) Policies and Procedures to Identify and Mitigate Conflicts of Interest

To ensure that the mitigation in Core Principle 3 is effected, the Commission proposes to require each registered SDR to establish, maintain and enforce rules to identify existing and potential conflicts of interest in its decision-making process. As discussed above, a control group can dominate an SDR to further its economic interests to the detriment of other reporting entities. Therefore, the Commission believes that it is critical for a registered SDR to establish, maintain and enforce policies and procedures to mitigate such a conflict. Moreover, the Commission believes that an SDR should engage in the identification and mitigation of conflicts of interest on an ongoing basis since conflicts can arise or change at any time. Further, the Commission proposes to require such SDR to have rules for making decisions in the event of a conflict of interest. The Commission believes such rules should require, at a minimum, the recusal of any person involved in the conflict from such decision-making. Such recusal rules will alleviate certain concerns regarding the impartiality of the SDR decision-making process.

Request for Comment. The Commission requests comment on the questions set forth below.

(1) Are the requirements described above sufficiently clear? If not, why not? What would be a better alternative?

(2) Should the Commission prescribe more detailed standards for SDR rules on identifying conflicts of interest? If so, which standards?

(3) Should the Commission prescribe more detailed standards for SDR rules on decision-making in the event of a conflict of interest? If so, which standards?

E. Additional Duties

In addition to the "core principles" set forth above in section D, Section 21(f)(4) of the CEA established a fourth core principle under which the Commission may prescribe additional duties for SDRs for the purpose of minimizing conflicts of interest, protecting data, ensuring compliance and guaranteeing the safety and security of the SDR. In this regard, pursuant to its authority under Sections 21(f)(4) and 8a(5) of the CEA the Commission proposes to require four additional duties that would require an SDR to (i) adopt and implement system safeguards, including business continuity and disaster recovery plans; (ii) maintain sufficient financial resources; (iii) furnish to market participants a disclosure document setting forth the risks and costs associated with using the services of the SDR; and (iv) provide fair and open access to the SDR and fees that are equitable and non-discriminatory. These additional duties are discussed in turn below.

1. System Safeguards

Proposed § 49.24 would require SDRs to (1) establish and maintain a program of risk oversight to identify and minimize sources of operational risk through the development of appropriate controls and procedures and the development of automated systems that are reliable, secure, and have adequate scalable capacity; (2) establish and maintain emergency procedures, backup facilities, and a plan for disaster recovery that allow for the timely recovery and resumption of operations and the fulfillment of the responsibilities and obligations of the SDR, *i.e.,* BC–DR Plans; and (3) periodically conduct tests to verify that backup resources are sufficient to ensure continued fulfillment of all duties of the SDR established by the CEA or the Commission's regulations.

The proposed regulation would require an SDR's program of risk analysis and oversight to address six categories of risk analysis and oversight, including information security; BC–DR planning and resources; capacity and performance planning; systems operations; systems development and quality assurance; and physical security and environmental controls. It would require each SDR to maintain a BC–DR plan and have BC–DR resources sufficient to enable recovery and resumption of its operations and resumption of its ongoing fulfillment of its duties and obligations as an SDR during the next business day following any disruption of its operations, either through sufficient infrastructure and personnel resources of its own or through sufficient contractual arrangements with other SDRs or disaster recovery service providers.[122] The proposed regulation would require each SDR to notify Commission staff of various security-related events and provide relevant documents to the Commission; and to conduct regular, periodic, objective testing and review of its automated systems. It would also require each SDR, to the extent practicable, to coordinate its BC–DR plan with SEFs, DCMs, DCOs, SDs, and MSPs who report swap data to the SDR, as well as initiate coordinated testing of such plans, and to take into account in its own BC–DR plan, the BC–DR plans of relevant telecommunications, power, water, and other essential service providers.

Because automated systems play a central and critical role in today's financial markets, oversight of these systems will be an essential part of the effective regulatory oversight of swaps.

[121] Warehouse Trust Response to the SDR Survey, at p. 4, available at *http://www.cftc.gov/ucm/groups/public/@swaps/documents/file/derivative9sub100510-wt.pdf* (stating that "SDR data is extremely valuable and could be sold either stand alone or enhanced with other market data and analysis").

[122] *See* Commission, Notice of Proposed Rulemaking: Business Continuity and Disaster Recovery, 75 FR 42,633 (July 22, 2010); Interagency Paper on Sound Practices to Strengthen the Resilience of the U.S. Financial System issued by the Board of Governors of the Federal Reserve System, the Department of the Treasury and the SEC, 68 FR 17,809 (Apr. 11, 2003); SEC, Policy Statement Relating to Business Continuity Planning for Trading Markets, Exchange Act Release No. 48,545 (Sept. 25, 2003), 68 FR 56,656 (Oct. 1, 2003).

Prompt and adequate notice to the Commission concerning systems malfunctions, systems security incidents, or any events leading to the activation of an SDR's BC–DR plan will assist the Commission's oversight and its ability to assess systemic risk levels. Additionally and because SDRs will hold data needed by financial regulators from multiple jurisdictions, safeguarding such systems will be essential to mitigation of systemic risk world-wide. The ability of SDRs to recover and resume operations promptly in the event of a disruption of their operations will be highly important to the U.S. and world economy. It would present unacceptable risks to the U.S. and world financial system if SDRs that hold data concerning swaps and thus comprise critical components of the world financial system were to become unavailable for an extended period of time for any reason. Adequate system safeguards are crucial to mitigation of such risks.

Request for Comment. The Commission requests comment on whether the time periods specified in proposed § 49.24 with respect to submission of annual reviews and written notices of material system outages and material systems changes the correct time periods to use? Should any of the proposed time periods be shortened or lengthened? If so, please explain your reasoning.

2. Financial Resources

Proposed § 49.25 would require an SDR to maintain financial resources sufficient to enable it to perform its functions in compliance with the duties set forth in proposed § 49.9 and the core principles set forth in proposed § 49.19.[123] The Commission believes that requiring SDRs to maintain sufficient financial resources will help to ensure the protection of the swap data maintained by the SDR as well as the safety and security of the SDR.

Proposed § 49.25 (a)(3) provides that financial resources [124] will be considered sufficient for an SDR if their value is at least equal to the total amount that would enable the SDR, or applicant for SDR registration, to cover its operating costs for a period of at least one year, calculated on a rolling basis. The types of financial resources to meet this obligation would include the SDR's own capital and any other financial resource acceptable to the Commission. The financial resources required in proposed § 49.25 must be the independent or dedicated resources of the SDR and may not be resources used for other purposes or by affiliated entities, *i.e.,* the same assets or capital may not be used for multiple purposes.

Proposed § 49.25(c) provides that SDRs, in computing its financial resource requirement, may make a reasonable calculation of its projected operating costs over a 12-month period.[125] This would be performed on a quarterly basis. Financial resources of a SDR would also be valued under proposed § 49.25(d) on at least a quarterly basis.

Proposed § 49.25(f) sets forth the reporting requirements to the Commission. Specifically, no later than 17 business days after the close of each fiscal quarter or at any time upon Commission request, a SDR is required to report the amount of financial resources required by proposed § 49.25(a) together with financial statements, including the balance sheet, income statement, and statement of cash flows of the SDR or of its parent company.

Request for Comment. The Commission requests comment on whether the methodology set forth above for determining sufficient financial resources would provide the necessary resources to ensure the financial integrity of the SDR. If not, please provide a different methodology or manner for calculating sufficient SDR financial resources.

3. Disclosure Requirements of Swap Data Repositories

Proposed § 49.26 would require an SDR furnish to market participants a disclosure document ("SDR Disclosure Document") setting forth the risks and costs associated with using the services of the SDR. The Commission believes that this requirement will benefit market participants and the swap market generally by helping to (i) minimize conflicts of interest and (ii) ensure SDR compliance with its statutory responsibilities and duties.

The Commission in proposed § 49.26 would require that each SDR Disclosure Document contain the following information:

- The SDR's criteria for providing others with access to services offered and data maintained by the SDR;
- The SDR's criteria for those seeking to connect to or link with the SDR;
- A description of the SDR's policies and procedures regarding its safeguarding of data and operational reliability, as described in proposed § 49.24;
- The SDR's policies and procedures designed to protect the privacy and confidentiality of any and all swap transaction information that the SDR receives from market participants, as described in proposed § 49.16;
- The SDR's policies and procedures regarding its non-commercial and/or commercial use of the swap data;
- The SDR's dispute resolution procedures involving market participant;
- A description of all the SDR's services, including any ancillary services;
- The SDR's updated schedule of any fees, rates, dues, unbundled prices, or other charges for all of its services, including any ancillary services; any discounts or rebates offered; and the criteria to benefit from such discounts or rebates; and
- A description of the SDR's governance arrangements.

Request for Comment. The Commission requests comment on the following questions:

(1) How should the SDR Disclosure Document be furnished to market participants? Would public availability on a SDR's Web site be sufficient? Any other available alternatives?

(2) How useful would the SDR Disclosure Document be for market participants?

4. Non-Discriminatory Access and Fees

Proposed § 49.27 is intended to establish non-discriminatory access to the services provided by SDRs because all swap transactions must be reported to a SDR pursuant to Section 2(a)(13)(G) of the CEA. The Commission believes that the intent and purpose of Section 21 of the CEA is for SDRs to provide open and equal access to its services. Consistent with open and equal access to SDR services, the Commission further believes that fees or charges adopted by an SDR must be equitable and otherwise non-discriminatory.

(a) *Access.* Proposed § 49.27(a) would require that the services provided by SDRs be available to all market participants, such as DCMs, SEFs, DCOs, SDs, MSPs and any other counterparty, on a fair, open and equal

[123] An entity that operates as both a SDR and DCO would also be required to comply with the financial resource requirements of Core Principle B set forth in Section 5b(c)(2)(B) of the CEA, 7 U.S.C. 7a–1(c)(2)(B).

[124] The financial resources allocated by the swap data repository to meet these requirements must include unencumbered, liquid financial assets (*i.e.,* cash and/or highly liquid securities) equal to at least six months' operating costs. If any portion of such financial resources is not sufficiently liquid, the SDR may take into account a committed line of credit or similar facility for the purpose of meeting this requirement.

[125] The SDR shall have reasonable discretion in determining the methodology used to compute such projected operating costs. The Commission may review the methodology and require changes as appropriate.

basis. SDRs that register and agree to accept swap data in a particular asset class (such as interest rates or commodities) could not offer their services on a discriminatory basis to select market participants or select categories of market participants. The Commission believes, pursuant to Section 21 of the CEA, that access should be fair, open and equitable. As a component of fair, open and equal access, the Commission submits that SDRs must ensure that they have the necessary operational capability to provide services to market participants that would seek access for the reporting of swap transactions consistent with Section 21 of the CEA.

(b) *Fees.* Proposed § 49.27(b) would ensure that fees or other charges established by a SDR are not used as a means to deny access to some market participants by employing disparate and/or discriminatory pricing. The Commission is especially concerned that SDRs could attempt to adopt disparate pricing for performing their statutory duties and obligations set forth in Section 21 of the CEA. The Commission believes that such action would be inconsistent with Core Principle 3 discussed above, the CEA generally and the guiding principles set forth in the Dodd-Frank Act.

The Commission recognizes that the ability to receive swap data in the form and manner proposed by part 45 of the Commission's regulations and the ongoing maintenance of such data may involve significant costs, including, but not limited to, technology, personnel, technical support and appropriate BC–DR plans. The Commission in this proposed § 49.27(b) seeks to ensure that the fees charged to DCMs, DCOs, SEFs, SDs, MSPs, and any other counterparties are equitable and do not become an artificial barrier to access, thereby potentially reducing competition for SDR services.

The Commission submits that an equitable fee would be a uniform and non-discriminatory set of fees for both "core" regulatory services provided by the SDR as well as any "ancillary" or "supplemental" services such as life-cycle analysis, confirmation, compression, dispute resolution, and mark-to-market valuation.

Any preferential pricing such as volume discounts or reductions would not be generally viewed as equitable by the Commission. Proposed § 49.27(b) provides that SDRs shall not offer preferential pricing arrangements to any market participant, including volume discounts or reductions *unless* such discounts or reductions apply to all market participants uniformly and are not otherwise established in a manner that would effectively limit the application of such discount or reduction to a select number of market participants. Proposed § 49.27 also would require SDRs to provide fee transparency to market participants. At a minimum, the proposed § 49.27 would require SDRs to set forth on its Web site a schedule of fees and charges as well as in the Disclosure Document discussed above in proposed § 49.26.

In addition, part 43 of the Commission's proposed regulations relating to real-time reporting would prohibit a registered SDR from offering a discount based on the volume of swap transaction and pricing data reported to the registered SDR for public dissemination, unless such discount is offered to all reporting parties and swap markets.[126]

Request for Comment. The Commission requests comment on the questions set forth below on fees:

(1) Are there circumstances in which it would be fair or reasonable for an SDR to charge a counterparty to a swap a fee to satisfy itself that the swap data submitted to the SDR by the other counterparty to the swap is accurate?

(2) In what instances would an SDR differentiate among its users with respect to fees, dues, other charges, discounts, and rebates? Should any of those instances be explicitly prohibited or restricted?

(3) Are there any other requirements that the Commission should impose on an SDR that would promote competition?

F. Real Time Reporting

Proposed § 49.15 details SDRs' ability to accept and publicly disseminate swap transaction and pricing data for public reporting of swap transactions executed on a DCM as well as those executed off-exchange.[127] The Dodd-Frank Act's real-time public reporting requirements and the text of proposed § 49.15 are summarized below.

Section 727 of the Dodd-Frank Act establishes certain public reporting requirements for all swap transactions and participants, and identifies the purpose of such public reporting as "to make swap transaction and pricing data available to the public in such form and at such times as the Commission determines appropriate to enhance price discovery."[128] Section 2(a)(13)(B) establishes the reporting requirements pursuant to which the Commission is authorized to promulgate regulations mandating the public availability of swap transaction and pricing data in "real-time."[129] By its terms, Section 2(a)(13)(A) of the CEA defines real-time public reporting to mean "as soon as technologically practicable after the time at which the swap transaction has been executed." Section 2(a)(13)(D) of the CEA permits the Commission to require registered entities to publicly disseminate swap transaction and pricing data.

To implement Section 2(a)(13) of the CEA, the Commission is proposing a real-time public reporting framework for swap transaction and pricing data in a new part 43 of the Commission's regulations that is subject to a separate rulemaking.[130] Proposed Section 43.2(v) defines "reportable swap transaction" to mean any executed swap, novation, swap unwind, partial novation, partial swap unwind or such other post-execution events that affect the price of the swap. A reportable swap transaction includes not only the execution of a swap contract, but also certain price-affecting events that occur over the "life" of a swap. The proposed regulations in part 43 require registered SDRs to publicly disseminate "off-facility" swap data and allows SDRs to choose to disseminate publicly for swaps executed on a swap market. The proposed regulations in part 43 organize swap transactions into a number of distinct categories for purposes of real-time public reporting, including (1) swap transactions executed on a "swap market" as defined in proposed § 43.2(z)[131], and (2) "off-facility" swaps as defined in proposed § 43.2(p).[132]

[126] *See* proposed § 43.3(i), *supra* note 39.

[127] As explained below, proposed § 49.15 applies to off-facility swap transactions. *See* proposed § 49.15.

[128] Section 2(a)(13)(A) of the CEA, 7 U.S.C. 2(a)(13)(A).

[129] *See* Section 2(a)(13)(C) of the CEA, 7 U.S.C. 2(a)(13)(C) (authorizing and requiring the Commission to provide, by rule, for the real-time public availability of swap transaction and pricing data for four types of swap transactions: (1) Swaps that are subject to the mandatory clearing requirement, including those swaps that may qualify for an exemption; (2) swaps that are not subject to the mandatory clearing requirement but are cleared at a registered derivatives clearing organization; (3) bilateral swap transactions between two counterparties that are reported to a registered swap data repository or the Commission in accordance with Section 2(h)(6) of the Act; and (4) swaps that are determined to be required to be cleared but are not cleared.). Pursuant to section 2(a)(13)(F) parties to a swap are required to report to a registered entity in a timely manner as prescribed by the Commission. Timeliness standards are prescribed in part 43. *See supra* note 39.

[130] *See supra* note 39.

[131] Proposed § 43.2(z) defines "swap market" as "any registered swap execution facility or registered designated contract market that makes swaps available for trading." *See supra* note 39.

[132] Proposed § 43.2(p) defines "off-facility" swaps as "any reportable swap transaction that is not

Continued

Proposed § 49.15 applies to off-facility swap transactions and to all swap transactions executed on a SEF or DCM that fulfill their public dissemination requirement [133] by reporting to a registered SDR.

Under proposed part 43, registered SDRs that disseminate swap transaction and pricing data to the public in real-time, must make the data available and accessible in an electronic format that is capable of being downloaded, saved and/or analyzed.[134] Proposed § 43.3(i) requires registered SDRs who disseminate publicly to retain all data related to a reportable swap transaction (including large notional swaps and block trades) for a period of not less than five years following the time at which such reportable swap transaction is publicly disseminated.

Proposed part 43 of the Commission's Regulations also reflects the Commission's belief in the economic utility of real-time swap data that is promptly reported to the public. Accordingly, proposed § 43.3(a) proposes specific timeliness standards that must to be met for each subcategory of swap transaction.

As noted above, proposed § 49.15 applies to off-facility swap transactions and all transactions executed on a SEF or DCM that fulfill their public dissemination requirement by reporting to a registered SDR that has undertaken to accept and publicly disseminate swap transaction and pricing data in real time. For these transactions, the proposed regulations in part 43 will require that one party to the swap transaction report specified real-time data to such a registered SDR, which, in turn, will be required to disseminate such data to the public.[135] In coordination with proposed part 43, proposed § 49.15(b) requires SDRs to "establish such electronic systems as are necessary to receive real-time swap transaction data," and specifies that such systems must be capable of publicly disseminating all data fields specified by the Commission in proposed part 43.

Proposed § 49.15(c) requires SDRs who disseminate swap transaction and pricing data in real time to promptly notify the Commission when real-time swap data is not timely reported. This proposed regulation also specifies the information that must be included in any notification to the Commission of untimely reporting. The notification must include all of the real-time swap data submitted; identify the party to the swap that submitted the real-time swap data; and contain the date and time the real-time swap transaction data was received by the SDR. The Commission will take appropriate regulatory action against the delinquent reporting party based on these notifications.

Request for Comment. The Commission request comment on the following questions relating to real-time reporting of swap transactions.

(1) Should any party that receives swaps data pursuant to proposed part 43 of the Commission's Regulations for the purpose of performing a real-time reporting function be required to register as a swap data repository?

(2) Should additional regulatory conditions and requirements apply to a party receiving swaps data pursuant to proposed part 43 of the Commission's Regulations for the purpose of performing a real-time reporting function if such a party is not required to register as a swap data repository?

G. Procedures for Implementing Swap Data Repository Rules

Proposed § 49.8 is largely intended to conform to the proposed changes to existing § 40.5(b) (Voluntary submission of rules for Commission review and approval).[136] The proposed amendments to § 40.5(b) are set forth in a separate rulemaking pertaining to "Provisions Common to Registered Entities." [137]

1. Request for Approval

Proposed § 49.8 provides that an applicant for registration as a SDR may request that the Commission approve under Section 5c(c) of the CEA, any or all of its rules and subsequent amendments, prior to implementation or, notwithstanding the provisions of Section 5c(c)(2) of the CEA, at anytime thereafter, under the procedures set forth in § 40.5 of the Commission's Regulations. SDRs that submit operating rules to the Commission for approval at the same time as an application for registration pursuant to proposed § 49.3 on Form SDR to reinstate the registration of a dormant registered SDR, as defined in § 40.1, or while one of the foregoing is pending, will be deemed approved by the Commission no earlier than when the swap data repository is deemed to be registered or reinstated.

2. Self-certification of Rules

Rules of a registered swap data repository not voluntarily submitted for prior Commission approval as described above must be submitted to the Commission with a certification that the rule or rule amendment complies with the CEA and Commission Regulations pursuant to the procedures set forth in § 40.6.

III. Effectiveness and Transition Period

The statutory deadline for final rules is July 15, 2011. Final rules will become effective sixty (60) days after the **Federal Register** publication of the final rules. The Commission expects all SDR applicants to fully comply with the final rules. The Commission requests comment on the nature and length of implementation and phase-in periods that would be appropriate to allow potential SDRs and market participants time to adapt to the new swaps regulatory structure and implement the Proposal in an efficient and orderly manner.

Request for Comment. The Commission requests comment on the questions set forth below.

(1) Is a phase-in period appropriate (especially for existing trade repositories that may seek SDR registration)? If so, how long should such phase-in period be?

(2) Conversely, should all applicants for SDR registration have to demonstrate compliance with the final rules to receive registration? Why or why not?

IV. General Request For Comments

In addition to any specific request for comment included above, the Commission generally requests comment on all aspects of the Proposal. Interested persons are invited to submit written presentations of views, data, and arguments concerning the Proposal.

executed on or subject to the rules of a swap market." *See supra* note 39.

[133] The proposed part 43 Regulations will provide that a swap market may fulfill its public dissemination requirement by either (i) sending the required data to a registered SDR that accepts and publicly disseminates such data; or (ii) by utilizing a third-party service provider to perform this function. *See supra* note 39.

[134] The Commission is proposing this provision to address the concern that a registered SDR may flash real-time swap transaction and pricing data to selected market participants before making such information available to the public and all market participants. Requiring registered SDRs to allow market participants and the public to download, save and/or analyze the real-time swap transaction and pricing data upon public dissemination, ensures equal access to real-time swap transaction and pricing data. *See* proposed § 43.3(e), *supra* note 39.

[135] The Commission notes that proposed § 43.3(b) also provides for an alternative method of reporting by using a third-party service provide for public dissemination. Reporting entities electing to satisfy their real-time reporting requirements through a third-party service provider would not need to report through an SDR. *See supra* note 39.

[136] Proposed § 40.3 is amended to require additional information to be provided by registered entities submitting new products for the Commission's review and approval. Proposed § 40.5(b) codifies a new standard for the review of new rules or rule amendments as established under the Dodd-Frank Act. *See supra* note 18.

[137] *Id.*

V. Related Matters

A. Paperwork Reduction Act

Provisions of proposed part 49 would result in new "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[138] 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 Office of Management and Budget (OMB) control number. The Commission therefore is submitting this proposal to OMB for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The title for this collection of information is "Part 49—Swap data repositories; registration and regulatory requirements," OMB control number 3038–NEW. If adopted, responses to this new collection of information would be mandatory.

The Commission will protect proprietary information according to the Freedom of Information Act and 17 CFR part 145, "Commission Records and Information." In addition, Section 8(a)(1) of the Act strictly prohibits the Commission, unless specifically authorized by the Act, from making public "data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers." The Commission also is required to protect certain information contained in a government system of records pursuant to the Privacy Act of 1974, 5 U.S.C. 552a.

1. Summary of the Proposed Requirements

The proposed regulations would establish a new registered entity called a swap data repository ("SDR"), which would gather swap data and make such data available to the Commission and other regulators. The Commission believes there will be approximately 15 entities seeking registration as SDRs.

2. Information Provided by Reporting Entities

As noted above, proposed part 49 will impose multiple new collections of information requirements within the meaning of the PRA. First, proposed part 49 would impose a registration requirement on all SDRs. This registration requirement is composed of a one-time initial registration as well as amendments to registration documents previously submitted to the Commission by an SDR. Second, proposed part 49 imposes a reporting requirement on registered SDRs. As part of this reporting requirement, SDRs are required to provide access to the swap data it holds to either the Commission or one of the Commission's designees. Additionally, an annual compliance report must be submitted by an SDR's CCO. Third, proposed part 49 imposes a recordkeeping requirement for registered SDRs whereby a registered SDR is required to maintain records of all swap transaction data for a period of at least five years after a swap expires and must maintain a written copy of written policies and procedures, including the code of ethics and conflicts of interest policies in furtherance of compliance with the Act and Commission regulations and any records relevant to the annual compliance report. Lastly, proposed part 49 imposes a disclosure requirement whereby registered SDRs must provide written disclosures before accepting any swap data from a reporting entity or upon a reporting entity's request.

Registration Requirement. Under proposed § 49.3, SDRs would be required to demonstrate compliance with specified registration requirements on Form SDR. The proposed collection for this one-time initial registration is estimated to involve 400 burden hours per SDR. The Commission bases this estimate on consultation with other regulators involving similar collections.[139] As noted above, the Commission believes 15 entities will be subject to this burden. Accordingly, the Commission estimates that the one-time initial registration burden for all SDRs will be approximately 6,000 annual burden hours.

Additionally, under proposed § 49.3, registered SDRs must amend Form SDR annually (*i.e.,* within 60 days after the end of each calendar year of such SDR) as well as when certain information specified on the Form SDR becomes inaccurate.[140] The Commission estimates that the hourly burden for complying with each amendment requirement will be 15 burden hours per amendment for each SDR. The Commission estimates that respondents will be required to file, on average, including the mandatory annual amendment, three amendments per year, for an ongoing annualized burden of approximately 45 hours per SDR and approximately 675 burden hours for all SDRs.

In addition to amending Form SDR, the following filing requirements may be imposed on an SDR in the following circumstances.[141] Under proposed § 49.3, a SDR may withdraw its registration application by filing an electronic request with the Secretary of the Commission at the Commission's Washington, DC office. In the event an SDR is registered and seeks to withdraw from registration, proposed § 49.4 would require such SDR to give notice to the Commission, in writing, requesting that its registration as an SDR be withdrawn. Such notice must be made at least 90 days prior to the date named therein as the date when the withdrawal of registration shall take effect. The Commission estimates the burden hours associated with these filings, which are in addition to and separate from the requirement to amend Form SDR, to be 10 hours per filing. Additionally, the Commission estimates that such filings will occur once over a period of two years for all registered SDRs. Therefore, the average burden hours annualized for all SDRs are expected to be 5 burden hours.

If an SDR is located outside of the United States and is seeking to register, proposed § 49.7 requires such SDR to, in addition to filing a Form SDR, provide the Commission with an opinion of counsel that the SDR, as a matter of law, is able to provide the Commission with prompt access to the book and records of such SDR and that the SDR can submit to onsite inspection and examination by the Commission. The Commission estimates that the hourly burden for complying with each opinion of counsel will be 20 burden hours per opinion for each SDR. The Commission estimates that five SDRs will be located outside the United States and therefore the aggregate burden hours associated with this requirement is estimated to be 100 annual burden hours for those SDRs.

Therefore, the total number of annual burden hours estimated to be required by the proposed regulations for purposes of registration is 6,000 hours initially (Form SDR)[142] and 680 hours

[138] 44 U.S.C. 3501 *et seq.*

[139] The Securities and Exchange Commission ("SEC") calculated in 2008 that Form SIP takes 400 hours to complete. Submission for OMB Review; Comment Request, 73 FR 34060 (June 16, 2008) (outlining the most recent SEC calculations regarding the PRA burdens for Form SIP). While the requirements of Form SIP and Form SDR are not identical, the Commission believes that there is sufficient similarity for PRA purposes that the burden would be roughly equivalent.

[140] An amendment to Form SDR may occur pending SDR registration.

[141] Prior to filing a notice to withdraw or vacate an application to register or filing for withdrawal of registration status, an SDR shall file an amended Form SDR to update any inaccurate information on the registration form (such burden hours associated with amendments to Form SDR are calculated above).

[142] The initial burden hours imposed will increase for SDRs located outside the United States.

on an ongoing basis for any additional filings.

Reporting Requirements. Under proposed § 49.22, chief compliance officers ("CCOs") of registered SDRs would be required to submit an annual compliance report that contains a description of the SDR's written policies and procedures, including those related to the code of ethics, conflicts of interest, and compliance with Section 21(c) core principles. If any material error is discovered in the annual compliance report, the CCO must promptly file an amendment with the Commission to correct such material error or omission. An amendment shall contain the oath or certification required by proposed § 49.22(e)(7) that, to the best of the CCO's knowledge and reasonable belief, and under penalty of law, the annual compliance report is accurate and complete. Based on the Commission's discussions with industry and other regulators, the Commission estimates that these reports (and any amendments which may be necessary) are estimated to involve an average of 5 annual burden hours per respondent per year, for an aggregate of 75 aggregate annual burden hours.

A CCO would also be responsible under proposed § 49.22 for, among other things, establishing procedures for the remediation of noncompliance issues, and establishing and following appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues. The Commission estimates that these two requirements will require 520 hours to create and 120 hours to administer per year per respondent, for a total burden of 7800 hours initially and 1800 hours on average, annually.

Under proposed § 49.10, SDRs would be required to establish, maintain, and enforce policies and procedures for the reporting of swap data of the SDR and shall accept and promptly record all swap data in its selected asset class and other regulatory information that is required to be reported pursuant to part 45. Once such swap data is accepted, proposed § 49.17 would require an SDR to provide direct electronic access to the Commission or its designees and, pursuant to proposed § 49.17(d), make such data available to other parties, including other regulators (*i.e.,* Appropriate Domestic Regulators and Appropriate Foreign Regulators). In the event an Appropriate Domestic Regulator or Appropriate Foreign Regulator files a request to gain access to the swaps data maintained by an SDR, proposed § 49.17 provides that the registered SDR must notify the Commission electronically and in a format specified by the Secretary of the Commission. Under proposed § 49.16, SDRs would be required to develop written policies and procedures to protect the confidentiality of data, and, under proposed § 49.11, ensure that submitted data is accurate. Prior to an Appropriate Domestic Regulator or Appropriate Foreign Regulator receiving the data, proposed § 49.17 requires that a "Confidentiality and Indemnification Agreement" between the Appropriate Domestic Regulator or Appropriate Foreign Regulator and the registered SDR be executed. Proposed §§ 49.23 and 49.24 specify the reporting requirements for a registered SDR's emergency policies and procedures and system safeguards. Proposed § 49.23 would require registered SDRs to establish procedures for the exercise of emergency authority in the event of an emergency. A registered SDR policies and procedures shall include provisions to notify the Commission as soon as reasonably practicable of any exercise of emergency authority. When notifying the Commission of any exercise of emergency authority, a SDR shall explain the reasons for taking such emergency action, explain how conflicts of interest were minimized, and document the decision-making process. Underlying documentation shall be made available to the Commission upon request. Proposed § 49.24 provides that a registered SDR must maintain a BC–DR plan which can be invoked in the case of an emergency. A registered SDR shall provide to the Commission, upon request, current copies of its BC–DR plan and other emergency procedures, its assessments of its operational risk and other documents requested by Commission staff for purpose of maintaining a current profile of the SDR's automated systems. Proposed § 49.24 also requires a registered SDR to notify the Commission staff of: (1) All system malfunction; (2) cyber security incidents or targeted threats that actually or potentially jeopardize automated system operation, reliability, security, or capacity; and (3) any activation of the SDR's BD–DR plan. Additionally, an SDR shall give the Commission staff timely notice of all (1) planned changes to automated systems that may impact the reliability, security, or adequate scalable capacity of such systems; and (2) planned changes to the SDR's program of risk analysis and oversight. The Commission estimates that the start-up burden associated with the reporting requirements in this paragraph will be 40,000 hours per respondent for a total of 600,000 aggregate burden hours for all respondents. The Commission further estimates that the total ongoing annual burden of these systems to be 15,000 hours per respondent for a total of 225,000 aggregate burden hours for all respondents.

Proposed § 49.25 would require a registered SDR to report to the Commission (and provide sufficient documentation to substantiate the calculations made therein) the amount of financial resources available to the SDR to meet the requirements set forth in proposed § 49.25, the value of each financial resource available, and provide a financial statement, including the balance sheet, income statement, and statement of cash flows of the registered SDR. In addition to providing documentation of the methodology used to compute its financial requirement, a registered SDR must also provide copies of any agreement establishing or amending a credit facility, insurance coverage, or other arrangement evidencing or otherwise supporting the SDR's conclusions. The Commission estimates the financial statement will result in 200 annual burden hours per SDR for 3000 aggregate annual burden hours.

Recordkeeping Requirement. Under proposed § 49.12, registered SDRs, which are estimated to be approximately 15 entities, would be required to maintain the swap transaction data it receives for a period of not less than five (5) years after the applicable swap expires, during which time the records must be readily available by the SDR and available to the Commission via real-time electronic access. Thereafter, the swap data must be archived and retrievable by the SDR within 3 business days. In addition to requiring SDRs to maintain records of swap transaction and pricing data, the proposed Regulations impose an additional recordkeeping requirement on SDRs whereby they must maintain: (a) A copy of written policies and procedures, including the code of ethics and conflicts of interest policies in furtherance of compliance with the Act and Commission regulations, and (b) any records relevant to the annual compliance report. These proposed recordkeeping obligations are estimated to involve, initially, 300 burden hours, for an aggregate of 4500 annual burden hours. The Commission further estimates that the ongoing annual burden would be 254 hours per respondent for a total ongoing annual burden of 3810 hours.

Disclosure Requirements. Proposed § 49.26 provides that before accepting any swap data from a reporting entity or upon a reporting entity's request, a

registered SDR shall furnish to the reporting entity a disclosure document. This disclosure document must contain written information which reasonably enables the reporting entity to identify and accurately evaluate the risks and costs associated with using the services of the SDR. The proposed disclosure obligation is estimated to involve a one-time initial burden of 100 hours per respondent (*i.e.,* preparation of template disclosure document), for a total initial burden of 1,500 hours. The Commission expects this requirement will result in an ongoing annual burden of one hour per respondent, for a total annual burden of 15 hours for all registered SDRs.

3. Information Collection Comments

The Commission invites the public and other Federal agencies to comment on any aspect of the reporting and recordkeeping burdens discussed above. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments in order to: (i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (ii) evaluate the accuracy of the Commission's estimate of the burden of the proposed collection of information; (iii) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (iv) minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Comments may be submitted directly to the OMB's Office of Information and Regulatory Affairs, by fax at (202) 395–6566 or by e-mail at *OIRAsubmissions@omb.eop.gov.* Please provide the Commission with a copy of submitted comments so that all comments can be summarized and addressed in the final rule preamble. Refer to the Addresses section of this notice of proposed rulemaking for comment submission instructions to the Commission. A copy of the supporting statements for the collections of information discussed above may be obtained by visiting RegInfo.gov. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release in the **Federal Register**. Consequently, a comment to OMB is most assured of being fully effective if received by OMB (and the Commission) within 30 days after publication of this notice of proposed rulemaking. Nothing in the foregoing affects the deadline enumerated above for public comment to the Commission on the proposed rules.

B. Cost-Benefit Analysis

Section 15(a) of the CEA [143] requires that the Commission, before promulgating a regulation or issuing an order, to consider the costs and benefits of its action. By its terms, Section 15(a) of the CEA does not require the Commission to quantify the costs and benefits of a new regulation or to determine whether the benefits of the regulation outweigh its costs. Rather, Section 15(a) of the CEA simply requires the Commission to "consider the costs and benefits" of its action.

Section 15(a) of the CEA further specifies that costs and benefits shall be evaluated in light of the following considerations: (1) Protection of market participants and the public; (2) efficiency and competition; (3) financial integrity of the futures markets and price discovery; (4) sound risk management practices; and (5) other public interest considerations. Accordingly, the Commission could, in its discretion, give greater weight to any one of the five considerations and could determine that, notwithstanding its costs, a particular regulation was necessary or appropriate to protect the public interest or to effectuate any of the provisions or to accomplish any of the purposes of the Act.

1. Costs

The Commission has determined that if the proposed regulations are not enacted, there will be a continued lack of transparency in the swaps market for both market participants and regulators. Increased costs to market participants will result from inefficiencies in the market related to price discovery and risk management and the inability of regulators to monitor systemic risk. This will ultimately result in greater market risk for all market participants and greater systemic risk for the larger economy.

2. Benefits

The Commission has determined that the proposed regulations would benefit market participants and the public by improving governance arrangements to prevent conflicts of interests that if not addressed, would serve the interests of one group of constituents over other groups, including market participants and the public. Additionally, the proposed regulations will improve efficiency and competition by identifying and mitigating conflicts of interests, which will lead to improved efficiency in decision-making on the one hand, and benefit competition by increasing open access to markets, on the other hand. The proposed regulations will also spur competition in the data and trade repository industry by setting forth clear registration guidelines and requirements for becoming SDRs and requiring more transparency and access for existing repositories. Enhanced transparency in the markets will also facilitate price discovery, which will decrease risk and, in turn, increase financial integrity. The increased transparency resulting from the proposed rules will lead to improved risk management practices, and the new governance arrangements more effectively balance different interests so that the risks presented by a "control group" or other interests will not dominate decision-making in the organization. Lastly, the proposed rules will give the Commission and other federal regulators access to data accepted by registered SDRs. Such access will promote greater risk management and give regulators a better measure of systematic risk throughout the financial markets. The proposed rules, for the reasons cited above, operate in the best interests of the public.

3. Public Comment

The Commission invites public comment on its cost-benefit considerations. Commenters are also invited to submit any data or other information that they may have quantifying or qualifying the costs and benefits of this proposal with their comment letters.

C. Antitrust Considerations

Section 15(b) of the Act requires "[t]he Commission [to] take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the objectives of this Act, as well as the policies and purposes of this Act, in issuing any order or adopting any Commission rule or regulation * * *" [144]

The Commission does not anticipate that these proposed regulations will result in anticompetitive behavior. However, because these proposed regulations are creating a new registered entity for a new market (*i.e.,* swaps market), the Commission encourages comments from the public on this regulation's potential anticompetitive nature.

[143] 7 U.S.C. 19(a).

[144] 7 U.S.C. 19.

D. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA") [145] requires that agencies consider whether the regulations 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.[146] The proposed Regulations by the Commission will affect only SDRs, which will comprise a new category of registered entity. Accordingly, the Commission has not previously addressed the question of whether SDRs are, in fact, small entities for purposes of the RFA.

The Commission has previously established certain definitions of "small entities" to be used in evaluating the impact of its rules under the RFA.[147] The Commission previously determined that derivatives clearing organizations ("DCOs") are not small entities because they clear contracts executed on contract markets such as designated contract markets ("DCMs"). The Commission's decision was based in part on its previous determination that DCMs are not small entities because of "the central role" they play in "the regulatory scheme concerning futures trading." [148] Because of the "importance of futures trading in the national economy," to register as a DCM, a board of trade has to meet stringent requirements set forth in Section 5 of the Act, 7 U.S.C. 7.[149] DCOs are subject to similar stringent requirements, including substantial financial resource requirements, set forth in Section 5b of the Act, 7 U.S.C. 7a–1.

The Dodd-Frank Act defines a SDR as any person that collects and maintains information or records with respect to transactions or positions in, or the terms and conditions of, swaps entered into by third parties for the purpose of providing a centralized recordkeeping facility for swaps. Similar to DCOs and DCMs, SDRs will play a central role both in the regulatory scheme for swaps trading and in the overall market for swap transactions. Additionally, the amount and complexity of swap transaction data expected to be reported, maintained and disseminated by SDRs is expected to require significant financial resources to build the systems necessary to comply with the statutory mandates set forth in the Dodd-Frank Act. SDRs will receive data from DCOs and DCMs, amongst others. Additionally, SDRs will be required to maintain certain minimum financial resources to perform its statutory duties set forth in proposed § 49.9 and the core principles set forth in proposed § 49.19. Although the financial requirements will vary for SDRs (*i.e.,* an SDR's financial resources shall be considered sufficient if their value is at least equal to a total amount that would enable the SDR, or applicant for registration, to cover its operating costs for a period of at least one year, calculated on a rolling basis), for the basic purpose of the financial integrity of the swaps market, the Commission can make no size distinction among registered SDRs. The Commission believes that the financial resources required to be registered as an SDR and to meet the statutory obligations of an SDR would essentially prohibit "small entities." Therefore, for purposes of the RFA, the Commission is hereby determining that SDRs, like DCOs and DCMs, are not "small entities."

Thus, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that the proposed rules, will not have a significant impact on a substantial number of small entities.

VI. List of Subjects

List of Subjects in 17 CFR Part 49

Swap data repositories; registration and regulatory requirements.

In consideration of the foregoing, and pursuant to the authority in the Commodity Exchange Act, as amended, and in particular Sections 8a(5) and 21 of the Act, the Commission hereby proposes to amend Chapter I of Title 17 of the Code of Federal Regulation by adding a new part 49 as follows:

PART 49—SWAP DATA REPOSITORIES

Sec

49.1 Scope.
49.2 Definitions.
49.3 Procedures for registration.
49.4 Withdrawal from registration.
49.5 Equity interest transfers.
49.6 Registration of successor entities.
49.7 Swap data repositories located in foreign jurisdictions.
49.8 Procedures for implementing registered swap data repository rules.
49.9 Duties of registered swap data repositories.
49.10 Acceptance of data.
49.11 Confirmation of data accuracy.
49.12 Swap data repository recordkeeping requirements.
49.13 Monitoring, screening and analyzing swap data.
49.14 Monitoring, screening and analyzing end-user clearing exemption claims by individual and affiliated entities.
49.15 Real-time public reporting of swap data.
49.16 Privacy and confidentiality requirements of swap data repositories.
49.17 Access to SDR data.
49.18 Confidentiality and indemnification agreement.
49.19 Core principles applicable to registered swap data repositories.
49.20 Governance arrangements (Core Principle 2).
49.21 Conflicts of interest (Core Principle 3).
49.22 Chief compliance officer.
49.23 Emergency policies and procedures.
49.24 System safeguards.
49.25 Financial resources.
49.26 Disclosure requirements of swap data repositories.
49.27 Access and fees.
Appendix A to part 49—Form SDR

Authority: 7 U.S.C. 12a and 24a, as amended by Title VII of the Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010), unless otherwise noted.

§ 49.1 Scope.

The provisions of this part apply to any swap data repository as defined under Section 1a(48) of the Act which is registered or is required to register as such with the Commission pursuant to Section 21(a) of the Act.

§ 49.2 Definitions.

(a) As used in this part:

(1) *Affiliate.* The term "*affiliate*" means a person that directly, or indirectly, controls, is controlled by, or is under common control with, the swap data repository.

(2) *Asset Class.* The term "*asset class*" means the particular broad category of goods, services or commodities underlying a swap. The asset classes include credit, equity, interest rates, currency, other commodities, and such other asset classes as may be determined by the Commission.

(3) *Control.* The term "*control*" (including the terms "controlled by" and "under common control with") means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.

(4) *Foreign Regulator.* The term "*Foreign Regulator*" means a foreign futures authority as defined in Section 1a(26) of the Act, foreign financial supervisors, foreign central banks and foreign ministries.

(5) *Commercial Use.* The term "*commercial use*" means the use of swap data held and maintained by a

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[145] 5 U.S.C. 601 *et seq.*

[146] 5 U.S.C. 601 *et seq.*

[147] Policy Statement and Establishment of Definitions of "Small Entities" for Purposes of the Regulatory Flexibility Act, 47 FR 18,618 (Apr. 30, 1982).

[148] *Id.*

[149] *Id.* at note 3.

registered swap data repository for a profit or business purposes. The use of swap data for regulatory purposes and/or responsibilities by a registered swap data repository would not be considered a commercial use regardless of whether the registered swap data repository charges a fee for reporting such swap data.

(6) *Market Participant.* The term "*market participant*" means any person participating in the swap market, including, but not limited to, designated contract markets, derivatives clearing organizations, swaps execution facilities, swap dealers, major swap participants, and any other counterparties to a swap transaction.

(7) *Non-affiliated third party.* The term "*non-affiliated third party*" means any person except:

(i) The swap data repository,

(ii) The swap data repository's affiliate, or

(iii) A person employed by a swap data repository and any entity that is not the swap data repository's affiliate (and "*non-affiliated third party*" includes such entity that jointly employs the person).

(8) *Person Associated with a Swap Data Repository.* The term "*person associated with a swap data repository*" means:

(i) Any partner, officer, or director of such swap data repository (or any person occupying a similar status or performing similar functions);

(ii) Any person directly or indirectly controlling, controlled by, or under common control with such swap data repository;

(iii) Or any employee of such swap data repository.

(9) *Position.* The term "*position*" means the gross and net notional amounts of open swap transactions aggregated by one or more attributes, including, but not limited to, the:

(i) Underlying instrument;

(ii) Index, or reference entity;

(iii) Counterparty;

(iv) Asset class;

(v) Long risk of the underlying instrument, index, or reference entity; and

(vi) Short risk of the underlying instrument, index, or reference entity.

(10) *Reporting Entity.* The term "*reporting entity*" means those entities that are required to report swap data to a registered swap data repository. These reporting entities include designated contract markets, swaps execution facilities, derivatives clearing organizations, swap dealers, major swap participants and certain end-users.

(11) *Section 8 Material.* The term "*Section 8 Material*" means the business transactions, trade data, or market positions of any person and trade secrets or names of customers.

(12) *Swap Data.* The term "*swap data*" means the specific data elements and information set forth in part 45 of this chapter that is required to be reported by a reporting entity to a registered swap data repository.

(13) *SDR Information.* The term "*SDR Information*" means any information that the swap data repository maintains.

(14) *Registered Swap Data Repository.* The term "*registered swaps data repository*" means a swaps data repository that is registered under Section 21 of the Act.

(15) *Independent Perspective.* The term "*independent perspective*" means a viewpoint that is impartial regarding competitive, commercial, or industry concerns and contemplates the effect of a decision on all constituencies involved.

(b) *Defined Terms.* Capitalized terms not defined in this part shall have the meanings assigned to them in § 1.3 of this chapter.

§ 49.3 Procedures for registration.

(a) *Application Procedures.* (1) An applicant, person or entity desiring to be registered as a swap data repository shall file electronically an application for registration on Form SDR provided in appendix A to this part, with the Secretary of the Commission at its headquarters in Washington, DC at *submissions@cftc.gov* in accordance with the instructions contained therein.

(2) The application shall include information sufficient to demonstrate compliance with core principles specified in Section 21 of the Act and the regulations thereunder. Form SDR consists of instructions, general questions and a list of Exhibits (documents, information and evidence) required by the Commission in order to determine whether an applicant is able to comply with the core principles. An application will not be considered to be materially complete unless the applicant has submitted, at a minimum, the exhibits as required in Form SDR. If the application is not materially complete, the Commission shall notify the applicant that the application will not be deemed to have been submitted for purposes of the 180-day review procedures.

(3) *180–Day Review Procedures.* The Commission will review the application for registration as a swap data repository within 180 days of the date of the filing of such application. At or prior to the conclusion of the 180-day period, the Commission will either by order grant registration; extend, by order, the 180-day review period for good cause; or deny the application for registration as a swap data repository. The 180-day review period shall commence once a completed submission on Form SDR is submitted to the Commission. The determination of when such submission on Form SDR is complete shall be at the sole discretion of the Commission. If deemed appropriate, the Commission may grant registration as a swap data repository subject to conditions. If the Commission denies an application for registration as a swap data repository, it shall specify the grounds for such denial. In the event of a denial of registration for a swap data repository, any person so denied shall be afforded an opportunity for a hearing before the Commission.

(4) *Standard for Approval.* The Commission shall grant the registration of a swap data repository if the Commission finds that such swap data repository is appropriately organized, and has the capacity, to ensure the prompt, accurate and reliable performance of its functions as a swap data repository, comply with any applicable provisions of the Act and regulations thereunder, carry out its functions in a manner consistent with the purposes of Section 21 of the Act and the regulations thereunder, and operate in a fair, equitable and consistent manner. The Commission shall deny registration of a swap data repository if it appears that the application is materially incomplete; fails in form or substance to meet the requirements of Section 21 of the Act and part 49; or is amended or supplemented in a manner that is inconsistent with this § 49.3. The Commission shall notify the applicant seeking registration that the Commission is denying the application setting forth the deficiencies in the application, and/or the manner in which the application fails to meet the requirements of this part.

(5) *Amendments and Annual Filing.* If any information reported on Form SDR or in any amendment thereto is or becomes inaccurate for any reason, whether before or after the application for registration has been granted, the swap data repository shall promptly file an amendment on Form SDR updating such information. In addition, the swap data repository shall annually file an amendment on Form SDR within 60 days after the end of each calendar year of such swap data repository.

(6) *Service of Process.* Each swap data repository shall designate and authorize on Form SDR an agent in the United States, other than a Commission official, who shall accept any notice or service

of process, pleadings, or other documents in any action or proceedings brought against the swap data repository to enforce the Act and the regulations thereunder.

(b) *Provisional Registration.* The Commission, upon the request of an applicant, may grant provisional registration of a swap data repository if such applicant is in substantial compliance with the standards set forth in paragraph (a)(4) of this section. Such provisional registration of a swap data repository shall expire on the earlier of: the date that the Commission grants or denies registration of the swap data repository; or the date that the Commission rescinds the temporary registration of the swap data repository. This paragraph (b) of this section shall terminate within 365 days of the effectiveness of this Regulation. A provisional registration granted by the Commission does not affect the right of the Commission to grant or deny permanent registration as provided under paragraph (a)(3) of this section.

(c) *Withdrawal of Application for Registration.* An applicant for registration may withdraw its application submitted pursuant to paragraph (a) of this section by filing with the Commission such a request. Withdrawal of an application for registration shall not affect any action taken or to be taken by the Commission based upon actions, activities, or events occurring during the time that the application for registration was pending with the Commission, and shall not prejudice the filing of a new application by such applicant.

(d) *Reinstatement of Dormant Registration.* Before accepting or re-accepting swap transaction data, a dormant registered swap data repository as defined in § 40.1(e) of this chapter shall reinstate its registration under the procedures set forth in paragraph (a) of this section; provided, however, that an application for reinstatement may rely upon previously submitted materials that still pertain to, and accurately describe, current conditions.

(e) *Delegation of Authority.* (1) The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Market Oversight or the Director's delegates, with the consultation of the General Counsel or the General Counsel's delegates, the authority to notify an applicant seeking registration as a swap data repository pursuant to Section 21 of the Act that the application is materially incomplete and the 180-day period review period is extended.

(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 paragraph.

(3) Nothing in this paragraph prohibits the Commission, at its election, from exercising the authority delegated in paragraph (e)(1) of this section.

(f) *Request for Confidential Treatment.* An applicant for registration may request confidential treatment for materials submitted in its application as set forth in § 145.9 of this chapter. The applicant shall identify with particularity information in the application that will be subject to a request for confidential treatment.

§ 49.4 Withdrawal from registration.

(a)(1) A registered swap data repository may withdraw its registration by giving notice in writing to the Commission requesting that its registration as a swap data repository be withdrawn, which notice shall be served at least ninety days prior to the date named therein as the date when the withdrawal of registration shall take effect. The request to withdraw shall be made by a person duly authorized by the registrant and shall specify:

(i) The name of the registrant for which withdrawal of registration is being requested;

(ii) The name, address and telephone number of the swap data repository that will have custody of data and records of the registrant;

(iii) The address where such data and records will be located; and

(iv) A statement that the custodial swap data repository is authorized to make such data and records available in accordance with § 1.44.

(2) Prior to filing a request to withdraw, a registered swap data repository shall file an amended Form SDR to update any inaccurate information. A withdrawal of registration shall not affect any action taken or to be taken by the Commission based upon actions, activities or events occurring during the time that the facility was designated by the Commission.

(b) A notice of withdrawal from registration filed by a swap data repository shall become effective for all matters (except as provided in this paragraph (b)) on the 60th day after the filing thereof with the Commission, within such longer period of time as to which such swap data repository consents or which the Commission, by order, may determine as necessary or appropriate in the public interest.

(c) *Revocation of Registration for False Application.* If, after notice and opportunity for hearing, the Commission finds that any registered swap data repository has obtained its registration by making any false and misleading statements with respect to any material fact or has violated or failed to comply with any provision of the Act and regulations thereunder, the Commission, by order, may revoke the registration. Pending final determination whether any registration shall be revoked, the Commission, by order, may suspend such registration, if such suspension appears to the Commission, after notice and opportunity for hearing, to be necessary or appropriate and in the public interest.

§ 49.5 Equity interest transfers.

(a) *Equity transfer notification.* Upon entering into any agreement(s) that could result in an equity interest transfer of ten percent or more in the swap data repository, the swap data repository shall file a notification of the equity interest transfer with the Secretary of the Commission at its Washington, DC headquarters at *submissions@cftc.gov* and the Division of Market Oversight at *DMOSubmissions@cftc.gov,* no later than the business day, as defined in § 40.1 of this chapter, following the date on which the swap data repository enters into a firm obligation to transfer the equity interest. The swap data repository shall also amend any information that is no longer accurate on Form SDR consistent with the procedures set forth in § 49.3 of this part.

(b) *Required information.* The notification must include and be accompanied by: any relevant agreement(s), including any preliminary agreements; any associated changes to relevant corporate documents; a chart outlining any new ownership or corporate or organizational structure; a brief description of the purpose and any impact of the equity interest transfer; and a representation from the swap data repository that it meets all of the requirements of Section 21 of the Act and Commission regulations adopted thereunder. The swap data repository shall keep the Commission apprised of the projected date that the transaction resulting in the equity interest transfer will be consummated, and must provide to the Commission any new agreements or modifications to the original agreement(s) filed pursuant to this section. The swap data repository shall notify the Commission of the consummation of the transaction on the day in which it occurs.

(c) *Certification.* (1) Upon a transfer of an equity interest of ten percent or more

in a registered swap data repository, the registered swap data repository shall file with the Secretary of the Commission at its Washington DC headquarters, at *submissions@cftc.gov*, and the Division of Market Oversight, at *DMOSubmissions@cftc.gov*, a certification that the registered swap data repository meets all of the requirements of Section 21 of the Act and Commission regulations adopted thereunder, no later than two business days, as defined in § 40.1 of this chapter, following the date on which the equity interest of ten percent or more was acquired. Such certification shall state whether changes to any aspects of the swap data repository's operations were made as a result of such change in ownership, and include a description of any such change(s).

(2) The certification required under this paragraph may rely on and be supported by reference to an application for registration as a swap data repository or prior filings made pursuant to a rule submission requirement, along with any necessary new filings, including new filings that provide any and all material updates of prior submissions.

§ 49.6 Registration of successor entities.

(a) In the event of a corporate transaction, such as a re-organization, merger, acquisition, bankruptcy or other similar corporate event, that creates a new entity, in which the swap data repository continues to operate, the swap data repository shall request a transfer of the registration, rules, and other matters, no later than 30 days after the succession. The registration of the predecessor shall be deemed to remain effective as the registration of the successor if the successor, within 30 days after such succession, files an application for registration on Form SDR, and the predecessor files a request for vacation of registration on Form SDR *provided, however,* that the registration of the predecessor swap data repository shall cease to be effective 90 days after the application for registration on Form SDR is filed by the successor swap data repository.

(b) If the succession is based solely on a change in the predecessor's date or state of incorporation, form of organization, or composition of a partnership, the successor may, within 30 days after the succession, amend the registration of the predecessor swap data repository on Form SDR to reflect these changes. This amendment shall be an application for registration filed by the predecessor and adopted by the successor.

§ 49.7 Swap data repositories located in foreign jurisdictions.

Any swap data repository located outside of the United States applying for registration pursuant to § 49.3 of this part shall certify on Form SDR and provide an opinion of counsel that the swap data repository, as a matter of law, is able to provide the Commission with prompt access to the books and records of such swap data repository and that the swap data repository can submit to onsite inspection and examination by the Commission.

§ 49.8 Procedures for implementing registered swap data repository rules.

(a) *Request for Commission approval of rules.* An applicant for registration as a swap data repository may request that the Commission approve under Section 5c(c) of the Act, any or all of its rules and subsequent amendments thereto, prior to their implementation or, notwithstanding the provisions of Section 5c(c)(2) of the Act, at anytime thereafter, under the procedures of § 40.5 of this chapter.

(b) Notwithstanding the timeline under § 40.5(c) of this chapter, the rules of a swap data repository that have been submitted for Commission approval at the same time as an application for registration under § 49.3 of this part to reinstate the registration of a dormant registered swap data repository, as defined in § 40.1 of this chapter, will be deemed approved by the Commission no earlier than when the swap data repository is deemed to be registered or reinstated.

(c) *Self-certification of rules.* Rules of a registered swap data repository not voluntarily submitted for prior Commission approval pursuant to paragraph (a) of this section must be submitted to the Commission with a certification that the rule or rule amendment complies with the Act or rules thereunder pursuant to the procedures of § 40.6 of this chapter, as applicable.

§ 49.9 Duties of registered swap data repositories.

(a) *Duties.* To be registered, and maintain registration, as a swap data repository, a registered swap data repository shall:

(1) Accept data as prescribed in § 49.10 for each swap;

(2) Confirm, as prescribed in § 49.11, with both counterparties to the swap the accuracy of the data that was submitted;

(3) Maintain, as prescribed in § 49.12, the data described in part 45 of the Commission's Regulations in such form and manner as provided therein and in the Act and the rules and regulations thereunder;

(4) Provide direct electronic access to the Commission (or any designee of the Commission, including another registered entity) as prescribed in § 49.17;

(5) Provide the information set forth in § 49.15 to comply with the public reporting requirements set forth in Section 2(a)(13) of the Act;

(6) Establish automated systems for monitoring, screening, and analyzing swap data as prescribed in § 49.13;

(7) Establish automated systems for the monitoring, screening and analyzing end-user clearing exemption claims as prescribed in § 49.14;

(8) Maintain the privacy of any and all swap data and any other related information that the swap data repository receives from a reporting entity as prescribed in § 49.16;

(9) Upon request of certain appropriate domestic and foreign regulators, provide access to swap data and information held and maintained by the swap data repository as prescribed in § 49.17;

(10) Adopt and establish appropriate emergency policies and procedures as prescribed in § 49.23.

(11) Designate an individual to serve as a chief compliance officer who shall comply with § 49.22; and

(12) Subject itself to inspection and examination by the Commission.

(b) This Regulation is not intended to limit, or restrict, the applicability of other provisions of the Act, including, but not limited to, Section 2(a)(13) of the Act and rules and regulations promulgated thereunder.

§ 49.10 Acceptance of data.

(a) A registered swap data repository shall establish, maintain, and enforce policies and procedures for the reporting of swap data to the registered swap data repository and shall accept and promptly record all swap data in its selected asset class and other regulatory information that is required to be reported pursuant to part 45 of this chapter by designated contract markets, derivatives clearing organizations, swap execution facilities, swap dealers, major swap participants and/or end-users.

(1) *Electronic Connectivity.* For the purpose of accepting all swap data as required by part 45, the registered swap data repository shall adopt policies and procedures, including technological protocols, which provide for electronic connectivity between the swap data repository and designated contract markets, derivatives clearing organizations, swaps execution facilities, swap dealers, major swap participants and/or end-users who report such data. The technological

protocols established by a swap data repository shall provide for the receipt of swap creation data, swap continuation data, real-time public reporting data, and all other data and information required to be reported to such swap data repository. The swap data repository shall ensure that its mechanisms for data acceptance are reliable and secure.

(b) A registered swap data repository shall set forth in its application for registration as described in § 49.3 the specific asset class or classes for which it will accept swaps data. If a swap data repository accepts swap data of a particular asset class, then it shall accept data from all swaps of that asset class.

(c) A registered swap data repository shall establish policies and procedures reasonably designed to prevent any provision in a valid swap from being invalidated or modified through the confirmation or recording process of the swap data repository.

(d) A registered swap data repository shall establish procedures and provide facilities for effectively resolving disputes over the accuracy of the swap data and positions that are recorded in the registered swap data repository.

§ 49.11 Confirmation of data accuracy.

(a) A registered swap data repository shall establish policies and procedures to ensure the accuracy of swap data and other regulatory information required to be reported by this part 49 that it receives from reporting entities or certain third party service providers such as confirmation or matching service providers acting on their behalf.

(b) With respect to data and other regulatory information submitted by a reporting entity or certain third party service providers acting on a reporting entity's behalf, the swap data repository shall confirm with both counterparties to the swap the accuracy of the data and information submitted. This requirement applies to all reported swap data except for data reported for purposes of real-time public reporting.

(c) A registered swap data repository in connection with the process of confirming the accuracy of the data and information submitted shall communicate with both counterparties to the swap and receive acknowledgement of the data and information submitted as well as any correction of any errors. The acknowledgement and correction of errors shall pertain to all information submitted by either counterparty and any entity that has been delegated the reporting obligation. The swap data repository shall keep a record of corrected errors that is available upon request to the Commission.

§ 49.12 Swap data repository recordkeeping requirements.

(a) A registered swap data repository shall maintain its books and records in accordance with the requirements of § 45.2 of this chapter regarding the swap data required to be reported to the swap data repository.

(b) A registered swap data repository shall maintain swap data (including all historical positions) throughout the existence of the swap and for five years following final termination of the swap, during which time the records must be readily accessible by the swap data repository and available to the Commission via real-time electronic access; and in archival storage for which such swap data is retrievable by the swap data repository within three business days.

(c) All records required to be kept pursuant to this Regulation shall be open to inspection upon request by any representative of the Commission, the United States Department of Justice, the Securities and Exchange Commission, or by any representative of a prudential regulator as authorized by the Commission. Copies of all such records shall be provided, at the expense of the swap data repository or person required to keep the record, to any representative of the Commission upon request, either by electronic means, in hard copy, or both, as requested by the Commission.

(d) A registered swap data repository that accepts and disseminates swap transaction and pricing data shall comply with the real time public reporting and recordkeeping requirements prescribed in part 43 of this chapter.

(e) A registered swap data repository shall establish policies and procedures to calculate positions for position limits and any other purpose as required by the Commission, for all persons with swaps that have not expired maintained by the registered swap data repository.

§ 49.13 Monitoring, screening and analyzing swap data.

(a) *Duty to Monitor, Screen and Analyze Data.* A registered swap data repository shall monitor, screen, and analyze all swap data in its possession in such a manner as the Commission may require. A swap data repository shall routinely monitor, screen, and analyze swap data for the purpose of any standing swap surveillance objectives which the Commission may establish as well as specific monitoring, screening, and analysis tasks based on ad hoc requests by the Commission.

(b) *Capacity to Monitor, Screen and Analyze Data.* A registered swap data repository shall establish and maintain sufficient information technology, staff, and other resources to fulfill the requirements in this § 49.13 in a manner prescribed by the Commission. A swap data repository shall monitor the sufficiency of such resources at least annually, and adjust its resources as its responsibilities, or the volume of swap transactions subject to monitoring, screening, and analysis, increase.

§ 49.14 Monitoring, screening and analyzing end-user clearing exemption claims by individual and affiliated entities.

A registered swap data repository shall have automated systems capable of identifying, aggregating, sorting, and filtering all swap transactions that are reported to it which are exempt from clearing pursuant to Section 2(h)(7) of the Act. Such capabilities shall be applicable to any information provided to a swap data repository by or on behalf of an end user regarding how such end user meets the requirements Sections 2(h)(7)(A)(i), 2(h)(7)(A)(ii), and 2(h)(7)(A)(iii) of the Act and any Commission regulations thereunder.

§ 49.15 Real-time public reporting of swap data.

(a) *Scope.* The provisions of this § 49.15 apply to real-time public reporting of swap data for off-facility swaps, as defined in part 43 of this chapter.

(b) *Systems to Accept and Disseminate Swap Data In Connection With Real-Time Public Reporting.* A registered swap data repository shall establish such electronic systems as are necessary to accept and publicly disseminate real-time swap data submitted to meet the real-time public reporting obligations of part 43 of this chapter. Any electronic systems established for this purpose must be capable of accepting and publicly disseminating all data fields required by part 43 of this chapter.

(c) *Duty to Notify the Commission of Untimely Data.* A registered swap data repository must notify the Commission of any swap transaction for which the real-time swap data was not received by the swap data repository within the time period required by § 43.3(a)(3). This notification must be submitted electronically to the Commission within forty-eight hours of when the swap data repository first receives an untimely real-time swap data report from one of the parties to the swap transaction. The notification submitted to the Commission must include all real-time swap data submitted for the relevant

swap transaction; identify the party to the swap that submitted the real-time swap data; and contain the date and time, to the nearest second, the real-time swap data was received by the swap data repository.

§ 49.16 Privacy and confidentiality requirements of swap data repositories.

(a) Each swap data repository shall:

(1) Establish, maintain, and enforce written policies and procedures reasonably designed to protect the privacy and confidentiality of any and all SDR Information that is not subject to real-time public reporting set forth in part 43 of this chapter. Such policies and procedures shall include, but are not limited to, policies and procedures to protect the privacy and confidentiality of any and all SDR Information (except for data disseminated under part 43) that the swap data repository shares with affiliates and non-affiliated third parties; and

(2) Establish and maintain safeguards, policies, and procedures reasonably designed to prevent the misappropriation or misuse, directly or indirectly, of:

(i) Section 8 Material;

(ii) Other SDR Information; and/or

(iii) Intellectual property, such as trading strategies or portfolio positions, by the swap data repository or any person associated with the swap data repository. Such safeguards, policies, and procedures shall include, but are not limited to,

(A) limiting access to such Section 8 Material, other SDR Information, and intellectual property,

(B) standards controlling persons associated with the swap data repository trading for their personal benefit or the benefit of others, and

(C) adequate oversight to ensure compliance with this subparagraph.

§ 49.17 Access to SDR data.

(a) *Purpose.* This Section provides a procedure by which the Commission, other domestic regulators and foreign regulators may obtain access to the swaps data held and maintained by registered swap data repositories. Except as specifically set forth in this Regulation, the Commission's duties and obligations regarding the confidentiality of business transactions or market positions of any person and trade secrets or names of customers identified in Section 8 of the Act are not affected.

(b) *Definitions.* For purposes of this § 49.17, the following terms shall be defined as follows:

(1) *Appropriate Domestic Regulator.* The term "Appropriate Domestic Regulator" shall mean:

(i) The Securities and Exchange Commission;

(ii) Each prudential regulator identified in Section 1a(39) of the Act with respect to requests related to any of such regulator's statutory authorities, without limitation to the activities listed for each regulator in Section 1a(39);

(iii) The Financial Stability Oversight Council;

(iv) The Department of Justice;

(v) The Federal Reserve Bank of New York;

(vi) The Office of Financial Research; and

(vii) Any other person the Commission deems appropriate.

(2) *Appropriate Foreign Regulator.* The term "Appropriate Foreign Regulator" shall mean those Foreign Regulators with an existing memorandum of understanding or other similar type of information sharing arrangement executed with the Commission and/or Foreign Regulators without an MOU as determined on a case-by-case basis by the Commission.

(i) *Filing Requirements.* For those Foreign Regulators who do not currently have a memorandum of understanding with the Commission, the Commission has determined to provide the following filing process for those Foreign Regulators that may require data or information maintained by a registered swap data repository. The filing requirement set forth in this § 49.17 will assist the Commission in its analysis of whether a specific Foreign Regulator should be considered "appropriate" for purposes of Section 21(c)(7) of the Commodity Exchange Act.

(A) The Foreign Regulator is required to file an application in the form and manner prescribed by the Commission.

(B) The Foreign Regulator in its application is required to provide sufficient facts and procedures to permit the Commission to analyze whether the Foreign Regulator has appropriate confidentiality procedures and whether the Foreign Regulator is otherwise subject to local laws, regulations and/or customs that would require disclosure of information in contravention of the Act.

(ii) The Commission in its analysis of Foreign Regulator applications shall be satisfied that any information potentially provided by a registered swap data repository will not be disclosed except in limited circumstances such as an adjudicatory action or proceeding involving the Foreign Regulator that are identified in Section 8 of the Act.

(iii) The Commission reserves the right in connection with any determination of an "Appropriate Foreign Regulator" to revisit or reassess a prior determination consistent with the Act.

(3) *Direct Electronic Access.* For the purposes of this regulation, the term "direct electronic access" shall mean an electronic system, platform or framework that provides internet or web-based access to real-time swap transaction data.

(c) *Commission Access.*

(1) *Direct Electronic Access.* A registered swap data repository shall provide direct electronic access to the Commission or the Commission's designee, including another registered entity, in order for the Commission to carry out its legal and statutory responsibilities under the Act and related regulations.

(2) *Monitoring Tools.* A registered swap data repository is required to provide the Commission with proper tools for the monitoring, screening and analyzing of swap transaction data, including, but not limited to, web-based services, various software and access to the staff of the swap data repository and/or third party service providers or agents familiar with the operations of the registered swap data repository, which can provide assistance to the Commission regarding data structure and content. These monitoring tools shall be identical in analytical capability as those provided to the compliance staff and the Chief Compliance Officer of the swap data repository.

(3) *Authorized Users.* The swap transaction data provided to the Commission by a registered swap data repository shall be accessible only by authorized users. The swap data repository shall maintain and provide a list of authorized users in the manner and frequency determined by the Commission.

(d) *Other Regulators*—(1) *Procedure for Gaining Access to Registered Swap Data Repository Data.* Appropriate Domestic Regulators and Appropriate Foreign Regulators seeking to gain access to the swaps data maintained by a swap data repository are required to apply for access as follows:

(i) File a request for access with the registered swap data repository setting forth in sufficient detail the basis of its request; and

(ii) Certify the statutory authority for its request and that it is acting within the scope of its jurisdiction;

(2) *Obligations of the Registered Swap Data Repository in Connection with Appropriate Domestic Regulator or*

Appropriate Foreign Regulator Requests for Data Access.

(i) A registered swap data repository shall promptly notify the Commission regarding any request received by an Appropriate Domestic Regulator or Appropriate Foreign Regulator to gain access to the swaps transaction data maintained by such swap data repository.

(ii) The registered swap data repository shall notify the Commission electronically in a format specified by the Secretary of the Commission.

(3) *Timing.* Once the swaps data repository provides the Commission with notification of a request for data access by an Appropriate Domestic Regulator or Appropriate Foreign Regulator as required by paragraph (d)(2) of this section, such swap data repository shall provide access to the requested swaps data if satisfied that the Appropriate Domestic Regulator or Appropriate Foreign Regulator is acting within the scope of its authority.

(4) *Confidentiality and Indemnification Agreement.* Consistent with § 49.18 of this part, the Appropriate Domestic Regulator or Appropriate Foreign Regulator prior to receipt of any requested data or information shall execute a "Confidentiality and Indemnification Agreement" with the registered swap data repository as set forth in Section 21(d) of the Act.

(e) *Third Party Service Providers to a Registered Swap Data Repository.* Access to the data and information maintained by a registered swap data repository may be necessary for certain third parties that provide various technology and data-related services to a registered swap data repository. Third party access to the swap data maintained by a swap data repository is permissible subject to the following conditions:

(1) Both the registered swap data repository and the third party service provider shall have strict confidentiality procedures that protect data and information from improper disclosure.

(2) Prior to swaps data access, the third party service provider and the registered swaps data repository shall execute a "Confidentiality Agreement" setting forth minimum confidentiality procedures and permissible uses of the information maintained by the swaps data repository.

(f) *Access by Market Participants*—(1) *General.* Access of swap data maintained by the registered swaps data repository to market participants is generally prohibited.

(2) *Exception.* Data and information maintained by the registered swap data repository may be accessed by market participants if the specific data was originally submitted by such party.

(g) *Commercial Uses of Data Maintained by the Registered Swap Data Repository Prohibited.* Data maintained by the swap data repository generally may not be used for commercial or business purposes by the swap data repository or any of its affiliated entities.

(1) The registered swap data repository is required to adopt and implement adequate "firewalls" to protect the data required to be maintained under § 49.12 of this part and Section 21(b) of the Act from any improper, commercial use.

(2) *Exception.* Market participants who submit the data maintained by the registered swap data repository may permit the commercial or business use of that data by express written consent.

§ 49.18 Confidentiality and indemnification agreement.

(a) *Purpose.* This section sets forth the obligations of registered swap data repositories to execute a "Confidentiality and Indemnification Agreement" in connection with providing access to swaps data to certain domestic regulators and "appropriate foreign regulators."

(b) *Confidentiality and Indemnification Agreement.* Prior to the registered swap data repository providing access to the swaps data with any Appropriate Domestic Regulator or Appropriate Foreign Regulator as defined in § 49.17(b), the swap data repository shall receive a written agreement from each such entity stating that the entity shall abide by the confidentiality requirements described in Section 8 of the Act relating to the swap data that is provided; and each such entity shall agree to indemnify the swap data repository and the Commission for any expenses arising from litigation relating to the information provided under Section 8 of the Act.

§ 49.19 Core principles applicable to registered swap data repositories.

(a) *Compliance with Core Principles.* To be registered, and maintain registration, a swap data repository shall comply with the core principles as described in this paragraph. Unless otherwise determined by the Commission by rule or regulation, a swap data repository shall have reasonable discretion in establishing the manner in which the swap data repository complies with the core principles described in this paragraph.

(b) *Antitrust Considerations (Core Principle 1).* Unless appropriate to achieve the purposes of the Act, a registered swap data repository shall avoid adopting any rule or taking any action that results in any unreasonable restraint of trade; or imposing any material anticompetitive burden on trading, clearing or reporting swaps.

(c) *Governance Arrangements (Core Principle 2).* Registered swap data repositories shall establish governance arrangements as set forth in § 49.20.

(d) *Conflicts of Interest (Core Principle 3).* Registered swap data repositories shall manage and minimize conflicts of interest and establish processes for resolving such conflicts of interest as set forth in § 49.21.

(e) *Additional Duties (Core Principle 4).* Registered swap data repositories shall also comply with the following additional duties:

(1) *System Safeguards.* Registered swap data repositories shall establish and maintain a program of system safeguards, including business continuity and disaster recovery plans as set forth in § 49.24;

(2) *Financial Resources.* Registered swap data repositories shall maintain sufficient financial resources as set forth in § 49.25;

(3) *Disclosure Requirements of Registered Swap Data Repositories.* Registered swap data repositories shall furnish an appropriate disclosure document setting forth the risks and costs of swap data repository services as detailed in § 49.26; and

(4) *Access and Fees.* Registered swap data repositories shall adhere to Commission requirements regarding fair and open access and the charging of any fees, dues or other similar type charges as detailed in § 49.27.

§ 49.20 Governance arrangements (Core Principle 2).

(a) *General.* (1) Each registered swap data repository shall establish governance arrangements that are transparent to fulfill public interest requirements, and to support the objectives of the Federal Government, owners, and participants.

(2) Each registered swap data repository shall establish governance arrangements that are well-defined and include a clear organizational structure with consistent lines of responsibility and effective internal controls, including with respect to administration, accounting, and the disclosure of confidential information. § 49.22 of this part contains rules on internal controls applicable to administration and accounting. § 49.16 of this part contains rules on internal

controls applicable to the disclosure of confidential information.

(b) *Transparency of Governance Arrangements.* (1) Each registered swap data repository shall state in its charter documents that its governance arrangements are transparent to support, among other things, the objectives of the Federal Government pursuant to Section 21(f)(2) of the Act.

(2) Each registered swap data repository shall, at a minimum, make the following information available to the public and relevant authorities, including the Commission:

(i) The mission statement of the registered swap data repository;

(ii) The mission statement and/or charter of the board of directors, as well as of each committee of the registered swap data repository that has:

(A) The authority to act on behalf of the board of directors or

(B) The authority to amend or constrain actions of the board of directors;

(iii) The board of directors nomination process for the registered swap data repository, as well as the process for assigning members of the board of directors or other persons to any committee referenced in paragraph (b)(2)(ii) of this section;

(iv) For the board of directors and each committee referenced in paragraph (b)(2)(ii) of this section, the names of all members;

(v) A description of the manner in which the board of directors, as well as any committee referenced in paragraph (b)(2)(ii) of this section, considers an Independent Perspective in its decision-making process, as § 49.2(a)(14) of this part defines such term;

(vi) The lines of responsibility and accountability for each operational unit of the registered swap data repository to any committee thereof and/or the board of directors; and

(vii) Summaries of significant decisions implicating the public interest, the rationale for such decisions, and the process for reaching such decisions. Such significant decisions shall include decisions relating to pricing of repository services, offering of ancillary services, access to data, and use of Section 8 Material, other SDR Information, and intellectual property (as referenced in § 49.16 of this part).

(3) The registered swap data repository shall ensure that the information specified in paragraph (b)(2)(i) to (vii) of this section is current, accurate, clear, and readily accessible, for example, on its Web site. The swap data repository shall set forth such information in a language commonly used in the commodity futures and swap markets and at least one of the domestic language(s) of the jurisdiction in which the swap data repository is located.

(4) Furthermore, the registered swap data repository shall disclose the information specified in paragraph (b)(2)(vii) of this section in a sufficiently comprehensive and detailed fashion so as to permit the public and relevant authorities, including the Commission, to understand the policies or procedures of the swap data repository implicated and the manner in which the decision implements or amends such policies or procedures. A swap data repository shall not disclose minutes from meetings of its board of directors or committees to the public, although it shall disclose such minutes to the Commission upon request.

(c) *The Board of Directors*—

(1) *General.* (i) Each registered swap data repository shall establish, maintain, and enforce (including, without limitation, pursuant to paragraph (c)(4) of this Regulation) written policies or procedures:

(A) To ensure that its board of directors, as well as any committee that has:

(*1*) Authority to act on behalf of its board of directors or

(*2*) Authority to amend or constrain actions of its board of directors, adequately considers an Independent Perspective in its decision-making process;

(B) To ensure that the nominations process for such board of directors, as well as the process for assigning members of the board of directors or other persons to such committees, adequately incorporates an Independent Perspective; and

(C) To clearly articulate the roles and responsibilities of such board of directors, as well as such committees, especially with respect to the manner in which they ensure that a registered swap data repository complies with all statutory and regulatory responsibilities under the Act and the regulations promulgated thereunder.

(ii) Each registered swap data repository shall submit to the Commission, within thirty days after each election of its board of directors:

(A) For the board of directors, as well as each committee referenced in paragraph (c)(1)(i)(A) of this section, a list of all members;

(B) A description of the relationship, if any, between such members and the registered swap data repository or any reporting entity thereof (or, in each case, affiliates thereof, as § 49.2(a)(1) of this part defines such term); and

(C) Any amendments to the written policies and procedures referenced in paragraph (c)(1)(i) of this section.

(2) *Compensation.* The compensation of non-executive members of the board of directors of a registered swap data repository shall not be linked to the business performance of such swap data repository.

(3) *Annual Self-Review.* The board of directors of a registered swap data repository shall review its performance and that of its individual members annually. It should consider periodically using external facilitators for such reviews.

(4) *Board Member Removal.* A registered swap data repository shall have procedures to remove a member from the board of directors, where the conduct of such member is likely to be prejudicial to the sound and prudent management of the swap data repository.

(5) *Expertise.* Each registered swap data repository shall ensure that members of its board of directors, members of any committee referenced in paragraph (c)(1)(i)(A) of this Regulation, and its senior management, in each case, are of sufficiently good repute and possess the requisite skills and expertise to fulfill their responsibilities in the management and governance of the swap data repository, to have a clear understanding of such responsibilities, and to exercise sound judgment about the affairs of the swap data repository.

(d) *Compliance with Core Principle.* The chief compliance officer of the registered swap data repository shall review the compliance of the swap data repository with this core principle.

§ 49.21 Conflicts of interest (Core Principle 3).

(a) *General.* (1) Each registered swap data repository shall establish and enforce rules to minimize conflicts of interest in the decision-making process of the swap data repository, and establish a process for resolving such conflicts of interest.

(2) Nothing in this section shall supersede any requirement applicable to the SDR pursuant to § 49.20 of this part.

(b) *Policies and Procedures.* (1) Each registered swap data repository shall establish, maintain, and enforce written procedures to:

(i) Identify, on an ongoing basis, existing and potential conflicts of interest; and

(ii) Make decisions in the event of a conflict of interest. Such procedures shall include rules regarding the recusal, in applicable circumstances, of

parties involved in the making of decisions.

(2) As further described in § 49.20 of this part, the chief compliance officer of the registered swap data repository shall, in consultation with the board of directors or a senior officer of the swap data repository, resolve any such conflicts of interest.

(c) *Compliance with Core Principle.* The chief compliance officer of the registered swap data repository shall review the compliance of the swap data repository with this core principle.

§ 49.22 Chief compliance officer.

(a) *Definition of Board of Directors.* For purposes of this part 49, the term "board of directors" means the board of directors of a registered swap data repository, or for those swap data repositories whose organizational structure does not include a board of directors, a body performing a function similar to a board of directors.

(b) *Designation and qualifications of chief compliance officer*—(1) *Chief Compliance Officer Required.* Each registered swap data repository shall establish the position of chief compliance officer, and designate an individual to serve in that capacity.

(i) The position of chief compliance officer shall carry with it the authority and resources to develop and enforce policies and procedures necessary to fulfill the duties set forth for chief compliance officers in the Act and Commission regulations.

(ii) The chief compliance officer shall have supervisory authority over all staff acting in furtherance of the chief compliance officer's statutory and regulatory obligations.

(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. No individual disqualified from registration pursuant to Sections 8a(2) or 8a(3) of the Act may serve as a chief compliance officer.

(c) *Appointment, Supervision, and Removal of Chief Compliance Officer*—(1) *Appointment and Compensation of Chief Compliance Officer Determined by Board of Directors.* A registered swap data repository's chief compliance officer shall be appointed by its board of directors. The board of directors shall also approve the compensation of the chief compliance officer and shall meet with the chief compliance officer at least annually. The appointment of the chief compliance officer and approval of the chief compliance officer's compensation shall require the approval of a majority of the board of directors. The senior officer of the swap data repository may fulfill these responsibilities. A swap data repository shall notify the Commission of the appointment of a new chief compliance officer within two business days of such appointment.

(2) *Supervision of Chief Compliance Officer.* A registered swap data repository's chief compliance officer shall report directly to the board of directors or to the senior officer of the swap data repository, at the swap data repository's discretion.

(3) *Removal of Chief Compliance Officer by Board of Directors.* Removal of a registered swap data repository's chief compliance officer shall require the approval of a majority of the swap data repository's board of directors. If the swap data repository does not have a board of directors, then the chief compliance officer may be removed by the senior officer of the swap data repository. The swap data repository shall notify the Commission within two business days of appointing any new chief compliance officer, whether interim or permanent.

(d) *Duties of Chief Compliance Officer.* The chief compliance officer's duties shall include, but are not limited to, the following:

(1) Overseeing and reviewing the swap data repository's compliance with Section 21 of the Act and any related rules adopted by the Commission;

(2) In consultation with the board of directors, a body performing a function similar to the board, or the senior officer of the swap data repository, resolving any conflicts of interest that may arise:

(i) Conflicts between business considerations and compliance requirements;

(ii) Conflicts between business considerations and the requirement that the registered swap data repository provide fair and open access as set forth in § 49.27 of this part; and

(iii) Conflicts between a registered swap data repository's management and members of the board of directors;

(3) Establishing and administering written policies and procedures reasonably designed to prevent violation of the Act and any rules adopted by the Commission;

(4) Ensuring compliance with the Act and Commission regulations relating to agreements, contracts, or transactions, and with Commission regulations under Section 21 of the Act, including confidentiality and indemnification agreements entered into with foreign or domestic regulators pursuant to Section 21(d) of the Act;

(5) Establishing procedures for the remediation of noncompliance issues identified by the chief compliance officer through a compliance office review, look-back, internal or external audit finding, self-reported error, or validated complaint;

(6) Establishing and following appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues; and

(7) Establishing and administering a written code of ethics designed to prevent ethical violations and to promote honesty and ethical conduct.

(e) *Annual Compliance Report Prepared by Chief Compliance Officer.* The chief compliance officer shall, not less than annually, prepare an annual compliance report, that at a minimum, contains the following information covering the time period since the date on which the swap data repository became registered with the Commission or since the end of the period covered by a previously filed annual compliance report, as applicable:

(1) A description of the registered swap data repository's written policies and procedures, including the code of ethics and conflict of interest policies;

(2) A review of applicable Commission regulations and each subsection and core principle of Section 21 of the Act, that, with respect to each:

(i) Identifies the policies and procedures that ensure compliance with each subsection and the core principle, including each duty specified in Section 21(c);

(ii) Provides a self-assessment as to the effectiveness of these policies and procedures; and

(iii) Discusses areas for improvement, and recommends potential or prospective changes or improvements to its compliance program and resources;

(3) A list of any material changes to compliance policies and procedures since the last annual compliance report;

(4) A description of the financial, managerial, and operational resources set aside for compliance with respect to the Act and Commission regulations;

(5) A description of any material compliance matters, including noncompliance issues identified through a compliance office review, look-back, internal or external audit finding, self-reported error, or validated complaint, and explains how they were resolved;

(6) Any objections to the annual compliance report by those persons who have oversight responsibility for the chief compliance officer; and

(7) A certification by the chief compliance officer that, to the best of

his or her knowledge and reasonable belief, and under penalty of law, the annual compliance report is accurate and complete.

(f) *Submission of Annual Compliance Report by Chief Compliance Officer to the Commission.* (1) Prior to submission of the annual compliance report to the Commission, the chief compliance officer shall provide the annual compliance report to the board of the registered swap data repository for its review. If the swap data repository does not have board, then the annual compliance report shall be provided to the senior officer for their review. Members of the board and the senior officer may not require the chief compliance officer to make any changes to the report. Submission of the report to the board or senior officer, and any subsequent discussion of the report, shall be recorded in board minutes or similar written record, as evidence of compliance with this requirement.

(2) The annual compliance report shall be provided electronically to the Commission not more than 60 days after the end of the registered swap data repository's fiscal year.

(3) Promptly upon discovery of any material error or omission made in a previously filed compliance report, the chief compliance officer shall file an amendment with the Commission to correct any material error or omission. An amendment shall contain the oath or certification required under paragraph (e)(7) of this section.

(4) A registered swap data repository may request the Commission for an extension of time to file its compliance report based on substantial, undue hardship. Extensions for the filing deadline may be granted at the discretion of the Commission.

(5) Annual compliance reports filed pursuant to this section will be treated as exempt from mandatory public disclosure for purposes of the Freedom of Information Act and the Government in the Sunshine Act and parts 145 and 147 of this chapter, but will be available for official use by any official or employee of the United States and any State, by any self-regulatory organization of which the person filing the report is a member, and by any other person to whom the Commission believes disclosure is in the public interest.

(g) *Recordkeeping.* (1) The registered swap data repository shall maintain:

(i) A copy of the written policies and procedures, including the code of ethics and conflicts of interest policies adopted in furtherance of compliance with the Act and Commission regulations;

(ii) Copies of all materials, including written reports provided to the board of directors or senior officer in connection with the review of the annual compliance report under paragraph (f)(1) of this section and the board minutes or similar written record of such review, that record the submission of the annual compliance report to the board of directors or senior officer; and

(iii) Any records relevant to the registered swap data repository's annual compliance report, including, but not limited to, work papers and other documents that form the basis of the report, and memoranda, correspondence, other documents, and records that are:

(A) Created, sent or received in connection with the annual compliance report and

(B) Contain conclusions, opinions, analyses, or financial data related to the annual compliance report.

(2) The registered swap data repository shall maintain records in accordance with § 1.31 of this chapter.

§ 49.23 Emergency policies and procedures.

(a) *Emergency Policies and Procedures Required.* A registered swap data repository shall establish policies and procedures for the exercise of emergency authority in the event of any emergency, including but not limited to natural, man-made, and information technology emergencies. Such policies and procedures shall also require a swap data repository to exercise its emergency authority upon request by the Commission. A swap data repository's policies and procedures for the exercise of emergency authority shall be transparent to the Commission and to market participants whose swap transaction data resides at the swap data repository.

(b) *Invocation of Emergency Authority.* A registered swap data repository's policies and procedures for the exercise of emergency authority shall enumerate the circumstances under which the swap data repository is authorized to invoke its emergency authority and the procedures that it shall follow to declare an emergency. Such policies and procedures shall also address the range of measures that it is authorized to take when exercising such emergency authority.

(c) *Designation of Persons Authorized to act in an Emergency.* A registered swap data repository shall designate one or more officials of the swap data repository as persons authorized to exercise emergency authority on its behalf. A swap data repository shall also establish a chain of command to be used in the event that the designated person(s) is unavailable. A swap data repository shall notify the Commission of the person(s) designated to exercise emergency authority.

(d) *Conflicts of Interest.* A registered swap data repository's policies and procedures for the exercise of emergency authority shall include provisions to avoid conflicts of interest in any decisions made pursuant to emergency authority. Such policies and procedures shall also include provisions to consult the swap data repository's chief compliance officer in any emergency decision that may raise potential conflicts of interest.

(e) *Notification to the Commission.* A registered swap data repository's policies and procedures for the exercise of emergency authority shall include provisions to notify the Commission as soon as reasonably practicable regarding any invocation of emergency authority. When notifying the Commission of any exercise of emergency authority, a swap data repository shall explain the reasons for taking such emergency action, explain how conflicts of interest were minimized, and document the decision-making process. Underlying documentation shall be made available to the Commission upon request.

§ 49.24 System safeguards.

(a) Each registered swap data repository shall, with respect to all swap data in its custody:

(1) Establish and maintain a program of risk analysis and oversight to identify and minimize sources of operational risk through the development of appropriate controls and procedures and the development of automated systems that are reliable, secure, and have adequate scalable capacity;

(2) Establish and maintain emergency procedures, backup facilities, and a business continuity-disaster recovery plan that allow for the timely recovery and resumption of operations and the fulfillment of the duties and obligations of the swap data repository; and

(3) Periodically conduct tests to verify that backup resources are sufficient to ensure continued fulfillment of all duties of the swap data repository established by the Act or the Commission's regulations.

(b) A registered swap data repository's program of risk analysis and oversight with respect to its operations and automated systems shall address each of the following categories of risk analysis and oversight:

(1) Information security;

(2) Business continuity-disaster recovery planning and resources;

(3) Capacity and performance planning;
(4) Systems operations;
(5) Systems development and quality assurance; and
(6) Physical security and environmental controls.

(c) In addressing the categories of risk analysis and oversight required under paragraph (b) above, a registered swap data repository should follow generally accepted standards and best practices with respect to the development, operation, reliability, security, and capacity of automated systems.

(d) A registered swap data repository shall maintain a business continuity-disaster recovery plan and business continuity-disaster recovery resources, emergency procedures, and backup facilities sufficient to enable timely recovery and resumption of its operations and resumption of its ongoing fulfillment of its duties and obligations as a swap data repository following any disruption of its operations. Such duties and obligations include, without limitation, the duties set forth in § 49.9 and the core principles set forth in § 49.19; and maintenance of a comprehensive audit trail. The swap data repository's business continuity-disaster recovery plan and resources generally should enable resumption of the swap data repository's operations and resumption of ongoing fulfillment of the swap data repository's duties and obligations during the next business day following the disruption.

(e) Swap data repositories determined by the Commission to be critical swap data repositories are subject to more stringent requirements as set forth below.

(1) Each swap data repository that the Commission determines is critical must maintain a disaster recovery plan and business continuity and disaster recovery resources, including infrastructure and personnel, sufficient to enable it to achieve a same-day recovery time objective in the event that its normal capabilities become temporarily inoperable for any reason up to and including a wide-scale disruption.

(2) A same-day recovery time objective is a recovery time objective within the same business day on which normal capabilities become temporarily inoperable for any reason up to and including a wide-scale disruption.

(3) To ensure its ability to achieve a same-day recovery time objective in the event of a wide-scale disruption, each swap data repository that the Commission determines is critical must maintain a degree of geographic dispersal of both infrastructure and personnel such that:

(i) Infrastructure sufficient to enable the swap data repository to meet a same-day recovery time objective after interruption is located outside the relevant area of the infrastructure the entity normally relies upon to conduct activities necessary to the reporting, recordkeeping and/or dissemination of swap data, and does not rely on the same critical transportation, telecommunications, power, water, or other critical infrastructure components the entity normally relies upon for such activities; and

(ii) Personnel sufficient to enable the swap data repository to meet a same-day recovery time objective, after interruption of normal swap data reporting, recordkeeping and/or dissemination by a wide-scale disruption affecting the relevant area in which the personnel the entity normally relies upon to engage in such activities are located, live and work outside that relevant area.

(4) Each swap data repository that the Commission determines is critical must conduct regular, periodic tests of its business continuity and disaster recovery plans and resources and its capacity to achieve a same-day recovery time objective in the event of a wide-scale disruption. The swap data repository shall keep records of the results of such tests, and make the results available to the Commission upon request.

(f) A registered swap data repository that is not determined by the Commission to be a critical swap data repository satisfies the requirement to be able to resume operations and resume ongoing fulfillment of the swap data repository's duties and obligations during the next business day following a disruption by maintaining either:

(1) Infrastructure and personnel resources of its own that are sufficient to ensure timely recovery and resumption of its operations, duties and obligations as a registered swap data repository following any disruption of its operations; or

(2) Contractual arrangements with other registered swap data repositories or disaster recovery service providers, as appropriate, that are sufficient to ensure continued fulfillment of all of the swap data repository's duties and obligations following any disruption of its operations, both with respect to all swaps reported to the swap data repository and with respect to all swap data contained in the swap data repository.

(g) A registered swap data repository shall notify Commission staff promptly of all:
(1) Systems malfunctions;
(2) Cyber security incidents or targeted threats that actually or potentially jeopardize automated system operation, reliability, security, or capacity; and
(3) Any activation of the swap data repository's business continuity-disaster recovery plan.

(h) A registered swap data repository shall give Commission staff timely advance notice of all:
(1) Planned changes to automated systems that may impact the reliability, security, or adequate scalable capacity of such systems; and
(2) Planned changes to the swap data repository's program of risk analysis and oversight.

(i) A registered swap data repository shall provide to the Commission upon request current copies of its business continuity and disaster recovery plan and other emergency procedures, its assessments of its operational risks, and other documents requested by Commission staff for the purpose of maintaining a current profile of the swap data repository's automated systems.

(j) A registered swap data repository shall conduct regular, periodic, objective testing and review of its automated systems to ensure that they are reliable, secure, and have adequate scalable capacity. It shall also conduct regular, periodic testing and review of its business continuity-disaster recovery capabilities. Both types of testing should be conducted by qualified, independent professionals. Such qualified independent professionals may be independent contractors or employees of the swap data repository, but should not be persons responsible for development or operation of the systems or capabilities being tested. Pursuant to §§ 1.31, 49.12 and 45.2 of the Commission's Regulations, the swap data repository shall keep records of all such tests, and make all test results available to the Commission upon request.

(k) To the extent practicable, a registered swap data repository should:
(1) Coordinate its business continuity-disaster recovery plan with those of the swap execution facilities, designated contract markets, derivatives clearing organizations, swap dealers, and major swap participants who report swap data to the swap data repository, and with those of regulators identified in Section 21(c)(7) of the Act, in a manner adequate to enable effective resumption of the registered swap data repository's

fulfillment of its duties and obligations following a disruption causing activation of the swap data repository's business continuity and disaster recovery plan;

(2) Participate in periodic, synchronized testing of its business continuity-disaster recovery plan and the business continuity-disaster recovery plans of the swap execution facilities, designated contract markets, derivatives clearing organizations, swap dealers, and major swap participants who report swap data to the registered swap data repository, and the business continuity-disaster recovery plans required by the regulators identified in Section 21(c)(7) of the Act; and

(3) Ensure that its business continuity-disaster recovery plan takes into account the business continuity-disaster recovery plans of its telecommunications, power, water, and other essential service providers.

§ 49.25 Financial resources.

(a) *General rule.* (1) A swap data repository shall maintain sufficient financial resources to perform its statutory duties set forth in § 49.9 and the core principles set forth in § 49.19.

(2) An entity that operates as both a swap data repository and a derivatives clearing organization shall also comply with the financial resource requirements of Core Principle B set forth in Section 5b(c)(2)(B) of the Act.

(3) Financial resources shall be considered sufficient if their value is at least equal to a total amount that would enable the swap data repository, or applicant for registration, to cover its operating costs for a period of at least one year, calculated on a rolling basis.

(4) The financial resources described in this paragraph (a) must be independent and separately dedicated to ensure that assets and capital are not used for multiple purposes.

(b) *Types of financial resources.* Financial resources available to satisfy the requirements of paragraph (a) of this section may include:

(1) The swap data repository's own capital; and

(2) Any other financial resource deemed acceptable by the Commission.

(c) *Computation of financial resource requirement.* A swap data repository shall, on a quarterly basis, based upon its fiscal year, make a reasonable calculation of its projected operating costs over a 12-month period in order to determine the amount needed to meet the requirements of paragraph (a) of this section. The swap data repository shall have reasonable discretion in determining the methodology used to compute such projected operating costs. The Commission may review the methodology and require changes as appropriate.

(d) *Valuation of financial resources.* At appropriate intervals, but not less than quarterly, a swap data repository shall compute the current market value of each financial resource used to meet its obligations under paragraph (a) of this section. Reductions in value to reflect market and credit risk (haircuts) shall be applied as appropriate.

(e) *Liquidity of financial resources.* The financial resources allocated by the swap data repository to meet the requirements of paragraph (a) shall include unencumbered, liquid financial assets (*i.e.,* cash and/or highly liquid securities) equal to at least six months' operating costs. If any portion of such financial resources is not sufficiently liquid, the swap data repository may take into account a committed line of credit or similar facility for the purpose of meeting this requirement.

(f) *Reporting requirements.* (1) Each fiscal quarter, or at any time upon Commission request, a swap data repository shall report to the Commission the amount of financial resources necessary to meet the requirements of paragraph (a), the value of each financial resource available, computed in accordance with the requirements of paragraph (d); and provide the Commission with a financial statement, including the balance sheet, income statement, and statement of cash flows of the swap data repository or of its parent company. Financial statements shall be prepared in conformity with generally accepted accounting principles (GAAP) applied on a basis consistent with that of the preceding financial statement.

(2) The calculations required by this paragraph shall be made as of the last business day of the swap data repository's fiscal quarter.

(3) The report shall be filed not later than 17 business days after the end of the swap data repository's fiscal quarter, or at such later time as the Commission may permit, in its discretion, upon request by the swap data repository.

§ 49.26 Disclosure requirements of swap data repositories.

Before accepting any swap data from a reporting entity or upon a reporting entity's request, a registered swap data repository shall furnish to the reporting entity a disclosure document that contains the following written information, which shall reasonably enable the reporting entity to identify and evaluate accurately the risks and costs associated with using the services of the swap data repository:

(a) The registered swap data repository's criteria for providing others with access to services offered and data maintained by the swap data repository;

(b) The registered swap data repository's criteria for those seeking to connect to or link with the swap data repository;

(c) A description of the registered swap data repository's policies and procedures regarding its safeguarding of data and operational reliability to protect the confidentiality and security of such data, as described in § 49.24;

(d) The registered swap data repository's policies and procedures reasonably designed to protect the privacy of any and all swap data that the swap data repository receives from a reporting entity, as described in § 49.16;

(e) The registered swap data repository's policies and procedures regarding its non-commercial and/or commercial use of the swap data that it receives from a market participant, any registered entity, or any other person;

(f) The registered swap data repository's dispute resolution procedures;

(g) A description of all the registered swap data repository's services, including any ancillary services;

(h) The registered swap data repository's updated schedule of any fees, rates, dues, unbundled prices, or other charges for all of its services, including any ancillary services; any discounts or rebates offered; and the criteria to benefit from such discounts or rebates; and

(i) A description of the registered swap data repository's governance arrangements.

§ 49.27 Access and fees.

(a) *Fair, Open and Equal Access.* A swap data repository, consistent with Section 21 of the Act, shall provide its services to market participants, including but not limited to designated contract markets, swap execution facilities, derivatives clearing organizations, swap dealers, major swap participants and any other counterparties, on fair, open and equal basis. For this purpose, a swap data repository shall not provide access to its services on a discriminatory basis but is required to provide its services to all market participants for swaps it accepts in an asset class.

(b) *Fees.* (1) Any fees or charges imposed by a registered swap data repository in connection with the reporting of swap data and any other supplemental or ancillary services provided by such swap data repository shall be equitable and established in a uniform and non-discriminatory

manner. Fees or charges shall not be used as an artificial barrier to access to the swap data repository. Swap data repositories shall not offer preferential pricing arrangements to any market participant on any basis, including volume discounts or reductions unless such discounts or reductions apply to all market participants uniformly and are not otherwise established in a manner that would effectively limit the application of such discount or reduction to a select number of market participants.

(2) All fees or charges are to be fully disclosed and transparent to market participants. At a minimum, the registered swap data repository shall provide a schedule of fees and charges that is accessible by all market participants on its Web site.

(3) The Commission notes that it will not specifically approve the fees charged by swap data repositories. However, any and all fees charged by swap data repositories must be consistent with the principles set forth in paragraph (b)(1) of this section.

Appendix A to Part 49—Form SDR

UNITED STATES COMMODITY FUTURES TRADING COMMISSION

FORM SDR

SWAP DATA REPOSITORY APPLICATION OR AMENDMENT TO APPLICATION FOR REGISTRATION UNDER THE COMMODITY EXCHANGE ACT

REGISTRATION INSTRUCTIONS

Intentional misstatements or omissions of fact may constitute federal criminal violations (7 U.S.C. § 13 and 18 U.S.C. § 1001) and/or grounds for disqualification from registration.

DEFINITIONS

Unless the context requires otherwise, all terms used in the form have the same meaning as in the Commodity Exchange Act, as amended, and in the Regulations of the Commission thereunder.

For the purposes of this form, the term "applicant" shall include any applicant for registration as a swap data repository or any registered swap data repository that is amending Form SDR.

GENERAL INSTRUCTIONS

1. Two (2) copies of Form SDR and Exhibits thereto are to be filed with the Commodity Futures Trading Commission by applicants for registration as a swap data repository, or by a registered swap data repository amending such registration, pursuant to Section 21 of the Commodity Exchange Act and the regulations thereunder. Upon the filing of an application for registration, the Commission will publish notice of the filing and afford interested persons an opportunity to submit written data, views and arguments concerning such application. No application for registration shall be effective unless the Commission, by order, grants such registration.

2. Individuals' names shall be given in full (last name, first name, middle name).

3. Signatures must accompany each copy of the Form SDR filed with the Commission. If this Form SDR is filed by a corporation, it must be signed in the name of the corporation by a principal officer duly authorized; if filed by a limited liability company, this Form SDR must be signed in the name of the limited liability company by a member duly authorized to sign on the limited liability company's behalf; if filed by a partnership, this Form SDR must be signed in the name of the partnership by a general partner authorized; if filed by an unincorporated organization or association which is not a partnership, it must be signed in the name of the organization or association by the managing agent, *i.e.,* a duly authorized person who directs, manages or who participates in the directing or managing of its affairs.

4. If Form SDR is being filed as an initial application for registration, all applicable items must be answered in full. If any item is not applicable, indicate by "none," "not applicable," or "N/A" as appropriate.

5. Under Section 21 of the Commodity Exchange Act and the regulations thereunder, the Commission is authorized to solicit the information required to be supplied by this form from applicants for registration as a swap data repository and from registered swap data repositories amending their registration. Disclosure of the information specified on this form is mandatory prior to processing of an application for registration as a swap data repository. The information will be used for the principal purpose of determining whether the Commission should grant or deny registration to an applicant. Except in cases where confidential treatment is requested by the applicant and granted by the Commission pursuant to the Freedom of Information Act and the regulations of the Commission thereunder, information supplied on this form will be included routinely in the public files of the Commission and will be available for inspection by any interested person. **A Form which is not prepared and executed in compliance with applicable requirements and instructions may be returned as not acceptable for filing. Acceptance of this Form SDR, however, shall not constitute any finding that the Form SDR has been filed as required or that the information submitted is true, current or complete.**

UPDATING INFORMATION ON THE FORM SDR

1. Section 21 requires that if any information contained in Items 1 through 15, 21, 27, and Item 51 of this application, or any supplement or amendment thereto, is or becomes inaccurate for any reason, an amendment must be filed promptly, unless otherwise specified, on Form SDR correcting such information.

2. Registrants filing Form SDR as an amendment (other than an annual amendment) need file only the facing page, the signature page (Item 11), and any pages on which an answer is being amended, together with such exhibits as are being amended. The submission of an amendment represents that all unamended items and exhibits remain true, current and complete as previously filed.

ANNUAL AMENDMENT ON THE FORM SDR

Annual amendments on the Form SDR shall be submitted within 60 days of the end of each calendar year. Applicants must complete the facing page and provide updated information.

An applicant may request an extension of time for submitting the annual amendment with the Secretary of the Commission based on substantial, undue hardship. Extensions for filing annual amendments may be granted at the discretion of the Commission.

WHERE TO FILE

File registration application and appropriate exhibits electronically with the Commission at the Washington, D.C. headquarters in a format specified by the Secretary of the Commission. Applications should be sent to the attention of the Secretary of the Commission at *submissions@cftc.gov*.

BILLING CODE 6351–01–P

UNITED STATES COMMODITY FUTURES TRADING COMMISSION

FORM SDR

SWAP DATA REPOSITORY
APPLICATION OR AMENDMENT TO APPLICATION FOR REGISTRATION
UNDER THE COMMODITY EXCHANGE ACT

_____

Exact name of applicant as specified in charter

_____

Address of principal executive offices

☐ If this is an **APPLICATION** for registration, complete in full and check here.

☐ If this is an **AMENDMENT** to an application, or to an effective registration (other than an annual amendment) list all items that are amended and check here.

_____
_____
_____
_____

☐ If this is an **ANNUAL AMENDMENT** to an application, or to an effective registration (other than an annual amendment) list all items that are amended and check here.

_____
_____
_____
_____

Please indicate which asset class(es) the applicant intends to serve:

- ☐ Interest Rate
- ☐ Equity
- ☐ Credit
- ☐ Foreign Currency
- ☐ Commodity (Specify) _____
- ☐ Other (Specify) _____

GENERAL INFORMATION

1. Name under which business is conducted, if different than name specified on facing sheet:

_____

2. If name of business is hereby amended, state previous business name:

_____

3. Mailing address, if different than address specified on facing sheet:

_____

(Number and Street)

_____

(City) **(State)** **(Zip Code)**

_____ _____ _____

(Phone) **(Fax)** **(Email)**

4. List of principal office(s) and address(es) where swap data repositories activities are conducted

Office	**Address**
_____	_____
_____	_____
_____	_____
_____	_____

5. If applicant is a successor to a previously registered swap data repository, please complete the following:

a. Date of succession

_____

b. Full name and address of predecessor registrant

_____

(Name)

_____

(Number and Street)

_____

(City) **(State)** **(Zip Code)**

_____ _____ _____

(Phone) **(Fax)** **(Email)**

6. Furnish a description of the function(s) that the applicant performs or proposes to perform:

_____

_____

_____

BUSINESS ORGANIZATION

7. Applicant is a:

- ☐ Corporation
- ☐ Partnership
- ☐ Limited Liability Company
- ☐ Other (Specify) _____

8. If applicant is a corporation or limited liability company, please complete the following:

a. Date of incorporation

_____

b. State/Country of incorporation

_____

9. If applicant is a partnership, please complete the following:

c. Date of filing of partnership articles

_____

d. State/Country in which filed

_____

10. Applicant agrees and consents that the notice of any proceeding before the Commission in connection with its application for registration as a swap data repository may be given by sending such notice by certified mail or confirmed telegram to the officer specified or person named below at the address given.

_____

(Name of person (if applicant is a corporation or limited liability company, title of officer))

_____

(Name of applicant)

_____

(Number and Street)

_____

(City) (State) (Zip Code)

_____ _____ _____

(Phone) (Fax) (Email)

SIGNATURES

11. The Applicant had duly caused this application or amendment to be signed on its behalf by the undersigned, hereunto duly authorized, this _____ day of _____, 20_____. The Applicant and the undersigned represent hereby that all information contained herein is true, current and complete. It is understood that all required items and Exhibits are considered integral parts of this form and that the submission of any amendment represents that all unamended items and Exhibits remain true, current, and complete as previously filed.

_____

(Name of Applicant)

_____

(Manual Signature of Authorized Person)

_____

(Title)

BILLING CODE 6351–01–C

EXHIBITS INSTRUCTIONS

The following exhibits must be included as part of Form SDR and filed with the Commodity Futures Trading Commission by applicants for registration as a swap data repository, or by registered swap data repository amending such registration, pursuant to Section 21 of the Commodity Exchange Act and regulations thereto. Such exhibits should be labeled according to the items specified in this Form. If any exhibit is not applicable, please specify the exhibit letter and indicate by "none," "not applicable," or "N/A" as appropriate. The applicant must identify with particularity the information in these exhibits that will be subject to a request for confidential treatment and supporting documentation for such request pursuant to Commission Regulation § 145.9.

If the applicant is a newly formed enterprise and does not have the financial statements required pursuant to Items 25 and 26 of this form, the applicant should provide *pro forma* financial statements for the most recent

six months or since inception, whichever is less. Except for pro forma financial statements prepared for newly-created entities, financial statements shall be prepared in conformity with generally accepted accounting principles ("GAAP") applied on a basis consistent with that of the preceding financial statement.

EXHIBITS I—BUSINESS ORGANIZATION

12. List as **Exhibit A** any person who owns ten (10) percent or more of applicant's equity or possesses voting power of any class, either directly or indirectly, through agreement or otherwise, or in any other manner, may control or direct the management or policies of applicant. "Control" for this purpose is defined in Commission Regulation § 49.2(a)(3).

State in Exhibit A the full name and address of each such person and attach a copy of the agreement or, if there is none written, describe the agreement or basis upon which such person exercises or may exercise such control or direction.

13. Attach as **Exhibit B** to this application a narrative that sets forth the fitness standards for the board of directors. Attach a list of the present officers, directors, governors (and, in the case of an applicant not a corporation, the members of all standing committees grouped by committee), or persons performing functions similar to any of the foregoing, of the swap data repository or of the entity identified in Item 16 that performs the swap data repository activities of the applicant, indicating for each:

a. Name

b. Title

c. Date of commencement and, if appropriate, termination of present term of position

d. Length of time each present officer, director, or governor has held the same position

e. Brief account of the business experience of each officer and director over the last five (5) years

f. Any other business affiliations in the securities industry or OTC derivatives industry

g. A description of:

(1) any order of the Commission with respect to such person pursuant to Section 5e of the Act;

(2) any conviction or injunction within the past 10 years;

(3) any disciplinary action with respect to such person within the last five (5) years;

(4) any disqualification under Sections 8b, and 8d of the Act;

(5) any disciplinary action under Section 8c of the Act;

(6) any violation pursuant to Section 9 of the Act.

h. For directors, list any committees on which they serve and any compensation received by virtue of their directorship.

14. Attach as **Exhibit C** to this application the following information about the chief compliance officer who has been appointed by the board of directors of the swap data repository or a person or group performing a function similar to such board of directors:

a. Name

b. Title

c. Dates of commencement and termination of present term of office or position

d. Length of time the chief compliance officer has held the same office or position

e. Brief account of the business experience of the chief compliance officer over the last five (5) years

f. Any other business affiliations in the derivatives/securities industry or swap data repository industry

g. A description of:

(1) any order of the Commission with respect to such person pursuant to Section 5e of the Act;

(2) any conviction or injunction within the past 10 years;

(3) any disciplinary action with respect to such person within the last five (5) years;

(4) any disqualification under Sections 8b, and 8d of the Act;

(5) any disciplinary action under Section 8c of the Act;

(6) any violation pursuant to Section 9 of the Act.

15. Attach as **Exhibit D** a copy of documents relating to the governance arrangements of the applicant, including, but not limited to:

a. the nomination and selection process of the members on the applicant's board of directors, a person or group performing a function similar to a board of directors (collectively, "board"), or any committee that has the authority to act on behalf of the board or amend or constrain the action of the board, the responsibilities of each of the board and such committee, and the composition of each board and such committee;

b. the process for assigning members of the board or other persons to any committees referenced in (a);

c. a description of the manner in which the board and the committees referenced in (a) allows the applicant to comply with applicable core principles, regulations, as well as the policies and procedures of the applicant (including those involving consideration of an Independent Perspective (as Commission Regulation § 49.2(a)(14) defines such term));

d. a description of the manner in which the board reviews its performance and the performance of its members;

e. a description of the procedures to remove a member of the board, where the conduct of such member is likely to be prejudicial to the sound and prudent management of the applicant.

16. Attach as **Exhibit E** a narrative or graphic description of the organizational structure of the applicant. Note: If the swap data repository activities are conducted primarily by a division, subdivision, or other segregable entity within the applicant's corporation or organization, describe the relationship of such entity within the overall organizational structure and attach as Exhibit E only such description as applies to the segregable entity. Additionally, prove any relevant jurisdictional information, including any and all jurisdictions in which the applicant or any affiliated entity is doing business and registration status, including pending application (e.g., country, regulator, registration category, date of registration). In addition, include a description of the lines of responsibility and accountability for each operational unit of the applicant to (i) any committee thereof and/or (ii) the board.

17. Attach as **Exhibit F** a copy of the conflicts of interest policies and procedures implemented by the applicant to minimize conflicts of interest in the decision-making process of the swap data repository and to establish a process for the resolution of any such conflicts of interest.

18. Attach as **Exhibit G**, a list of all affiliates of the swap data repository and indicate the general nature of the affiliation. Provide a copy of any agreements entered into or to be entered by the swap data repository, including partnerships or joint ventures, or its participants, that will enable the applicant to comply with the registration requirements and core principles specified in Section 21 of the Commodity Exchange Act.

19. Attach as **Exhibit H** to this application a copy of the constitution, articles of incorporation or association with all amendments thereto, and existing by-laws, rules or instruments corresponding thereto, of the applicant. A certificate of good standing dated within one week of the date of the application shall be provided.

20. Where the applicant is a foreign entity seeking registration or filing an amendment to an existing registration, attach as **Exhibit I**, an opinion of

counsel that the swap data repository, as a matter of law, is able to provide the Commission with prompt access to the books and records of such swap data repository and that the swap data repository can submit to onsite inspection and examination by the Commission.

21. Where the applicant is a foreign entity seeking registration, attach as **Exhibit I–1**, to designate and authorize an agent in the United States, other than a Commission official, to accept any notice or service of process, pleadings, or other documents in any action or proceedings brought against the swap data repository to enforce the Act and the regulations thereunder.

22. Attach as **Exhibit J**, a current copy of the applicant's rules as defined in Commission Regulation § 40.1, consisting of all the rules necessary to carry out the duties as a swap data repository.

23. Attach as **Exhibit K**, a description of the applicant's internal disciplinary and enforcement protocols, tools, and procedures. Include the procedures for dispute resolution.

24. Attach as **Exhibit L**, a brief description of any material pending legal proceeding(s), other than ordinary and routine litigation incidental to the business, to which the applicant or any of its affiliates is a party or to which any of its or their property is the subject. Include the name of the court or agency in which the proceeding(s) are pending, the date(s) instituted, and the principal parties thereto, a description of the factual basis alleged to underlie the proceeding(s) and the relief sought. Include similar information as to any such proceeding(s) known to be contemplated by the governmental agencies.

EXHIBITS II—FINANCIAL INFORMATION

25. Attach as **Exhibit M** a balance sheet, statement of income and expenses, statement of sources and application of revenues and all notes or schedules thereto, as of the most recent fiscal year of the applicant. If a balance sheet and statements certified by an independent public accountant are available, such balance sheet and statement shall be submitted as Exhibit M. Except for pro forma financial statements prepared for newly-created entities, financial statements shall be prepared in conformity with generally accepted accounting principles (GAAP) applied on a basis consistent with that of the preceding financial statement.

26. Attach as **Exhibit N** a balance sheet and an income and expense statement for each affiliate of the swap data repository that also engages in swap data repository activities as of the end of the most recent fiscal year of each such affiliate. Except for pro forma financial statements prepared for newly-created entities, financial statements shall be prepared in conformity with GAAP applied on a basis consistent with that of the preceding financial statement.

27. Attach as **Exhibit O** the following:

a. A complete list of all dues, fees and other charges imposed, or to be imposed, by or on behalf of applicant for its swap data repository services and identify the service or services provided for each such due, fee, or other charge.

b. Furnish a description of the basis and methods used in determining the level and structure of the dues, fees and other charges listed above in paragraph a of this item.

c. If the applicant differentiates, or proposes to differentiate, among its customers, or classes of customers in the amount of any dues, fees, or other charges imposed for the same or similar services, so state and indicate the amount of each differential. In addition, identify and describe any differences in the cost of providing such services, and any other factors, that account for such differentiations.

EXHIBITS III—OPERATIONAL CAPABILITY

28. Attach as **Exhibit P** copies of all material contracts with any swap execution facility, clearing agency, central counterparty, or third party service provider. To the extent that form contracts are used by the applicant, submit a sample of each type of form contract used. In addition, include a list of swap execution facilities, clearing agencies, central counterparties, and third party service providers with whom the applicant has entered into material contracts. Where swap data repository functions are performed by a third-party, attach any agreements between or among the applicant and such third party, and identify the services that will be provided.

29. Attach as **Exhibit Q** any technical manuals, other guides or instructions for users of, or participants in, the market.

30. Attach as **Exhibit R** a description of system test procedures, test conducted or test results that will enable the applicant to comply, or demonstrate the applicant's ability to comply with the core principles for swap data repositories.

31. Attach as **Exhibit S** a description in narrative form or by the inclusion of functional specifications, of each service or function performed as a swap data repository. Include in Exhibit S a description of all procedures utilized for the collection, processing, distribution, publication and retention (e.g., magnetic tape) of information with respect to transactions or positions in, or the terms and conditions of, swaps entered into by market participants.

32. Attach as **Exhibit T** a list of all computer hardware utilized by the applicant to perform swap data repository functions, indicating where such equipment (terminals and other access devices) is physically located.

33. Attach as **Exhibit U** a description of the personnel qualifications for each category of professional employees employed by the swap data repository or the division, subdivision, or other segregable entity within the swap data repository as described in Item 16.

34. Attach as **Exhibit V** a description of the measures or procedures implemented by applicant to provide for the security of any system employed to perform the functions of a swap data repository. Include a general description of any physical and operational safeguards designed to prevent unauthorized access (whether by input or retrieval) to the system. Describe any circumstances within the past year in which the described security measures or safeguards failed to prevent any such unauthorized access to the system and any measures taken to prevent a reoccurrence. Describe any measures used to verify the accuracy of information received or disseminated by the system.

35. Attach as **Exhibit W** copies of emergency policies and procedures and applicant's business continuity-disaster recovery plan. Include a general description of any business continuity-disaster recovery resources, emergency procedures, and backup facilities sufficient to enable timely recovery and resumption of its operations and resumption of its ongoing fulfillment of its duties and obligations as a swap data repository following any disruption of its operations.

36. Where swap data repository functions are performed by automated facilities or systems, attach as **Exhibit X** a description of all backup systems or subsystems that are designed to prevent interruptions in the performance of any swap data repository function as a result of technical malfunctions or otherwise in the system itself, in any permitted input or output system connection, or as a result of any independent source. Include a narrative description of each type of interruption that has lasted for more than two minutes and has occurred within the six (6) months preceding the date of the filing, including the date of each interruption,

the cause and duration. Also state the total number of interruptions that have lasted two minutes or less.

37. Attach as **Exhibit Y** the following:

a. For each of the swap data repository functions:

(1) quantify in appropriate units of measure the limits on the swap data repository's capacity to receive (or collect), process, store or display (or disseminate for display or other use) the data elements included within each function (e.g., number of inquiries from remote terminals); and

(2) identify the factors (mechanical, electronic or other) that account for the current limitations reported in answer to (1) on the swap data repository's capacity to receive (or collect), process, store or display (or disseminate for display or other use) the data elements included within each function.

b. If the applicant is able to employ, or presently employs, the central processing units of its system(s) for any use other than for performing the functions of a swap data repository, state the priorities of assignment of capacity between such functions and such other uses, and state the methods used or able to be used to divert capacity between such functions and such other uses.

EXHIBITS IV—ACCESS TO SERVICES

38. Attach as **Exhibit Z** the following:

a. As to each swap data repository service that the applicant provides, state the number of persons who presently utilize, or who have notified the applicant of their intention to utilize, the services of the swap data repository.

b. For each instance during the past year in which any person has been prohibited or limited in respect of access to services offered by the applicant as a swap data repository, indicate the name of each such person and the reason for the prohibition or limitation.

c. Define the data elements for purposes of the swap data repository's real-time public reporting obligation. Appendix A to part 43 of the Commission's Regulations (Data Elements and Form for Real-Time Reporting for Particular Markets and Contracts) sets forth the specific data elements for real-time public reporting.

39. Attach as **Exhibit AA** copies of any agreements governing the terms by which information may be shared by the swap data repository, including with market participants. To the extent that form contracts are used by the applicant, submit a sample of each type of form contract used.

40. Attach as **Exhibit BB** a description of any specifications, qualifications or other criteria that limit, are interpreted to limit, or have the effect of limiting access to or use of any swap data repository services furnished by the applicant and state the reasons for imposing such specifications, qualifications, or other criteria, including whether such specifications, qualifications or other criteria are imposed.

41. Attach as **Exhibit CC** any specifications, qualifications, or other criteria required of participants who utilize the services of the applicant for collection, processing, preparing for distribution, or public dissemination by the applicant.

42. Attach as **Exhibit DD** any specifications, qualifications, or other criteria required of any person, including, but not limited to, regulators, market participants, market infrastructures, venues from which data could be submitted to the applicant, and third party service providers who request access to data maintained by the applicant.

43. Attach as **Exhibit EE** policies and procedures implemented by the applicant to review any prohibition or limitation of any person with respect to access to services offered or data maintained by the applicant and to grant such person access to such services or data if such person has been discriminated against unfairly.

EXHIBITS—OTHER POLICIES AND PROCEDURES

44. Attach as **Exhibit FF**, a narrative and supporting documents that may be provided under other Exhibits herein, that describe the manner in which the applicant is able to comply with each core principle and other requirements pursuant to Commission Regulation § 49.17.

45. Attach as **Exhibit GG** policies and procedures implemented by the applicant protect the privacy of any and all swap information that the swap data repository receives from reporting entities.

46. Attach as **Exhibit HH** a description of safeguards, policies, and procedures implemented by the applicant to prevent the misappropriation or misuse of (a) any confidential information received by the applicant, including, but not limited to "Section 8 Material" and "SDR Information," as those terms are defined in Commission Regulation § 49.2, about a market participant or any of its customers; and/or (c) intellectual property by applicant or any person associated with the applicant for their personal benefit or the benefit of others.

47. Attach **Exhibit II** policies and procedures implemented by the applicant regarding its use of the SDR Information that it receives from a market participant, any registered entity, or any person for non-commercial and/or commercial purposes.

48. Attach as **Exhibit JJ** procedures and a description of facilities of the applicant for effectively resolving disputes over the accuracy of the transaction data and positions that are recorded in the swap data repository.

49. Attach as **Exhibit KK** policies and procedures relating to the applicant's calculation of positions.

50. Attach as **Exhibit LL** policies and procedures that are reasonably designed to prevent any provision in a valid swap from being invalidated or modified through the procedures or operations of the applicant.

51. Attach as **Exhibit MM** a plan to ensure that the transaction data and position data that are recorded in the applicant continue to be maintained after the applicant withdraws from registration as a swap data repository, which shall include procedures for transferring the transaction data and position data to the Commission or its designee (including another registered swap data repository).

Issued in Washington, DC on November 19, 2010, by the Commission.

David A. Stawick,

Secretary of the Commission.

Note: The following Statement will not appear in the Code of Federal Regulations.

Statement of Chairman Gary Gensler
Swap Data Repositories

I support the proposed rulemaking to establish registration requirements and regulations of swap data repositories. This proposal would implement Congress's mandate that all swaps—whether cleared or uncleared—be reported to a swap data repository registered with the Commission. Registration will enable the Commission to monitor swap data repositories for compliance with the Dodd-Frank Act and Commission regulations. The proposal implements Congress's direction that regulators would have direct access to information maintained by swap data repositories. The proposal requires swap data repositories to verify the accuracy and completeness of all of the swaps data it accepts. The proposed rule also includes a requirement that swap data repositories would receive notifications with regard to non-financial end-users hedging or mitigating commercial risk. The proposal also includes important features where swap data repositories will facilitate real time reporting of

swaps transactions. Lastly, the proposal includes provisions for swap data repositories to aggregate certain information for regulators and the public.

Dissenting Statement of Commissioner Jill E. Sommers

I disagree with several aspects of the proposal the Commission is issuing today, but seek public comment on two particular areas that I believe are important as they relate to the critical function of real-time public reporting of swap data.

First, I request public comment on whether the Commission should require registered swap data repositories (SDRs) to perform the real-time reporting duties described in section 2(a)(13) of the Commodity Exchange Act (CEA), as amended by the Dodd-Frank Act. Section 21(c) of the CEA sets forth specific duties that SDRs must perform. It directs, in relevant part, that SDRs "shall . . . provide the information described in paragraph (1) [i.e., swap data] in such form and at such frequency as the Commission may require to comply with the public reporting requirements contained in section 2(a)(13) [i.e., real-time reporting]." Section 21(c)(4)(B). The proposal contemplates that SDRs will be required to perform real-time reporting for off-facility swaps, but can choose not to perform this function for swaps executed on a swap market, in which case the data can be submitted to a third-party vendor for real-time reporting.

In my view, real-time reporting is one of the core functions that Congress intended SDRs to perform. The structure the Commission is proposing may needlessly fragment the public reporting of real-time data and could undermine the purpose of real-time reporting, which is to make data available to the public in a form that enhances price transparency.

Second, I recognize that under Section 2(a)(13) of the CEA the Commission may also require other registered entities to perform real-time reporting, but I question the utility of allowing third-party vendors to perform this important function. As such, I also seek public comment on whether third-party vendors should be subject to some form of regulatory oversight in the event the Commission permits them to accept data for real-time reporting purposes.

[FR Doc. 2010–31133 Filed 12–22–10; 8:45 am]

BILLING CODE 6351–01–P



Federal Register

Thursday,
December 23, 2010

Part III

Securities and Exchange Commission

17 CFR Parts 229 and 249
Conflict Minerals; Proposed Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 229 and 249

[Release No. 34–63547; File No. S7–40–10]

RIN 3235–AK84

Conflict Minerals

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: We are proposing changes to the annual reporting requirements of issuers that file reports pursuant to Sections 13(a) or 15(d) of the Securities Exchange Act of 1934 to implement Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act. The proposed rules would require any issuer for which conflict minerals are necessary to the functionality or production of a product manufactured, or contracted to be manufactured, by that issuer to disclose in the body of its annual report whether its conflict minerals originated in the Democratic Republic of the Congo or an adjoining country. If so, that issuer would be required to furnish a separate report as an exhibit to its annual report that includes, among other matters, a description of the measures taken by the issuer to exercise due diligence on the source and chain of custody of its conflict minerals. These due diligence measures would include, but would not be limited to, an independent private sector audit of the issuer's report conducted in accordance with standards established by the Comptroller General of the United States. Further, any issuer furnishing such a report would be required, in that report, to certify that it obtained an independent private sector audit of its report, provide the audit report, and make its reports available to the public on its Internet Web site.

DATES: Comments should be received on or before January 31, 2011.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form *(http://www.sec.gov/rules/proposed.shtml)*;
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number S7–40–10 on the subject line; or
- Use the Federal Rulemaking Portal *(http://www.regulations.gov).* Follow the instructions for submitting comments.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number S7–40–10. This file number should be included on the subject line if e-mail is used. To help us 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/proposed.shtml*). Comments are also available for Web site viewing and copying in the Commission's Public Reference Room 100 F Street, NE., Washington, DC 20549–1090, on official business days between the hours of 10 a.m. and 3 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: John Fieldsend, Special Counsel in the Office of Rulemaking, Division of Corporation Finance, at (202) 551–3430, 100 F Street, NE., Washington, DC 20549–3628.

SUPPLEMENTARY INFORMATION: The Commission is proposing to add a new Item 104 to Regulation S–K,[1] revise Item 601 of Regulation S–K,[2] and amend Form 20–F,[3] Form 40–F,[4] and Form 10–K[5] under the Securities Exchange Act of 1934 (the "Exchange Act").[6]

Table of Contents

I. Background and Summary
A. Statutory Requirements
B. Overview of Proposed Rules
II. Discussion
A. Conflict Minerals
B. Step One—Determining Issuers Covered by the Conflict Minerals Provision
1. Issuers That File Reports Under the Exchange Act
2. "Manufacture" and "Contract to Manufacture" Products
3. Mining Issuers as "Manufacturing" Issuers
4. When Conflict Minerals are "Necessary" to a Product
C. Step Two—Determining Whether Conflict Minerals Originated in the DRC Countries and the Resulting Disclosure
1. Location of Disclosure
2. Standard for Disclosure
D. Step Three—Conflict Minerals Report's Content and Supply Chain Due Diligence
1. Content of Conflict Minerals Report
2. Location and Furnishing of Conflict Minerals Report
3. Due Diligence Standard in the Conflict Minerals Report
E. Time Periods
1. Furnishing of the Initial Disclosure and Conflict Minerals Report
2. Time Period in Which Conflict Minerals Must be Disclosed or Reported
F. Thresholds, Alternatives, Termination, Revisions, and Waivers
1. Materiality Threshold
2. Recycled and Scrap Minerals
3. Termination, Revisions, and Waivers
G. General Request for Comment
III. Paperwork Reduction Act
A. Background
B. Burden and Cost Estimates Related to the Proposed Amendments
1. Form 10–K
2. Regulation S–K
3. Form 20–F
4. Form 40–F
C. Summary of Proposed Changes to Annual Compliance Burden in Collection of Information
D. Request for Comment
IV. Cost-Benefit Analysis
A. Benefits
B. Costs
V. Consideration of Burden on Competition and Promotion of Efficiency, Competition, and Capital Formation
VI. Initial Regulatory Flexibility Act Analysis
A. Reasons for, and Objectives of, the Proposed Action
B. Legal Basis
C. Small Entities Subject to the Proposed Amendments
D. Reporting, Recordkeeping, and Other Compliance Requirements
E. Duplicative, Overlapping, or Conflicting Federal Rules
F. Significant Alternatives
G. Solicitation of Comment
VII. Small Business Regulatory Enforcement Fairness Act
VIII. Statutory Authority and Text of The Proposed Rule and Form Amendments

I. Background and Summary

A. Statutory Requirements

Section 1502 (the "Conflict Minerals Provision") of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act")[7] amends the Exchange Act by adding new Section 13(p).[8] The Commission is required pursuant to new Section 13(p) to issue final rules implementing Section 13(p) no later than 270 days after the date of enactment, or April 15, 2011.[9] Section 13(p) requires the Commission to promulgate disclosure and reporting regulations regarding the use of conflict minerals from the Democratic Republic

[1] 17 CFR 229.10 *et seq.*
[2] 17 CFR 229.601.
[3] 17 CFR 249.220f.
[4] 17 CFR 249.240f.
[5] 17 CFR 249.310.
[6] 15 U.S.C. 78a *et seq.*

[7] Public Law 111–203, 124 Stat. 1376 (July 21, 2010).
[8] 15 U.S.C. 78m(p).
[9] *See* Exchange Act Section 13(p)(1)(A).

of the Congo (the "DRC") and adjoining countries (together the "DRC countries").[10] Section 1502(a) of the Conflict Minerals Provision, which is titled "Sense of the Congress on Exploitation and Trade of Conflict Minerals Originating in the Democratic Republic of the Congo," sets forth the background for this provision. In Section 1502(a), Congress provides that: "It is the sense of the Congress that the exploitation and trade of conflict minerals originating in the Democratic Republic of the Congo is helping to finance conflict characterized by extreme levels of violence in the eastern Democratic Republic of the Congo, particularly sexual- and gender-based violence, and contributing to an emergency humanitarian situation therein, warranting the provisions of section 13(p) of the Securities Exchange Act of 1934, as added by subsection (b)." [11]

Section 13(p) mandates that the Commission promulgate regulations requiring that a "person described" [12] disclose annually whether any "conflict minerals" [13] that are "necessary to the functionality or production of a product manufactured by such person" [14] originated in the DRC countries,[15] and make that disclosure publicly available on the issuer's Internet Web site.[16] If a person's conflict minerals originated in the DRC countries, that person must submit a report (the "Conflict Minerals Report") to the Commission that includes a description of the measures taken by the person to exercise due diligence on the minerals' source and chain of custody.[17] In general, undertaking due diligence involves performing the investigative measures that a reasonably prudent person would perform in the management of his or her own property. Under Section 13(p), the measures that must be taken to exercise due diligence "shall include an independent private sector audit" of the Conflict Minerals Report that is conducted according to standards established by the Comptroller General of the United States, in accordance with the Commission's promulgated rules, in consultation with the Secretary of State.[18] The person submitting the Conflict Minerals Report must also identify the independent private sector auditor [19] and certify the independent private sector audit.[20]

Further, the Conflict Minerals Report must include a description of the products manufactured or contracted to be manufactured that are not "DRC conflict free," the facilities used to process the conflict minerals, the country of origin of the conflict minerals, and "the efforts to determine the mine or location of origin with the greatest possible specificity." [21] The term "DRC Conflict Free" is defined in Exchange Act Section 13(p)(1)(A)(ii) and Exchange Act Section 13(p)(1)(D) as products that do not contain conflict minerals that "directly or indirectly finance or benefit armed groups" in the DRC countries.[22] Each person must make their Conflict Minerals Report available to the public on that person's Internet Web site.[23]

B. Overview of Proposed Rules

Our proposed rules would apply to issuers who file reports with the Commission under Exchange Act Sections 13(a) [24] or 15(d) [25] and for which conflict minerals are "necessary to the functionality or production of a product manufactured" or contracted to be manufactured by such issuer.[26] These issuers would be required to disclose, based on their reasonable country of origin inquiry, in the body of their annual reports whether their conflict minerals originated in the DRC countries. If an issuer concludes that its conflict minerals did not originate in the DRC countries, the issuer would disclose this determination and the reasonable country of origin inquiry process it used in reaching this determination in the body of its annual report. Also, the issuer would be required to provide on its Internet Web site its determination that its conflict minerals did not originate in the DRC countries, disclose that this information is available on its Web site and the Internet address of that site in the body of its annual report, and maintain records demonstrating that its conflict minerals did not originate in the DRC countries. If the issuer concludes that its conflict minerals did originate in the DRC countries, or is unable to conclude that its conflict minerals did not originate in the DRC countries, the issuer would similarly disclose this conclusion, note that the Conflict Minerals Report is furnished as an exhibit to the annual report, furnish the Conflict Minerals Report, make available the Conflict Minerals Report on its Internet Web site, disclose that the Conflict Minerals Report is posted on its Internet Web site, and provide the Internet address of that site.

As required by Section 13(p), our proposed rules would require that an issuer provide, in its Conflict Minerals Report, a description of the measures it had taken to exercise due diligence on the source and chain of custody of its conflict minerals, which would have to include a certified independent private sector audit of the Conflict Minerals Report that identifies the auditor and is furnished as part of the Conflict Minerals Report. Further, the issuer would be required to include in the Conflict Minerals Report a description of its products manufactured or contracted to be manufactured containing conflict minerals that are not "DRC conflict free," [27] the facilities used to process those conflict minerals, those conflict minerals' country of origin, and the efforts to determine the mine or location of origin with the greatest

[10] The term "adjoining country" is defined in Section 1502(e)(1) of the Act as a country that shares an internationally recognized border with the DRC.

[11] Section 1502(a) of the Act.

[12] The term "person described" is defined in Exchange Act Section 13(p)(2) as one (1) who is required to file reports under Sections 13(p)(1)(A), and (2) the conflict minerals are necessary to the functionality or production of a product manufactured by such person. Section 13(p)(1)(A) does not provide a definition but refers back to Section 13(p)(2).

[13] The term "conflict mineral" is defined in Section 1502(e)(4) of the Act as (A) columbite-tantalite, also known as coltan (the metal ore from which tantalum is extracted); cassiterite (the metal ore from which tin is extracted); gold; wolframite (the metal ore from which tungsten is extracted); or their derivatives; or (B) any other mineral or its derivatives determined by the Secretary of State to be financing conflict in the DRC countries.

[14] Exchange Act Section 13(p)(2)(B).

[15] Exchange Act Section 13(p)(1)(A).

[16] *See* Exchange Act Section 13(p)(1)(E) (stating that each issuer "shall make available to the public on the Internet Web site of such [issuer] the information disclosed under" Exchange Act Section 13(p)(1)(A)).

[17] *See* Exchange Act Section 13(p)(1)(A)(i).

[18] *See id.* (requiring in the Conflict Minerals Report "a description of the measures taken by the person to exercise due diligence on the source and chain of custody of such [conflict] minerals, which measures shall include an independent private sector audit of such report"). The Conflict Minerals Provision assigns certain responsibilities to other federal agencies. In developing our proposed rules, our staff has consulted with the staff of these other agencies, including the Government Accountability Office (the "GAO"), which is headed by the Comptroller General, and the State Department.

[19] *See* Exchange Act Section 13(p)(1)(A)(ii) (stating that the issuer must provide a description of the "entity that conducted the independent private sector audit in accordance with" Exchange Act Section 13(p)(1)(A)(i)").

[20] As noted in Exchange Act Section 13(p)(1)(B), if an issuer is required to provide a Conflict Minerals Report that includes an independent private sector audit, that issuer "shall certify the audit" and that certified audit "shall constitute a critical component of due diligence in establishing the source and chain of custody of such minerals."

[21] *See* Exchange Act Section 13(p)(1)(A)(ii).

[22] *Id.;* Exchange Act Section 13(p)(1)(D).

[23] Exchange Act Section 13(p)(1)(E).

[24] 15 U.S.C. 78m(a).

[25] 15 U.S.C. 78o(d).

[26] Exchange Act Section 13(p)(2)(B).

[27] The definition of the term "DRC conflict free" in our proposed rules would be identical to the definition in Exchange Act Sections 13(p)(1)(A)(ii) and 13(p)(1)(D).

possible specificity. The issuer would be required to exercise due diligence in making these determinations in the Conflict Minerals Report.

II. Discussion

The Conflict Minerals Provision establishes, and we are likewise proposing, a disclosure requirement for conflict minerals that is divided into three steps. The first step required by Section 1502 is for the issuer to determine whether it is subject to the Conflict Minerals Provision. An issuer is only subject to the Conflict Minerals Provision if it is a "person described," which the Conflict Minerals Provision defines as one for whom "conflict minerals are necessary to the functionality or production of a product manufactured by such person." [28] If an issuer does not meet this definition, the issuer would not be required to take any action, make any disclosures, or submit any reports. If, however, an issuer meets this definition, that issuer would move to the second step.

The second step would require the issuer to determine after a reasonable country of origin inquiry whether its conflict minerals originated in the DRC countries. If the issuer determines that its conflict minerals did not originate in the DRC countries, the issuer would disclose this determination and the reasonable country of origin inquiry it used in reaching this determination in the body of its annual report.[29] If, however, the issuer determines that its conflict minerals did originate in the DRC countries, or if it is unable to conclude that its conflict minerals did not originate in the DRC countries, the issuer would disclose this conclusion in its annual report and move to the third step.[30]

Finally, the third step under the Conflict Minerals Provision would require an issuer with conflict minerals that originated in the DRC countries, or an issuer that is unable to conclude that its conflict minerals did not originate in the DRC countries, to furnish a Conflict Minerals Report as described in greater detail below. As required by Section 13(p)(1)(A)(ii), in the Conflict Minerals Report, the issuer would be required to provide, among other information, a description of any of its products that contain conflict minerals that it is unable to determine did not "directly or indirectly finance or benefit armed groups" in the DRC countries.[31] The issuer would identify such products by describing them as not "DRC conflict free." If any of its products contain conflict minerals that do not "directly or indirectly finance or benefit" these armed groups, the issuer may describe such products as "DRC conflict free," whether or not the minerals originated in the DRC countries.

A. Conflict Minerals

The Conflict Minerals Provision defines the term "conflict mineral" as cassiterite, columbite-tantalite, gold, wolframite, or their derivatives, or any other minerals or their derivatives determined by the Secretary of State to be financing conflict in the DRC countries.[32] Cassiterite is the metal ore that is most commonly used to produce tin, which is used in alloys, tin plating, and solders for joining pipes and electronic circuits.[33] Columbite-tantalite is the metal ore from which tantalum is extracted. Tantalum is used in electronic components, including mobile telephones, computers, videogame consoles, and digital cameras, and as an alloy for making carbide tools and jet engine components.[34] Gold is used for making jewelry and, due to its superior electric conductivity and corrosion resistance, is also used in electronic, communications, and aerospace equipment.[35] Finally, wolframite is the metal ore that is used to produce tungsten, which is used for metal wires, electrodes, and contacts in lighting, electronic, electrical, heating, and welding applications.[36] Based on the many uses of these minerals, we expect the Conflict Minerals Provision to apply to many companies and industries.

B. Step One—Determining Issuers Covered by the Conflict Mineral Provision

1. Issuers That File Reports Under the Exchange Act

Our proposed rules would apply to any issuer that files reports with the Commission under the Exchange Act, provided that the issuer is a "person described" under the Conflict Minerals Provision. The Conflict Minerals Provision defines a "person described" as one for whom conflict minerals are "necessary to the functionality or production of a product manufactured by such person." [37] We note that the provision could be read to apply to any company, including companies that are not subject to Commission reporting requirements, or individuals, so long as conflict minerals are necessary to the functionality or production of a product manufactured by that entity or individual. Such a broad reading of the provision, however, does not appear warranted given the provision's background and its location in the section of the Exchange Act dealing with reporting issuers.[38] Conversely, the Conflict Minerals Provision does not limit its disclosure or reporting obligations to issuers of any particular size. Again, the only limiting factor appears to be whether conflict minerals are "necessary to the functionality or production" of an issuer's products.[39] Based on these considerations, we are not proposing to include an exemption for smaller reporting companies, although we request comment below on whether that would be appropriate.

We have received letters and other communications with a variety of recommendations regarding the Conflict

[28] Exchange Act Section 13(p)(2).

[29] The issuer also would be required to make available this disclosure on its Internet Web site, disclose in its annual report that the disclosure is posted on its Internet Web site, and disclose the Internet address on which this disclosure is posted. Such an issuer, however, would not have any further disclosure or reporting obligations with regard to its conflict minerals.

[30] The issuer also would be required make its Conflict Minerals Report available to the public on its Internet Web site, disclose in its annual report that the Conflict Minerals Report is posted on its Internet Web site, and disclose the Internet address on which the Conflict Minerals Report is posted.

[31] *See* Exchange Act Section 13(p)(1)(A)(ii).

[32] Section 1502(e)(4) of the Act. Presently, the Secretary of State has not designated any other mineral as a conflict mineral. Therefore, the conflict minerals include only cassiterite, columbite-tantalite, gold, wolframite, or their derivatives.

[33] Tin Statistics and Information, U.S. Geological Survey. available at, *http://minerals.usgs.gov/minerals/pubs/commodity/tin/*.

[34] Niobium (Columbium) and Tantalum Statistics and Information, U.S. Geological Survey, available at, *http://minerals.usgs.gov/minerals/pubs/commodity/niobium*.

[35] Gold Statistics and Information, U.S. Geological Survey, available at, *http://minerals.usgs.gov/minerals/pubs/commodity/gold*.

[36] Tungsten Statistics and Information, U.S. Geological Survey, available at, *http://minerals.usgs.gov/minerals/pubs/commodity/tungsten*.

[37] *See supra* note 12.

[38] H.R. Rep. No. 111–517, Joint Explanatory Statement of the Committee of Conference, Title XV, "Conflict Minerals," at 879 (Conf. Rep.) (June 29, 2010) ("The conference report requires disclosure to the SEC by all persons otherwise required to file with the SEC for whom minerals originating in the Democratic Republic of Congo and adjoining countries are necessary to the functionality or production of a product manufactured by such person."); 156 Cong. Rec. S3978 (daily ed. May 19, 2010) (statement of Sen. Feingold) (stating that the "Brownback amendment was narrowly crafted" and, in discussing the provision, referring only to "companies on the U.S. stock exchanges"); 156 Cong. Rec. S3865–66 (daily ed. May 18, 2010) (stating that the Conflict Minerals Provision "is a narrow SEC reporting requirement" and referring only to "SEC reporting requirements" in discussing the provision); and 156 Cong. Rec. S3816–17 (daily ed. May 17, 2010) (statement of Sen. Durbin) (stating that the provision "would require companies listed on the New York Stock Exchange to disclose in their SEC filings").

[39] Exchange Act Section 13(p)(2)(B).

Minerals Provision and our rulemaking,[40] including those that discussed what the provision's definition of a "person described" should be construed to mean. Specifically, one industry group representative stated that the term was intended to apply solely to persons who file periodic reports under Section 13(a)(2) of the Exchange Act, although that representative indicates that the provision is unclear as written.[41] A separate individual who submitted a letter to us stated that the provision's definition of the term is broad and appears to cover more than only reporting issuers.[42] Finally, another issuer that submitted a letter to us indicated our rules should define a "person described" in the broadest possible sense so that it includes non-reporting companies.[43] This issuer stated that, because the provision's intent is to limit the exploitation and trade of conflict minerals so as to prevent human rights abuses, and the provision is not necessarily intended to protect investors, the scope of the provision should include more than just reporting issuers. Further, the issuer stated that applying our proposed rules only to reporting issuers would unfairly burden reporting issuers and damage their competitive position.

We recognize there is some ambiguity as to whom the Conflict Minerals Provision applies given that the Conflict Minerals Provision states that the Commission shall promulgate regulations for any "person described,"[44] and the provision states that a "person is described" if "conflict minerals are necessary to the functionality or production of a product manufactured by such person."[45] Therefore, the Conflict Minerals Provision could be interpreted to apply to a wide range of private companies not previously subject to our disclosure and reporting rules. However, given the provision's legislative background, its statutory location, and the absence of Congressional direction to apply these provisions to companies not previously subject to those rules,[46] we do not propose to extend the rules beyond reporting companies. Also, even if we were to interpret the provision in this manner, it is uncertain how the Commission could administer such a program. Therefore, our proposed rules would apply only to issuers that file reports with the Commission under Section 13(a) or Section 15(d) of the Exchange Act, although we request comment on this question below.[47] Consistent with the statutory language, our rules would apply to domestic companies, foreign private issuers, and smaller reporting companies. The statutory language does not suggest an exemption for foreign private issuers or smaller reporting companies and our proposal, therefore, would cover those issuers, although we request comment on this question below.

Request for Comment

1. Should our reporting standards, as proposed, apply to all conflict minerals equally?[48]

2. Should our rules, as proposed, apply to all issuers that file reports under Sections 13(a) and 15(d) of the Exchange Act? If not, to what issuers or other persons should our rules apply? Should we require an issuer that has a class of securities exempt from Exchange Act registration pursuant to Exchange Act Rule 12g3–2(b)[49] to provide the disclosure and reporting requirements in its home country annual report or in a report on EDGAR? Would such an approach be consistent with the Act?[50]

3. Should we have an alternative interpretation of a "person described?"

4. Should our rules apply to foreign private issuers, as proposed? Should we exempt such issuers and, if so, why and on what basis? Should the rules otherwise be adjusted in some fashion for foreign private issuers?

5. Would our proposed rules present undue costs to smaller reporting companies? If so, how could we mitigate those costs? Also, if our proposed rules present undue costs to smaller reporting companies, do the benefits of making their conflict minerals information publicly available justify these costs? Should our rules provide an exemption for smaller reporting companies? Alternatively, should our rules provide more limited disclosure and reporting obligations for smaller reporting companies? If so, what should these limited requirements entail? For example, should our rules require smaller reporting companies to disclose, if true, that conflict minerals are necessary to the functionality or production of their products but not require those issuers to disclose whether those conflict minerals originated in the DRC countries or to furnish a Conflict Minerals Report? Should our rules provide for a delayed implementation date for smaller reporting companies in order to provide them additional time to prepare for the requirement and the benefit of observing how larger companies comply?

6. Should we require that all individuals and entities, regardless of whether they are reporting issuers, private companies, or individuals who manufacture products for which conflict minerals are necessary to the functionality or production of the products, provide the conflict minerals

[40] To facilitate public input on the Act, the Commission has provided a series of e-mail links, organized by topic, on its Web site at *http://www.sec.gov/spotlight/regreformcomments.shtml*. The public comments we have received on the topic of the Conflict Minerals Provision are available on our Web site at *http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-8.pdf*.

[41] *See* letter from Jewelers Vigilance Committee.

[42] *See* letter from Stuart P. Seidel, Esq. (stating that a person described is "not the usual SEC 'issuer' requirement and appears much broader").

[43] *See* letter from Tiffany & Co.

[44] *See* Exchange Act Section 13(p)(1)(A).

[45] *See* supra note 12.

[46] *See* H.R. Rep. No. 111–517, Joint Explanatory Statement of the Committee of Conference, Title XV, "Conflict Minerals," at 879 (Conf. Rep.) (June 29, 2010) ("The conference report requires disclosure to the SEC by all persons otherwise required to file with the SEC for whom minerals originating in the Democratic Republic of Congo and adjoining countries are necessary to the functionality or production of a product manufactured by such person.")

[47] Section 13(a) requires issuers with classes of securities registered under Section 12 of the Exchange Act to file periodic and other reports. 15 U.S.C. 78l. Section 15(d) requires issuers with effective registration statements under the Securities Act of 1933 (the "Securities Act") to file reports similar to Section 13(a) for the fiscal year within which such registration statement became effective. 15 U.S.C. 77a *et seq.* Therefore, if our proposed rules did not include issuers required to file reports under Section 15(d), some issuers who file annual reports may not otherwise be required to comply with our proposed conflict minerals rules.

[48] *See* the petition attached to the memorandum of the November 18, 2010 meeting with Chairman Mary L. Schapiro and with John Prendergast and Darren Fenwick of The Enough Project, Sasha Lezhnev of Grassroots Reconciliation Group, and Deborah R. Meshulam of DLA Piper (calling on the Commission to promulgate rules that would require equal reporting standards for all the conflict minerals), available at, *http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-80.pdf*.

[49] 17 CFR 240.12g3–2(b). A foreign private issuer may claim that exemption as long as it meets a foreign listing requirement, publishes its material home country documents in English on its Internet Web site or through another electronic information delivery system that is generally available to the public in its primary trading market, and otherwise is not required to file Exchange Act reports. A foreign private issuer typically relies on the Rule 12g3–2(b) exemption in order to establish an unlisted American Depositary Receipt ("ADR") facility for the issuance and trading of ADRs through the over-the-counter market.

[50] The Commission has not considered Rule 12g3–2(b)-exempt companies to be subject to Exchange Act reporting and filing requirements. Prior to the amendment to Rule 12g3–2(b) in 2008, we required issuers claiming the Rule 12g3–2(b) exemption to furnish paper copies of their material home country documents to the Commission. The documents were deemed furnished and not filed under the Exchange Act because they were subject to their home country, and not Exchange Act, disclosure rules.

disclosure and, if necessary, a Conflict Minerals Report? If so, how would we oversee such a broad reporting system?

7. Would requiring compliance with our proposed rules only by issuers filing reports under the Exchange Act unfairly burden those issuers and place them at a significant competitive disadvantage compared to companies that do not file reports with us? If so, how can we lessen that impact?

8. General Instruction I to Form 10–K contains special provisions for the omission of certain information by wholly-owned subsidiaries. General Instruction J to Form 10–K contains special provisions for the omission of certain information by asset-backed issuers. Should either or both of these types of registrants be permitted to omit the proposed conflict minerals disclosure in the annual reports on Form 10–K?

2. "Manufacture" and "Contract To Manufacture" Products

The Conflict Minerals Provision applies to any person for whom conflict minerals are necessary to the functionality or production of a product manufactured by that person.[51] It appears, therefore, that the Conflict Minerals Provision was not intended to apply to all issuers, but was intended to apply only to issuers that manufacture products. In this regard, our proposed rules would likewise apply to reporting issuers that manufacture products.

We do not propose to define the term "manufacture" in our rules, since we believe it is generally understood.[52] We note that some of those submitting letters in advance of this rulemaking have suggested our proposed rules should define the term "manufacturing" with greater specificity and have provided their views on this matter. One non-governmental organization ("NGO") stated that the term "manufactured" should be defined as the "production, preparation, assembling, combination, compounding, or processing of ingredients, materials, and/or processes such that the final product has a name, character, and use, distinct from the original ingredients, materials, and/or processes."[53] An industry group indicated that the term manufacture should exempt issuers involved in the "mining, processing, refining, alloying, fabricating, importing, exporting or sale" of gold and those engaged in "jewelry repairs or refurbishment, * * * setting or re-setting diamonds or gemstones into mountings or * * * [the] manufactur[ing of] individual custom jewelry pieces."[54] We are not proposing to define the term, but we request comment on that point below.

One section of the Conflict Minerals Provision defines a "person described" as one for which conflict minerals are "necessary to the functionality or production of a product manufactured by such a person,"[55] while another section of the provision requires issuers to describe "the products manufactured or *contracted to be manufactured* that are not DRC conflict free" [emphasis added] in their Conflict Mineral Reports.[56] The absence of the phrase "contract to manufacture" from the "person described" definition raises some question as to whether the requirements apply equally to those who manufacture products themselves and those who contract to have their products manufactured by others. Based on the totality of the provision, however, it appears that the legislative intent was for the provision to apply both to issuers that directly manufacture products and to issuers that contract the manufacturing of their products for which conflict minerals are necessary to the functionality or production of those products. Our proposed rules, therefore, would apply equally to issuers that manufacture products and to issuers that "contract to manufacture" their products. We believe that this approach would allow the "contracted to be manufactured" language to have effect in the Conflict Minerals Report.

With regard to what it means to "contract to manufacture a product," an industry group expressed concern that our rules could include retailing issuers' private label goods.[57] Two of the Congressmen who sponsored Section 1502 have stated in a letter submitted to us that rules implementing the provision should "exempt pure retailers" from any reporting requirements.[58] In this regard, they suggested that the rules should clarify that retailers who sell "pure 'white label' products," products over which retailers have no influence regarding their manufacture, would not be required to provide information regarding any conflict minerals in those products. Also, they indicated that the rules should include products that a retailer "contracts to be manufactured or for which the retailer issues unique product requirements."[59]

We intend that our proposed rules would apply to issuers that contract for the manufacturing of products over which they have any influence regarding the manufacturing of those products. They also would apply to issuers selling generic products under their own brand name or a separate brand name that they have established, regardless of whether those issuers have any influence over the manufacturing specifications of those products, as long as an issuer has contracted with another party to have the product manufactured specifically for that issuer. We do not, however, propose that our rules would apply to retail issuers that sell only the products of third parties if those retailers have no contract or other involvement regarding the manufacturing of those products, or if those retailers do not sell those products under their brand name or a separate brand they have established and do not have those products manufactured specifically for them.

Request for Comment

9. Should we define the term "manufacture?" If so, how should we define the term?

10. Should our rules, as proposed, apply both to issuers that manufacture and issuers that contract to manufacture products in which conflict minerals are necessary to the functionality or production of those products?

11. Should we require a minimum level of influence, involvement, or control over the manufacturing process before an issuer must comply with our proposed rules? If so, how should we articulate the minimum amount? Should we require issuers to have nominal, minimal, substantial, total, or another level of control over the manufacturing process before those issuers become subject to our rules? How would those amounts be measured? Should we require that issuers must, at minimum, mandate that the product be manufactured according to particular specifications?

12. Is it appropriate to consider issuers who sell generic products under their own labels or labels that they establish to be contracting the manufacture of those products as long as those issuers have contracted with other parties to have the products manufactured specifically for them? If not, what would be a more appropriate approach?

[51] *See* Exchange Act Section 13(p)(2)(B).

[52] For example, the Second Edition of the Random House Webster's Dictionary defines the term to include the "making goods or wares by hand or machinery, esp. on a large scale." Random House Webster's Dictionary 403(2d ed. 1996).

[53] *See* letter from The Enough Project.

[54] *See* letter from Jewelers Vigilance Committee.

[55] Exchange Act Section 13(p)(2)(B).

[56] Exchange Act Section 13(p)(1)(A)(ii).

[57] *See* letter from National Retail Federation.

[58] Letter from Senator Richard J. Durbin and Representative Jim McDermott, United States Congress.

[59] *Id.*

3. Mining Issuers as "Manufacturing" Issuers

As a separate but related issue, our proposed rules would consider issuers that mine conflict minerals, including issuers that mine gold, to be manufacturing those minerals, and issuers contracting for the mining of conflict minerals to be contracting the manufacturing of those minerals. In this regard, we have received input that our proposed rules should not consider a gold mining issuer as manufacturing or contracting to manufacture gold.[60] Conversely, another view expressed to us by an NGO was that our proposed rules should consider mining commensurate with manufacturing or contracting to manufacture.[61] This NGO cited to and quoted from the United States Controlled Substances Act,[62] which includes mining under the definition of manufacturing. We are proposing in an instruction to our proposed rules[63] that mining issuers should be considered to be manufacturing conflict minerals when they extract those minerals.[64] We do, however, request comment on this point below.

Request for Comment

13. Is it appropriate for our rules, as proposed, to consider reporting issuers that are mining companies as "persons described" under Section 1502? Does the extraction of conflict minerals from a mine constitute "manufacturing" or "contracting to manufacture" a "product" such that mining issuers should be subject to our rules?

14. Alternatively, should a mining issuer not be viewed as manufacturing a product under our rules unless it engages in additional processes to refine and concentrate the extracted minerals into salable commodities or otherwise changes the basic composition of the extracted minerals?

15. If so, what transformative processes, if any, should mining issuers be permitted to perform on conflict minerals before our proposed rules should consider them to be manufacturing products to which conflict minerals are necessary?

4. When Conflict Minerals are "Necessary" to a Product

The Conflict Minerals Provision requires the Commission to promulgate regulations requiring that any "person described" disclose annually whether conflict minerals that are "necessary" originated in the DRC countries and, if so, submit to the Commission a Conflict Minerals Report.[65] The provision further states that a "person is described" if "conflict minerals are necessary to the functionality or production of a product manufactured by such person."[66] The provision, however, provides no additional explanation or guidance as to the meaning of this phrase. Likewise, we do not propose to define when a conflict mineral is necessary to the functionality or production of a product. We are, however, requesting comment on whether our rules should define this phrase and, if so, how.

We have received differing input as to when a conflict mineral should be considered necessary to the functionality or production of a product for purposes of the Conflict Minerals Provision. One NGO stated that the term "necessary" should be interpreted broadly and, at a minimum, include conflict minerals that are "intentionally added," "closely related," or "directly essential" to the production of a product.[67] That NGO indicated also that a conflict mineral is necessary when it is "required for the financial success or marketability of the product."[68] Further, the NGO affirmed that it believes that our proposed rules should exempt any product that contains naturally occurring trace amount of conflict minerals.[69] Two of the Congressional sponsors of Section 1502 indicated that "it is the policy of Section 1502 to require transparency of all sourcing of conflict minerals" from the DRC countries, so they believe the provision was intended "to include all uses of conflict minerals coming from DRC—except those that are 'naturally occurring' or 'unintentionally included' in the product."[70]

While we are not proposing to define "necessary to the functionality or production," we note that if a mineral is necessary, the product is covered without regard to the amount of the mineral involved.[71] Further, we intend our proposed rules to include products if the conflict mineral is intentionally included in a product's production process and is necessary to that process, even if that conflict mineral is not ultimately included anywhere in the final product.[72] On the other hand, conflict minerals necessary to the functionality or production of a physical tool or machine used to produce a product would not be considered necessary to the production of the product even if that tool or machine is necessary to producing the product. For example, if an automobile containing no conflict minerals is produced using a wrench that contains conflict minerals necessary to the functionality or production of that wrench, we would not consider the conflict minerals in that wrench necessary to the production of the automobile.

Request for Comment

16. Should our rules define the phrase "necessary to the functionality or production of a product," or is that phrase sufficiently clear without a definition? If our rules should define the phrase, how should it be defined?

17. If we were to define this phrase, should we delineate it to mean that a conflict mineral would be necessary to a product's functionality only if the conflict mineral is necessary to the product's basic function? If so, should we define the term "basic function" and, if so, how should we define that term? Should we define the term to include components of a product if those components are necessary to the product's basic function such that a conflict mineral would be considered necessary to the functionality of a product if the conflict mineral is necessary to the functionality of any of the product's components that are required for that product's basic function? For example, if the only conflict minerals in an automobile are contained in the automobile's radio, should our proposed rules consider those conflict minerals necessary to the automobile's functionality even if the

[60] *See* letter from Jewelers Vigilance Committee (stating that our proposed "rules should make clear that the mining, processing, refining, alloying, fabricating, importing, exporting or sale of gold does not constitute 'manufacture' ").

[61] *See* letter from The Enough Project.

[62] 21 U.S.C.A. 802(15), the United States Controlled Substances Act, which defines the term "manufacture" as the production, preparation, propagation, compounding, or processing of a drug or other substance, either directly or indirectly or by extraction from substances of natural origin").

[63] New Item 4(a) of Form 10–K (through new Instruction 1 to Item 104 of Regulation S–K), new Instruction 2 to Item 16 of Form 20–F, and new Instruction 2 to General Instruction B(16) of Form 40–F.

[64] *See* Industry Guide 7 [17 CFR 229.802(g)] (implying that companies may "produce" minerals from a mining reserve).

[65] Exchange Act Section 13(p)(1)(A).

[66] Exchange Act Section 13(p)(2)(B).

[67] Letter from The Enough Project.

[68] *Id.*

[69] *Id.*

[70] Letter from Senator Richard J. Durbin and Representative Jim McDermott, United States Congress.

[71] *See* discussion *infra* Part II.F.1.

[72] *See* letter from Senator Richard J. Durbin and Representative Jim McDermott, United States Congress ("All users of conflict minerals that originate from the Democratic Republic of the Congo an adjoining countries that are not naturally occurring * * * or are a purely unintentional byproduct * * * need to be subject to reporting and transparency.").

automobile's basic function is for transportation? If that radio is marketed and sold with the automobile, should our proposed rules consider the conflict minerals that are isolated in the radio necessary to the functionality of the automobile? Alternatively, should such a definition consider only conflict minerals isolated in an automobile component required specifically for the automobile's basic function as necessary for the functionality of the automobile?

18. If we were to define the phrase "necessary to the functionality," should we delineate it to mean that a conflict mineral would be necessary to a product's functionality if the conflict mineral is included in a product for any reason because that conflict mineral would be contributing to the product's economic utility? Does the fact that, if a conflict mineral is not "necessary" it, axiomatically, could be excluded from the product or the manufacturing process support such a broad reading?

19. Should we define the phrase to indicate that, as one letter suggested, a conflict mineral should be considered necessary when "[t]he conflict mineral is intentionally added to the product; or [t]he conflict mineral is used by the [issuer] for the production of a product and such mineral is purchased in mineral form by the [issuer] and used by the [issuer] in the production of the final product but does not appear in the final product; and [t]he conflict mineral is essential to the product's use or purpose; or [t]he conflict mineral is required for the marketability of the product?" [73]

20. Should we delineate the phrase "necessary to the production" to mean that a conflict mineral would be necessary to a product's production only if the conflict mineral is intentionally included in a product's production process even if that conflict mineral is not ultimately included in the final product because it was removed or washed away prior to the completion of the production process? Should we consider conflict minerals necessary to the production of a product if they are not contained in the product but they are necessary to the functionality or production of a physical tool or machine used to produce a product? Should we consider such conflict minerals necessary to the production of a product if the tool or machine used to produce the product was manufactured for the purpose of producing the product? Would such an approach cover too broad a group of tools or machines? Should we limit such an approach to certain kinds of tools or machines, and if so, which ones? Should we be more specific and provide, as a letter recommended, that a conflict mineral is necessary to a product's production only if it is "used by [an issuer] for the production of a product and such mineral is purchased in mineral form by the [issuer] and used by the [issuer] in the production of the final product but does not appear in the final product?" [74]

21. Should we delineate the phrase "necessary to the production" so that our rules would not consider conflict minerals occurring naturally in a product or conflict minerals that are purely an unintentional byproduct of the product as necessary to the production of that product?

C. Step Two—Determining Whether Conflict Minerals Originated in the DRC Countries and the Resulting Disclosure

If conflict minerals are necessary to the functionality or production of a product manufactured by that issuer, the Conflict Minerals Provision requires an issuer to disclose whether those conflict minerals originated in the DRC countries.[75] If they did not originate in the DRC countries, the statute requires the issuer to make available that disclosure on its Internet Web site, but does not require the issuer to submit anything further to the Commission. If, however, any of the issuer's conflict minerals originated in the DRC countries, the provision requires the issuer to submit to the Commission a Conflict Minerals Report for the portion of its conflict minerals that originated in the DRC countries, and make that report available on its Internet Web site.

The rules we are proposing would require an issuer to disclose whether its conflict minerals originated in the DRC countries. Under our proposed rules, an issuer would be required to make a reasonable country of origin inquiry as to whether its conflict minerals originated in the DRC countries, but our proposed rules would not set forth what constitutes a reasonable country of origin inquiry. If, after a reasonable country of origin inquiry, an issuer concludes that any of its conflict minerals did not originate in the DRC countries, the issuer would be required to disclose this in the body of the annual report and on its Internet Web site.[76] Also, the issuer would be required to disclose in the body of the annual report the Internet address on which the disclosure is posted and retain the information on the Web site at least until the issuer's subsequent annual report is filed with the Commission. Further, the issuer would be required to disclose in the body of its annual report the reasonable country of origin inquiry it undertook to determine that its conflict minerals did not originate in the DRC countries and maintain reviewable business records to support its determination.[77] The issuer, however, would not be required to make any other disclosures with regard to its conflict minerals that did not originate in the DRC countries.

Under our proposed rules, if an issuer determines through its reasonable country of origin inquiry that any of its conflict minerals originated in the DRC countries, or if the issuer is unable to determine after a reasonable country of origin inquiry that any such conflict minerals did not originate in the DRC countries, our proposed rules would require the issuer to disclose this in the body of the annual report and disclose that the Conflict Minerals Report is furnished as an exhibit to the annual report. Additionally, the issuer would be required to make available its Conflict Minerals Report on its Internet Web site, disclose in the body of its annual report that the Conflict Minerals Report is posted online, and disclose in the body of its annual report the Internet address on which the Conflict Minerals Report is located.[78] We note, however, that under our proposal such an issuer would only have to post the Conflict Minerals Report on its Internet Web site and would not have to post any of the disclosures it provides in the body of its annual report.[79]

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[73] *See* letter submitted by Patricia Jurewicz on November 18, 2010 (the "Multi-Stakeholder Group Letter") (representing a consortium of NGOs, large issuers, and socially responsible institutional investors).

[74] *See id.*

[75] Exchange Act Section 13(p)(1)(A).

[76] *See* Exchange Act Section 13(p)(1)(E). The issuer would be required to keep this information on its Internet Web site until it filed is subsequent annual report.

[77] *See* Multi-Stakeholder Group Letter (suggesting that entities subject to the Conflict Minerals Provision be required to maintain reviewable business records to support a negative determination).

[78] *See* Exchange Act Section 13(p)(1)(E).

[79] We recognize that there may be instances in which an issuer determines that its products contain a mixed assortment of conflict minerals, such that some did not originate in the DRC countries, some originated in the DRC countries, some have minerals that the issuer cannot determine did not originate in the DRC countries, or any combination thereof. If an issuer can determine which conflict minerals did not originate in the DRC countries, it would not have to provide a Conflict Minerals Report regarding those minerals. However, the issuer would still be required to file a Conflict Minerals Report for the minerals that originated in the DRC countries or that the issuer was unable to determine did not originate in the DRC countries.

1. Location of Disclosure

Our proposed rules would require disclosure about conflict minerals in an issuer's annual report on Form 10–K for a domestic issuer, Form 20–F for a foreign private issuer, and Form 40–F for an eligible Canadian issuer. Section 1502 requires issuers to disclose information about their conflict minerals annually, but does not otherwise specify where this disclosure must be located, either in terms of which form or in terms of where within a particular form. Our proposed rules would require this disclosure in the existing Form 10–K, Form 20–F, or Form 40–F annual report because issuers are already required to file these reports so this approach should be less burdensome than requiring a separate annual report to be filed. Further, to facilitate locating the conflict minerals disclosure within the annual report without over-burdening investors with extensive information about conflict minerals in the body of the report, our proposed rules would require issuers to include brief conflict minerals disclosure under a separate heading entitled, "Conflict Minerals Disclosure," and the more extensive, information in a separate exhibit to the annual report, if required.

To implement Section 1502 of the Act, we are proposing to add new Item 4(a) of Form 10–K (which references new Item 104(a) of Regulation S–K), new Item 16(a) of Form 20–F, and a new General Instruction B(16)(a) of Form 40–F. These rules would require that an issuer disclose in its annual report under a separate heading, entitled "Conflict Minerals Disclosure," its determination as to whether any of its conflict minerals originated in the DRC countries, based on its reasonable country of origin inquiry, and, for its conflict minerals that do not originate in the DRC countries, a brief description of the reasonable country of origin inquiry it conducted in making such a determination. Our proposed rules would not require an issuer who determines that its conflict minerals did not originate in the DRC countries, based on its reasonable country of origin inquiry, to provide any further disclosures.

We are also proposing that an issuer include brief additional disclosure in the body of the annual report if the issuer's conflict minerals originated in the DRC countries or if the issuer cannot determine that its conflict minerals did not originate in the DRC countries, based on its reasonable country of origin inquiry. We propose to add new Item 4(a) of Form 10–K, new Item 104(b)(2) of Regulation S–K, new Item 16(b)(2) of Form 20–F, and new General Instruction B(16)(b)(2) and Form 40–F to implement this additional disclosure. These proposed requirements would require an issuer to disclose that its conflict minerals originated in the DRC countries, or that it is unable to conclude that its conflict minerals did not originate in the DRC countries, that its Conflict Minerals Report has been furnished as an exhibit to the annual report, that the Conflict Minerals Report, including the certified independent private sector audit, is publicly available on the issuer's Internet Web site, and the issuer's Internet address on which the Conflict Minerals Report and audit report are located. As noted above, we are proposing this approach to facilitate access to the conflict minerals information by placing it outside the body of the annual report.

The Conflict Minerals Provision requires that each issuer make its Conflict Minerals Report available to the public on the issuer's Internet Web site.[80] Consistent with the statute, we are proposing that new Item 104(b)(3) of Regulation S–K, new Item 16(b)(3) of Form 20–F, and new General Instruction B(16)(b)(3) of Form 40–F require an issuer to make such a report, including the certified audit report, available to the public by posting the text of the report on its Internet Web site. Our proposed rules would require that the text of the Conflict Minerals Report remain on the issuer's Web site at least until it files its subsequent annual report. Although we would require an issuer that furnishes a Conflict Minerals Report to provide some disclosures in the body of its annual report regarding that report, we would not require that issuer to post this disclosure on its Web site. We believe this is appropriate because any information disclosed in the body of the annual report would also be included in the Conflict Minerals Report, which would be required to be posted on the issuer's Internet Web site.

Request for Comment

22. Should we require issuers to provide the conflict minerals disclosure and reporting requirements mandated under Section 13(p) in its Exchange Act annual report, as proposed? Should we require, or permit, the conflict minerals disclosure to be included in a new, separate form furnished annually on EDGAR, rather than adding it to Form 10–K, Form 20–F, and Form 40–F? Would requiring issuers to disclose the information in a separate annual report be consistent with Section 13(p)? Should we develop a separate annual report to be filed on EDGAR that includes all of the specialized disclosures mandated by the Dodd-Frank Act?[81] What would be the benefits or burdens of such a form for investors or issuers with necessary conflict minerals?

23. Should we require some brief disclosure in the body of the annual report, as proposed?

24. Should our rules provide that, rather than be included in the body of the annual report, all required information would be set forth in the Conflict Minerals Report that would be furnished as an exhibit to the annual report?

25. Instead, should all required information, including the Conflict Minerals Report, be included in the body of the annual report?

26. Should issuers with necessary conflict minerals that did not originate in the DRC countries be required to disclose any information other than as proposed? For example, should we require such an issuer to disclose the countries from which its conflict minerals originated?

27. Should we, as proposed, require issuers to describe the reasonable country of origin inquiry they used in making their determination that their conflict minerals did not originate in the DRC countries? Is a separately captioned section in the body of the annual report the appropriate place for this disclosure?

28. Should we require, as proposed, that an issuer maintain reviewable business records if it determines that its conflict minerals did not originate in the DRC countries? Are there other means of verifying an issuer's determination that its minerals did not originate in the DRC countries? Should we specify for how long issuers would be required to maintain these records? For example, should we require issuers to maintain records for one year, five years, 10 years, or another period of time?

29. Should we require the disclosure in an issuer's annual report to be provided in an interactive data format? Why or why not? Would investors find interactive data to be a useful tool to easily find the information provided? If so, what format would be most appropriate for providing standardized data disclosure? For example, should

[80] *See* Exchange Act Section 13(p)(1)(E), which is entitled "Information Available to the Public" and states that "[e]ach person described under paragraph (2) shall make available to the public on the Internet Web site of such person the information disclosed by such person under subparagraph (A)."

[81] Sections 1502, 1503, and 1504 of the Act.

the format be eXtensible Business Reporting Language (XBRL), as one letter recommended,[82] or should the format be eXtensible Markup Language (XML)?

30. Should we require issuers to briefly disclose in the body of their annual reports the contents of the Conflict Minerals Report? If so, how much of the information in the Conflict Minerals Report should we require issuers to disclose?

31. Should we require an issuer to post its audit report on its Internet Web site, as proposed?

32. Should we require, as proposed, that an issuer post its Conflict Minerals Report and its audit report on its Internet Web site at least until it files its subsequent annual report? If not, how long should an issuer keep this information posted on its Internet Web site?

2. Standard for Disclosure

We are proposing rules that would require issuers to disclose, based on their reasonable country of origin inquiry, whether their necessary conflict minerals originated in the DRC countries or that they are unable to determine, after such a reasonable country of origin inquiry, that their conflict minerals did not originate in the DRC countries. Our proposed rules would not specify what constitutes a reasonable country of origin inquiry. Instead, the proposed rules would require an issuer that determined its conflict minerals did not originate in the DRC countries to disclose its reasonable country of origin inquiry in making its determination.

Under our proposal, the reliability of any inquiry would be based solely on whether the information used provides a reasonable basis for an issuer to be able to trace the origin of any particular conflict mineral it uses.[83] For example, it would not satisfy our proposed rules for an issuer to conclude that it is unreasonable for it to attempt to determine the origin of its conflict minerals solely because of the large amount of conflict minerals it uses in its products or the large number of its products that include conflict minerals. Instead, that issuer would be required to make a reasonable country of origin inquiry as to the origin of all of its conflict minerals that are necessary to the functionality or production of its products that it manufactures or contracts to be manufactured to determine whether those conflict minerals originated in the DRC countries.

A multi-stakeholder group suggested a similar approach. This group recommended that our proposed rules require an issuer to make a reasonable inquiry into whether its conflict minerals originated in the DRC countries, provide a stated basis for any determination that the source and origin of the conflict minerals was not in the DRC countries, and maintain auditable business records to support a negative determination.[84] Similarly, in a separate submission, an NGO stated that our proposed rules should require issuers to conduct "a sufficient inquiry to enable them to have a reasonable basis to state whether necessary conflict minerals do or do not originate in the DRC or an adjoining country."[85] In this regard, that NGO also indicated that our proposed rules should require that the issuer "disclose the basis for any determination that necessary conflict minerals did not originate in the DRC or an adjoining country."[86]

Others who submitted letters, however, have suggested different standards for determining whether an issuer's conflict minerals originated in the DRC countries. A different NGO stated that our proposed rules should require issuers to "conduct sufficient due diligence to enable them to determine accurately whether conflict minerals do or do not originate from the DRC or an adjoining country."[87] An industry group indicated that our proposed rules should require issuers to use due diligence in determining whether their conflict minerals originated in the DRC countries.[88] The letter from that industry group stated, however, that it is not possible for issuers in every instance to determine definitively the origins of certain conflict minerals,[89] so it suggested that our proposed rules "should thus create a mechanism by which entities can make a disclosure stating 'no evidence of DRC or adjoining country origin.'"[90]

We recognize the possibility that issuers who have conducted a reasonable country of origin inquiry may nonetheless not be able to determine with absolute accuracy the origins of their conflict minerals. We do not believe, however, that it is appropriate for our rules to permit issuers to satisfy their country of origin disclosure requirement by concluding that there is "no evidence" that their conflict minerals originated in the DRC countries and, thereby, not be required to provide any further information regarding their conflict minerals. Such an allowance might encourage issuers to conduct poorly planned or executed inquiries. Therefore, under our proposed rules such an issuer would still be required to file a Conflict Minerals Report and, therefore, would be required to exercise a greater level of investigation into the source and chain of custody of its conflict minerals. As discussed in greater detail below, we would permit issuers who cannot determine the origins of their conflict minerals, based on their reasonable country of origin inquiry, to disclose that they are unable to determine that their conflict minerals did not originate in the DRC countries. This approach is similar to one recommended by a multi-stakeholder group, which indicated that, if an issuer "is unable to determine the origin of the minerals specified in the statute after making a reasonable country of origin inquiry, the [issuer] should be required to submit" a Conflict Minerals Report.[91]

We believe that conducting a reasonable country of origin inquiry before disclosing whether an issuer's conflict minerals originated in the DRC countries is appropriate. However, our proposed rules would not state what that reasonable country of origin inquiry would entail because we believe that necessarily would depend on the issuer's particular facts and circumstances. In this regard, we note that the reasonable country of origin inquiry requirement is not meant to suggest that issuers would have to determine with absolute certainty whether their conflict minerals originated in the DRC countries, as the Commission has often stated that a reasonableness standard is not the same as an absolute standard.[92]

[82] *See* letter from the Social Investment Forum.

[83] This determination would not be based on whether an issuer considers it reasonable to undertake to determine the origin of all its conflict minerals as a whole.

[84] *See* Multi-Stakeholder Group Letter.

[85] *See* letter from The Enough Project.

[86] *Id.*

[87] Letter from Global Witness.

[88] Letter from Jewelers Vigilance Committee.

[89] We note that the comments submitted by the Jewelers Vigilance Committee refer only to gold.

[90] Letter from Jewelers Vigilance Committee.

[91] *See* Multi-Stakeholder Group Letter.

[92] *See* Management's Report on Internal Control Over Financial Reporting, Release No. 33–8762 (Dec. 20, 2006) [71 FR 77635] (stating that the "Commission has long held that 'reasonableness' is not an 'absolute standard of exactitude for corporate records'" (citing to Foreign Corrupt Practices Act of 1977, Release No. 34–17500 (Jan. 20, 1981) [46 FR 11544]) and that "the terms 'reasonable,' 'reasonably' and 'reasonableness' in the context of Section 404 [of the Sarbanes-Oxley Act of 2002, 15 U.S.C. 7262] implementation do not imply a single conclusion or methodology, but encompass the full range of appropriate potential conduct, conclusions or methodologies upon which an issuer may reasonably base its decisions"). This release also cites to the Foreign Corrupt Practices Act (the "FCPA"), 15 U.S.C. 78m(b)(7) and Exchange Act Section 13(b)(7), which states that "the terms

We note that conducting the reasonable country of origin inquiry could be less exhaustive than the due diligence discussed below. We believe that this disparity in how the standards are characterized reflects the language in the Conflict Minerals Provision. Initially, the provision requires issuers to determine whether their conflict minerals originated in the DRC countries. After making this determination, only issuers with conflict minerals that originated in the DRC countries or issuers that cannot determine their minerals did not originate in the DRC countries must submit to the Commission the Conflict Minerals Report, which describes, among other matters, the issuer's due diligence exercised on the source and chain of custody of its conflict minerals. It appears, therefore, that the provision was not intended to require the same investigation for determining whether conflict minerals originated in the DRC countries and for determining the source and chain of custody of those conflict minerals that originate in the DRC countries.

We believe that the steps necessary to constitute a reasonable country of origin inquiry will depend on the available infrastructure at a given point in time. Presently, we do not believe there is any single or exclusive manner for issuers to conduct this inquiry. However, one way we would view an issuer as satisfying the reasonable country of origin inquiry standard is if it received reasonably reliable representations from the facility at which its conflict minerals were processed that those conflict minerals did or did not originate in the DRC countries. These representations could come either directly from that facility or indirectly through the issuer's suppliers, but the issuer would have to reasonably believe these representations to be true based upon the facts and circumstances. For example, one way that an issuer could reasonably rely on a facility's representations regarding the source of its conflict minerals is if the smelter was identified as one that processes only "DRC conflict free" minerals under recognized national or international standards after receiving an independent third party audit of the source and chain of custody of the conflict minerals it processes. It is important to note, however, that although reliance on smelter certifications and supplier declarations may be sufficient now due to our understanding of the current information systems in place to discover conflict minerals' countries of origin, as these systems improve, the facts and circumstances surrounding what would be considered a reasonable country of origin inquiry may change. In other words, as systems improve, smelter certifications and supplier declarations may not satisfy a reasonable country of inquiry standard.

In this regard, we note a letter submitted to us by a multi-stakeholder group that discussed a similar approach, which referred to a "compliant smelter."[93] The multi-stakeholder group stated that it would prefer a "supplier declaration approach" to sourcing conflict minerals, which would "consist of having direct and component suppliers and others in the supply chain take reasonable means to assure that all the tin, tantalum, tungsten, and/or gold in their materials/products are sourced from a compliant smelter." The group stated further that a smelter would be "compliant" if it meets the requirements of an individual or industry wide audit process that stipulates the collection, disclosure, and efforts made to obtain certain information.[94]

Request for Comment

33. Is a reasonable country of origin inquiry standard an appropriate standard for determining whether an issuer's conflict minerals originated in the DRC countries for purposes of our rules implementing the Conflict Minerals Provision? If not, what other standard would be appropriate? Rather than requiring a reasonable country of origin inquiry as proposed, should our rules mandate that the standard for making the supply chain determinations, as set forth in Exchange Act Sections 13(p)(1)(A)(i) and (ii) (and described below), also applies to the determination as to whether an issuer's conflict minerals originated in the DRC countries? Should we provide additional guidance about what would constitute a reasonable country of origin inquiry in determining whether conflict minerals originated in the DRC countries?

34. Should we not require any type of inquiry? For example, would it be appropriate and consistent with the Conflict Minerals Provision to permit an issuer to make no inquiry, so long as it disclosed that fact?

35. Should issuers be able to rely on reasonably reliable representations from their processing facilities, either directly or indirectly through their suppliers, to satisfy the reasonable country of origin inquiry standard? If so, should we provide additional guidance regarding what would constitute reasonably reliable representations and what type of guidance should we provide? If not, what would be a more appropriate requirement?

36. Should any qualifying or explanatory language be allowed in addition to or instead of the reasonable country of origin inquiry standard, as proposed, regarding whether issuers' conflict minerals originated in the DRC countries? For example, should issuers be able to state that none of their conflict minerals originated in the DRC countries "to the best of their knowledge" or that "they are not aware" that any conflict minerals originated in the DRC countries?

D. Step Three—Conflict Minerals Report's Content and Supply Chain Due Diligence

The Conflict Minerals Provision requires any issuer determining that its necessary conflict minerals originated in the DRC countries to submit to the Commission a Conflict Minerals Report that includes, among other matters, a description of the measures taken by the issuer to exercise due diligence on the source and chain of custody of its conflict minerals, which measures "shall include an independent private sector audit" of the Conflict Minerals Report.[95] In this regard, the Conflict Minerals Provision states that the issuer submitting the Conflict Minerals Report "shall certify the audit * * * that is included in such report" and such a certified audit "shall constitute a critical component of due diligence in establishing the source and chain of custody of such minerals."[96]

In order to implement these requirements, our proposed rules would require issuers that determined that their necessary conflict minerals originated in the DRC countries and those that are unable to determine that their conflict minerals did not originate in the DRC countries to exercise due diligence on the source and chain of custody of their conflict minerals and describe the due diligence they exercised. After exercising due diligence to make their Conflict Minerals Report determinations, issuers would be

'reasonable assurances' and 'reasonable detail' mean such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs." The release further cites to the conference committee report on amendments to the FCPA, Cong. Rec. H2116 (daily ed. Apr. 20, 1988), which states the reasonableness "standard 'does not connote an unrealistic degree of exactitude or precision,'" but instead "'contemplates the weighing of a number of relevant factors, including the cost of compliance.'"

[93] *See* Multi-Stakeholder Group Letter.

[94] *Id.*

[95] Exchange Act Section 13(p)(1)(A)(i).

[96] Exchange Act Section 13(p)(1)(B).

required to describe their products that are not "DRC conflict free," the country of origin of those conflict minerals, the facilities used to process those conflict minerals, and the efforts to determine the mine or location of origin with the greatest possible specificity.[97] Additionally, our proposed rules would require all issuers furnishing a Conflict Minerals Report to certify that they obtained an independent private sector audit of the report and furnish as part of the Conflict Minerals Report the audit report of the independent private sector auditor.

1. Content of Conflict Minerals Report

As required by the Conflict Minerals Provision,[98] our proposed rules would require issuers to exercise due diligence on the source and chain of custody of their conflict minerals and to describe those due diligence measures in their Conflict Minerals Reports.[99] Moreover, consistent with the Conflict Minerals Provision,[100] we are proposing to require that the description of the measures taken by issuers to exercise due diligence on the source and chain of custody of their conflict minerals include a certified independent private sector audit conducted in accordance with the standards established by the Comptroller General of the United States.[101] The proposed rules also state that the audit would constitute a critical component of due diligence.[102] To implement the Conflict Minerals Provision's requirement that issuers "certify the audit," [103] we are proposing that issuers be required to certify that they obtained an independent private sector audit of their Conflict Minerals Report,[104] and we are proposing that issuers provide this certification in that report.[105] Further, as required by the Conflict Minerals Provision,[106] we are proposing that our rules require descriptions, in the Conflict Minerals Report, of issuers' products that are not "DRC conflict free," the facilities used to process those conflict minerals, the country of origin of those conflict minerals, and the efforts to determine the mine or location of origin with the greatest possible specificity.[107]

An issuer that is required to furnish a Conflict Minerals Report because it is unable to determine that its conflict minerals did not originate in the DRC countries must also provide this information. We recognize that such an issuer may not be able to determine with certainty whether any of its products are or are not "DRC conflict free," insofar as their initial efforts to determine the origin of the conflict minerals in those products under the reasonable country of origin inquiry was inconclusive and their subsequent due diligence on the source and chain of custody of such minerals was also inconclusive. Consistent with Section 13(p)(1)(A)(ii), we would require such an issuer to describe all of its products that contain such conflict minerals and to identify these products as not "DRC conflict free" [108] since the issuer would not be able to establish that the minerals did not directly or indirectly finance or benefit armed groups in the DRC countries. Also, such issuers would be required to describe, to the extent known after conducting due diligence, the facilities used to process those conflict minerals and the efforts to determine the mine or location of origin with the greatest possible specificity.[109] An issuer may provide additional disclosure explaining, for example, that although these products are labeled as not "DRC conflict free" in compliance with our rules implementing the Conflict Minerals Provision, the issuer has been unable to determine the source of the conflict minerals, including whether the conflict minerals in these products benefited or financed armed groups in the DRC countries.

An issuer's description of any of its products that are not "DRC conflict free" should be based on its individual facts and circumstances so that the description sufficiently identifies the products or categories of products. For example, an issuer may disclose each model of a product containing conflict minerals that are not "DRC conflict free," each category of a product containing conflict minerals that are not "DRC conflict free," the specific products containing conflict minerals that are not "DRC conflict free" that were produced during a specific time period, that all its products contain conflict

[97] In this release, we refer to the issuer determinations required by Exchange Act Sections 13(p)(1)(A)(i) and (ii) regarding the source and chain of custody of the issuer's conflict minerals, its products manufactured or contracted to be manufactured that are not DRC conflict free, its conflict minerals' country of origin, the facilities used to process its conflict minerals, and the efforts to determine the mine or location of origin with the greatest possible specificity as the issuer's "supply chain determinations." We recognize, of course, that issuers that are unable to determine that their conflict minerals did not originate in the DRC countries would not know their minerals' country of origin and may not know their minerals processing facility.

[98] *See* Exchange Act Section 13(p)(1)(A)(i).

[99] These rules would be included in proposed Item 104(b)(1)(i) of Regulation S–K, proposed Item 16(b)(1)(i) of Form 20–F, and proposed General Instruction B(16)(b)(1)(i) of Form 40–F.

[100] *See* Exchange Act Sections 13(p)(1)(A)(i) and 13(p)(1)(B).

[101] *See* Exchange Act Section 13(p)(1)(A). We note that, under the Conflict Minerals Provision, the Comptroller General establishes the appropriate standards for the independent private sector audit. Staff of the GAO has informed our staff that they preliminarily believe no new standards need to be promulgated, but rather auditing standards that are part of the Government Auditing Standards, such as the standards for Attestation Engagements or the standards for Performance Audits will be applicable. *See* GAO–07–731G. The GAO staff has not indicated whether and, if so, what evaluation criteria are required for an Attestation Engagement.

[102] *See* new Item 4(a) of Form 10–K (referring to new Item 104(b)(1)(i) of Regulation S–K), new Item 16(b)(1)(i) of Form 20–F, and new General Instruction B(16)(b)(1)(i) of Form 40–F. Exchange Act Section 13(p)(1)(A)(i) states that a Conflict Minerals Report must include "a description of the measures taken by the person to exercise due diligence on the source and chain of custody of such minerals, which measures shall include an independent private sector audit of such report submitted through the Commission that is conducted in accordance with standards established by the Comptroller General of the United States, in accordance with the rules promulgated by the Commission, in consultation with the Secretary of State." Exchange Act Section 13(p)(1)(B) defines the term "Certification" as follows: "The person submitting a report under subparagraph (A) shall certify the audit described in clause (i) of such subparagraph that is included in such report. Such a certified audit shall constitute a critical component of due diligence in establishing the source and chain of custody of such minerals."

[103] Exchange Act Section 13(p)(1)(B).

[104] Alternatively, one could interpret this language to mean that an issuer must ensure that the audit it obtained is accurate, but such an interpretation would appear to mean that an issuer must review the audit of its Conflict Minerals Report, which the issuer created originally. We are not proposing this approach since it appears redundant.

[105] These rules would be included under proposed Item 104(b)(1)(ii) of Regulation S–K, proposed Item 16(b)(1)(ii) of From 20–F, and proposed General Instruction B(16)(b)(1)(ii) of Form 40–F.

[106] *See* Exchange Act Section 13(p)(1)(A)(ii), which states that a Conflict Minerals Report must include, among other matters, "a description of the products manufactured or contracted to be manufactured that are not DRC conflict free * * *, the facilities used to process the conflict minerals, the country of origin of the conflict minerals, and the efforts to determine the mine or location of origin with the greatest possible specificity."

[107] These rules would be included under proposed Item 104(b)(1)(iii) of Regulation S–K, proposed Item 16(b)(1)(iii) of Form 20–F, and proposed General Instruction B(16)(b)(1)(iii) of Form 40–F.

[108] If any products contain conflict minerals that did not originate in the DRC countries and conflict minerals that the issuer is unable to determine did not originate in the DRC countries, the issuer would be required to classify those products as not "DRC conflict free." Similarly, if any of an issuer's products contain conflict minerals that did not originate in the DRC countries, that the issuer is unable to determine did not originate in the DRC countries, or that originated in the DRC countries but did not directly or indirectly finance or benefit armed groups in the DRC countries, and also contain conflict minerals that originated in the DRC countries and that directly or indirectly financed or benefited armed groups in the DRC countries, the issuer must classify those products as not "DRC conflict free."

[109] We recognize that such issuers would not be able to provide the country of origin of those minerals.

minerals that are not "DRC conflict free," or another such description depending on the issuer's facts and circumstances.

The Conflict Minerals Provision uses the phrase "facilities used to process the conflict minerals," which would appear to refer to the smelter or refinery through which the issuer's minerals passed. We note also that the Conflict Minerals Provision states that products are "DRC conflict free" when those products do not contain conflict minerals that directly or indirectly finance or benefit armed groups.[110] Section 1502(e)(3) of the Act defines the term "armed group" as "an armed group that is identified as perpetrators of serious human rights abuses in the annual Country Reports on Human Rights Practices under sections 116(d) and 502B(b) of the Foreign Assistance Act of 1961,"[111] as it relates to the DRC countries.[112] Our proposed rule includes a cross reference to that definition to provide guidance to issuers.

Our proposed rules would require issuers to furnish, as part of their Conflict Minerals Report, the audit report prepared by the independent private sector auditor and to specifically identify that auditor.[113] While one might read the statutory language to suggest that only the issuer's certification of the audit, and not the audit report itself, is required to be submitted, we preliminarily believe that approach is not the better reading of the Conflict Minerals Provision. As noted above, the Conflict Minerals Provision emphasizes that the independent audit is a "critical component of due diligence." In light of the importance of this audit report to our new reporting requirements and the statutory language, we are proposing to require that the audit report be furnished with the Conflict Minerals Report.

Although we are proposing that the audit report be furnished with the Conflict Minerals Report, new Item 4(a) of Form 10–K (referring to new Instruction 2 to Item 104 of Regulation S–K), new Instruction 3 to Item 16 of Form 20–F, and new Instruction 3 to General Instruction B(16) of Form 40–F would state that the Conflict Minerals Report, which would include the audit report, would not be deemed to be incorporated by reference into any filing under the Securities Act or the Exchange Act, except to the extent that the issuer specifically incorporates it by reference. For example, if an issuer incorporates by reference its annual report into a Securities Act registration statement, that issuer would not be automatically incorporating the Conflict Minerals Report into the Securities Act document. Therefore, in such a situation, the independent private sector auditor would not assume expert liability and the issuer would not,[114] therefore, have to file a consent from that auditor unless the issuer specifically incorporates by reference the Conflict Minerals Report into the Securities Act registration statement.

Request for Comment

37. Should our rules, as proposed, require issuers that are unable to determine the origin of their conflict minerals to label their products that contain such minerals as not "DRC conflict free"? Is this approach consistent with the Conflict Minerals Provision"? Would it be more appropriate to allow such issuers to label such products differently, such as "May Not Be DRC Conflict Free"? Would having a separate category for products that contain such unknown origin minerals be consistent with the Conflict Minerals Provision? Would the proposed approach be confusing for readers, or can issuers sufficiently address any confusion by including supplemental disclosure for those products that contain minerals of unknown origin?

38. Should our rules, as proposed, permit issuers to describe their products that contain conflict minerals that do not qualify as being DRC conflict free or that may not qualify as being DRC conflict free based on their individual facts and circumstances? If not, how should we require issuers to describe their products that contain conflict minerals that do not qualify as being DRC conflict free? If an issuer had hundreds or thousands of products that were not DRC conflict free, would the report provide overwhelming information? Would it be unduly expensive to produce?

39. Should our rules, as proposed, require issuers to disclose the facilities, countries of origin, and efforts to find the mine or location of origin only for its conflict minerals that do not qualify as DRC conflict free, and not for all of its conflict minerals? Alternatively, should we require issuers to disclose the facilities, countries of origin, and efforts to find the mine or location of origin for all of its conflict minerals regardless of whether those conflict minerals do not qualify as DRC conflict free?

40. Should our rules require issuers to disclose the mine or location of origin of their conflict minerals with the greatest possible specificity in addition to requiring issuers, as proposed, to describe the efforts to determine the mine or location of origin with the greatest possible specificity? If so, how should we prescribe how the location is described?

41. As suggested in a submission,[115] should our rules require issuers to include information on the capacity of each mine they source from along with the weights and dates of individual mineral shipments?

42. We are proposing that an issuer "certify the audit" by certifying that it obtained such an audit. Should we further specify the nature of the certification? We are not proposing that anyone sign this certification. Should our rules require issuers to have the audit's certification signed? If so, who should be required to sign the certification? Also, if we revise our proposal to require an individual to sign, should the individual who signs the certification sign it in his or her capacity within the company or on behalf of the company? What liability should our rules assign to the individual who signs the certification?

43. Should our rules, as proposed, require an issuer to furnish its independent private sector audit report as part of its Conflict Minerals Report? Are there other ways to give effect to the Conflict Minerals Provision's requirement of Section 13(p)(1)(B) that the issuer "certify the audit * * * *that is included in*" [emphasis added] the Conflict Minerals Report? Would investors find the audit report useful? How would the potential liability for a furnished audit report affect the cost and availability of such audit services?

44. Should our rules provide that, as proposed, the independent private sector audit report furnished as an

[110] *See* Exchange Act Sections 13(p)(1)(A)(ii) and 13(p)(1)(D).

[111] 22 U.S.C. 2151n(d) and 2304(b).

[112] Section 1502(e)(3) of the Act.

[113] These rules would be included in proposed Item 4(a) of Form 10–K (through Item 104(b)(1)(iv) of Regulation S–K), proposed Item 16(b)(1)(iv) of From 20–F, and proposed General Instruction B(16)(b)(1)(iv) of Form 40–F. Having our proposed rules require the issuer to identify the certified independent private sector auditor would satisfy Exchange Act Section 13(p)(1)(A)(ii), which states that the issuer must provide a description of "the entity that conducted the independent private sector audit in accordance with clause (i)."

[114] *See* Rule 436 of Regulation C [17 CFR 230.436].

[115] *See* the petition attached to the memorandum of the November 18, 2010 meeting with Chairman Mary L. Schapiro and with John Prendergast and Darren Fenwick of The Enough Project, Sasha Lezhnev of Grassroots Reconciliation Group, and Deborah R. Meshulam of DLA Piper, *available at, http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-80.pdf.*

exhibit to an issuer's annual report not be deemed to be incorporated by reference into any filing under the Securities Act or the Exchange Act, except to the extent that the issuer specifically incorporates it by reference? Is this audit report qualitatively different from other experts' reports for which consent is required under our rules?

45. Are there other ways we should treat the audit report under our rules to balance the interests of receiving a high quality audit and not unnecessarily increasing potential liability and costs?

2. Location and Furnishing of Conflict Minerals Report

As noted above, we are proposing rules that require a Conflict Minerals Report to be furnished as an exhibit to an issuer's annual report on Form 10–K, Form 20–F, or Form 40–F, as applicable.[116] By requiring issuers to furnish their Conflict Minerals Report as an exhibit to the annual report, our proposed rules would enable anyone accessing the Commission's Electronic Data Gathering, Analysis, and Retrieval system (the "EDGAR" system) [117] to determine quickly whether an issuer furnished a Conflict Minerals Report with its annual report. Specifically, proposed Item 4(a) of Form 10–K (through Item 104 to Regulation S–K), Item 16 to Form 20–F, and General Instruction B(16) to Form 40–F would require an issuer to furnish its Conflict Minerals Report as an exhibit to its annual report. Also, our proposed rules would further revise Regulation S–K and Form 20–F to include a new Paragraph (96) of Item 601(b) and a new Paragraph 16 to the "Instructions as to Exhibits" section of Form 20–F to provide additional instructions specifically for their exhibits under Item 601 and Paragraph 16, respectively. The text of Item 601(b)(96) and Paragraph 16 would be substantially similar and only would reference Item 104 and Item 16, respectively.[118]

Under our proposed rules, an issuer's Conflict Minerals Report, which would include the independent private sector audit report, would not be "filed" for purposes of Section 18 of the Exchange Act and would, thus, not be subject to the liability of that section of the Exchange Act unless the issuer states explicitly that the Conflict Minerals Report and the independent private sector audit report are filed under the Exchange Act. Instead, these documents would only be furnished to the Commission. These documents, therefore, would be treated in the same manner as other furnished disclosures, such as the certifications required to be submitted as exhibit 32 [119] to Exchange Act documents under Rule 13a–14(b) [120] or Rule 15d–14(b) [121] and Section 1350 of Chapter 63 of Title 18 of the United States Code,[122] the Audit Committee Report required by Item 407(d) of Regulation S–K,[123] and the Compensation Committee Report required by Item 407(e)(5) of Regulation S–K.[124] Similarly, our proposed rules would not consider the Conflict Minerals Report and the independent private sector audit report incorporated by reference into any filing under the Securities Act or the Exchange Act, except to the extent that the issuer specifically incorporates them by reference into the documents.

We believe this approach is not inconsistent with the Conflict Minerals Provision, which provides that an issuer must "submit" the Conflict Minerals Report, and does not otherwise mandate that the information be filed with the Commission.[125] Further, we preliminarily believe this approach is appropriate in light of the nature and purpose of this disclosure as set forth in Section 1502(a) of the Act.[126] It appears that the nature and purpose of the Conflict Minerals Provision is for the disclosure of certain information to help end the emergency humanitarian situation in the eastern DRC that is financed by the exploitation and trade of conflict minerals originating in the DRC countries,[127] which is qualitatively different from the nature and purpose of the disclosure of information that has been required under the periodic reporting provisions of the Exchange Act.[128] Finally, we note that we have received input indicating that our proposed rules should allow issuers to furnish their conflict minerals disclosures and Conflict Minerals Reports, as applicable.[129]

Although the Conflict Minerals Report would not be subject to Section 18 liability,[130] we note that under Exchange Act Section 13(p)(1)(C), failure to comply with the Conflict Minerals Provision would deem the issuer's due diligence process "unreliable" and, therefore, the Conflict Minerals Report "shall not satisfy" our proposed rules.[131] In this regard, issuers that fail to comply with our proposed rules would be subject to liability for violations of Exchange Act Sections 13(a) or 15(d), as applicable.[132]

Request for Comment

46. Should we, as proposed, require the Conflict Minerals Report to be furnished as an exhibit to the issuer's annual report? If not, how should it be provided?

47. Should we require the Conflict Minerals Report to be filed as an exhibit, rather than furnished, which would affect issuers' liability under the Exchange Act or under the Securities Act (if any such issuer incorporates by reference its annual report into a Securities Act registration statement)?

48. Under Exchange Act Section 18, "Any person who shall make or cause to be made any statement in any application, report, or document filed pursuant to [the Exchange Act] or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 15, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, shall be liable to any person (not knowing that such statement was false or misleading) who, in reliance upon such statement, shall have purchased or sold a security at a price which was affected by such statement, for damages caused by such reliance, unless the person sued shall prove that he acted in good faith and had no knowledge that such statement

[116] Our proposed rules would require that issuers furnish their Conflict Minerals Report as Exhibit 96 to their annual reports.

[117] *See* the Securities and Exchange Commission's Internet Web site, "Researching Public Companies Through EDGAR: A Guide for Investors," available at: *http://www.sec.gov/investor/pubs/edgarguide.htm.*

[118] Item 601(96) of Regulation S–K would state, "The report required by Item 104(b) of Regulation S–K, if applicable." Also, Paragraph 16 in the "Instructions as to Exhibits" section to Form 20–F would state, "The Conflict Minerals Report required by Item 16 of this Form, if applicable." Further, our proposed rules would revise the Exhibit Table in Item 601 of Regulation S–K.

[119] Item 601(32)(ii) of Regulation S–K [17 CFR 229.601(b)(32)].

[120] 17 CFR 240.13a–14(b).

[121] 17 CFR 240.15d–14(b).

[122] 18 U.S.C. 1350.

[123] 17 CFR 229.407(d).

[124] 17 CFR 229.407(e)(5).

[125] *See* Exchange Act Section 13(p)(1)(A).

[126] *See supra* note 11. A co-sponsor of the Conflict Minerals Provision stated that the disclosure of an issuer's conflict minerals information would help investors make a more informed decision. *See* 156 Cong. Rec. S3865–66 (statement of Sen. Feingold) (daily ed. May 18, 2010) (stating that "[c]reating these mechanisms to enhance transparency will help the United States and our allies more effectively deal with these complex problems, at the same time that they will also help American consumers and investors make more informed decisions.")

[127] *Id.*

[128] 15 U.S.C. 78b.

[129] *See* letter from the American Bar Association.

[130] 15 U.S.C. 78r.

[131] *See* Exchange Act Section 13(p)(1)(C).

[132] 15 U.S.C. 78m(a) and 15 U.S.C. 78o(d).

was false or misleading."[133] Is it appropriate not to have the Conflict Minerals Report subject to the Section 18 liability even if the elements of Section 18 liability can be established? Should we require the Conflict Minerals Report to be filed for purposes of Exchange Act Section 18, but permit an issuer to elect not to incorporate it into Securities Act filings?

49. Should the Conflict Minerals Report be furnished annually on Form 8–K.[134] Would that approach be consistent with Exchange Act Section 13(p)(1)(A)? If so, should foreign private issuers, which do not file Forms 8–K, be permitted to submit the Conflict Minerals Report either in their Form 20–F or 40–F as applicable, or annually on Form 6–K, at their election?

3. Due Diligence Standard in the Conflict Minerals Report

Our proposed rules would require issuers to use due diligence regarding the supply chain determinations in their Conflict Minerals Report.[135] Our proposed rules would not, however, dictate the standard for, or otherwise provide guidance concerning, due diligence that issuers must use in making their supply chain determinations. Instead, our proposed rules would require issuers to disclose the due diligence they used in making their determinations, such as whether they used any nationally or internationally recognized standards or guidance of supply chain due diligence.

The Conflict Minerals Provision requires issuers to conduct due diligence based on the provision's requirement that issuers describe their due diligence on the source and chain of custody of their conflict minerals.[136] Also, the provision states that issuers shall include an independent private sector audit of the Conflict Minerals Report as a critical component of due diligence.[137] Further, under Exchange Act Section 13(p)(1)(C), the Commission may determine an issuer's independent private sector audit or other due diligence processes to be unreliable and, under the terms of the Conflict Minerals Provision, any Conflict Minerals Report that relies on such an unreliable due diligence process would not satisfy our proposed rules.[138] In light of these statutory provisions, our proposed rules provide that an issuer's Conflict Minerals Report must include reliable due diligence processes, and that due diligence is required in making the supply chain determinations in the Conflict Minerals Report.

We note that we have received suggestions that due diligence is required in making the supply chain determinations. One letter received stated that a due diligence obligation "needs to be extended to the supply chain."[139] Two of the Congressional sponsors of Section 1502 of the Act have indicated their belief that the due diligence requirement should not be limited to determining whether the smelter uses due diligence.[140] An NGO submitted to us a description of its model supply chain due diligence processes, which would require issuers to perform due diligence on all aspects of their supply chain, including the supply chain determinations in their Conflict Minerals Reports.[141] In addition, an industry group from the precious metals industry indicated that it would not be opposed to conducting due diligence of its supply chains and, in fact, that due diligence is already part of its current business practice.[142] We note, however, that another industry group submitted a letter to us expressing concern about the feasibility of implementing a due diligence requirement, particularly with regard to gold.[143] This industry group pointed out that applying due diligence requirements to the gold supply chain would be especially challenging because the supply chain often begins with a bullion produced by a refiner that incorporates both newly mined and recycled gold.[144]

We believe that the statutory provision contemplates that issuers must use due diligence in their supply chain determinations. We do not believe, however, that it would be appropriate to prescribe any particular guidance for conducting due diligence because the conduct undertaken by a reasonably prudent person may vary and evolve over time.[145] Although we are not proposing to establish any particular conduct requirements, we believe that due diligence must be performed and information about what conduct an issuer performed in its due diligence regarding its supply chain determinations is relevant. Our proposed rules, therefore, would require issuers to describe the due diligence used in making these determinations. In particular, we expect that an issuer whose conduct conformed to a nationally or internationally recognized set of standards of, or guidance for, due diligence regarding conflict minerals supply chains[146] would provide evidence that the issuer used due diligence in making its supply chain determinations.

If an issuer is unable to determine, after a reasonable country of origin inquiry, that its conflict minerals did not originate in the DRC countries, that issuer still would be required to submit a Conflict Minerals Report and obtain an independent private sector audit of that Conflict Minerals Report. We note that in such instances an issuer may not be able to provide all the information required by the Conflict Minerals Report, such as its conflict minerals' country of origin. We would, however, expect such an issuer to provide as much of the required information as possible, such as a description of the measures it took to exercise due diligence on the source and chain of custody of its conflict minerals.

In this regard, if an issuer is unable to determine after a reasonable country of origin inquiry that its conflict minerals did not originate in the DRC countries, the issuer would be required to exercise due diligence in making its supply chain determinations. Therefore, such an issuer would be required to describe its due diligence efforts regarding the facilities used to process the conflict

[133] Exchange Act Section 18(a).

[134] *See, e.g.,* letter from American Bar Association.

[135] *See* new Item 4(a) of Form 10–K (as through new Item 104(b)(1) of Regulation S–K), new Item 16(b)(1) of Form 20–F, and a new General Instruction B(16)(b)(1) of Form 40–F.

[136] Exchange Act Section 13(p)(1)(A)(i).

[137] Exchange Act Section 13(p)(1)(B).

[138] Exchange Act Section 13(p)(1)(C).

[139] Letter from Howland Greene Consultants LLC.

[140] *See* letter from Senator Richard Durbin and Representative Jim McDermott.

[141] *See* attached materials to the memorandum of the September 15, 2010 meeting of the staff of Division of Corporation Finance met with Corinna Gilfillan, Jonathan Grant, and Annie Dunnebacke of Global Witness, *available at, http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-18.pdf.*

[142] *See* letter from International Precious Metals Institute.

[143] *See* letter from Tiffany & Co.

[144] Letter from Jewelers Vigilance Committee.

[145] For instance, the Organisation for Economic Cooperation and Development (the "OECD") is developing due diligence guidance for conflict mineral supply chains. *See* Organisation for Economic Cooperation and Development (the "OECD"), *Draft Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* (2010), *available at,* http://www.oecd.org/dataoecd/13/18/46068574.pdf. Also, on November 30, 2009, the United Nations Security Council adopted Resolution 1896 that, among other matters, extended and expanded the mandate of the United Nations Group of Experts for the Democratic Republic of the Congo to create recommendations on due diligence guidelines for minerals originating in the DRC. *See* United Nations Security Council Resolution 1896 (2009) [S/RES/1896 (2009)].

[146] *See, e.g.,* OECD, *Draft Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* (2010), *available at, http://www.oecd.org/dataoecd/13/18/46068574.pdf.*

minerals, the conflict minerals' country of origin, if it can be determined, and the efforts to determine the mine or location of origin with the greatest possible specificity.

Request for Comment

50. Should our rules, as proposed, require an issuer to use due diligence in its supply chain determinations and the other information required in a Conflict Minerals Report? If so, should those rules prescribe the type of due diligence required and, if so, what due diligence measures should our rules prescribe? Alternatively, should we require only that persons *describe* whatever due diligence they used, if any, in making their supply chain determinations and their other conclusions in their Conflict Minerals Report?

51. Should different due diligence measures be prescribed for gold because of any unique characteristics of the gold supply chain? If so, what should those measures entail?

52. Should our rules state that an issuer is permitted to rely on the reasonable representations of its smelters or any other actor in the supply chain,[147] provided there is a reasonable basis to believe the representations of the smelters or other parties?

53. Is our approach to issuers that are unable to determine that their products did not originate in the DRC countries appropriate?

54. Should our rules prescribe any particular due diligence standards or guidance?

55. Should our rules require that an issuer use specific national or international due diligence standards or guidance, such as standards developed by the OECD, the United Nations Group of Experts for the DRC, or another such organization? If so, should our rules require the issuer to disclose which due diligence standard or guidance it used? Should we list acceptable national or international organizations that have developed due diligence standards or guidance on which an issuer may rely? Should our rules permit issuers to rely on standards from federal agencies if any such agencies develop applicable rules?

E. Time Periods

1. Furnishing of the Initial Disclosure and Conflict Minerals Report

The Conflict Minerals Provision requires issuers to provide their initial conflict minerals disclosure and, if necessary, their initial Conflict Minerals Report after their first full fiscal year following the promulgation of our final rules.[148] Assuming we adopt rules in April 2011, as required by the statutory provision, a December 31 fiscal year-end issuer would first have to provide conflict minerals disclosure or a Conflict Minerals Report after the end of its December 31, 2012 fiscal year. An issuer with a May 31 fiscal year-end, however, would have to provide the conflict minerals disclosure or a Conflict Minerals Report in its annual report for the fiscal year that encompasses the period from June 1, 2011 through May 31, 2012.

Request for Comment

56. Should our rules, as proposed, require that a complete fiscal year begin and end before issuers are required to provide their initial disclosure or Conflict Minerals Report regarding their conflict minerals?

57. If we require issuers to provide their disclosure or reporting requirements in their Exchange Act annual reports, should we permit them to file an amendment to the annual report within a specified period of time subsequent to the due date of the annual report, similar to Article 12 schedules or financial statements provided in accordance with Regulation S–X Rule 3–09,[149] to provide the conflict minerals information? [150] If so, why and for which issuers should our rules permit such a delay? For example, should we allow this delay only for smaller reporting companies?

58. Should we phase in our rules and permit certain issuers, such as smaller reporting companies, to delay compliance with the Conflict Minerals Provision's disclosure and reporting obligations until a period after that which is provided in the Exchange Act Section 13(p)(1)(A)?

2. Time Period in Which Conflict Minerals Must Be Disclosed or Reported

The Conflict Minerals Provision requires issuers to disclose whether their necessary conflict minerals originated in the DRC countries "in the year for which such reporting is required." [151] We believe the date that the issuer takes possession of a conflict mineral would determine which reporting year an issuer would have to provide the required disclosure or Conflict Minerals Report for its conflict minerals. For example, if a December 31 fiscal year-end issuer takes possession of the conflict minerals, or product containing the conflict minerals, on December 31, the issuer would have to provide the required disclosure or a Conflict Minerals Report for the current year. However, if that same issuer did not take possession of the minerals until January 1, the issuer would not have to provide the disclosure or a report until the end of the year beginning that day and ending on the subsequent December 31.

In an instance in which an issuer contracts the manufacturing of a product in which a conflict mineral is necessary to the production of that product, but the conflict mineral is not included in the product, the issuer may use the date it takes possession of the product to determine which reporting year the issuer would have to provide the required disclosure or Conflict Minerals Report for the conflict mineral used to produce the product. For example, if a December 31 fiscal year-end issuer takes possession on December 31 of the product for which a conflict mineral was necessary to produce but that did not end up in the product, the issuer would have to provide the required disclosure or a Conflict Minerals Report for the year ended on that December 31. However, if that same issuer did not take possession of the product until the subsequent day, January 1, the issuer would not have to provide the disclosure or a report until the end of the year beginning that January 1 and ending on the subsequent December 31.

Request for Comment

59. Is "possession" the proper determining factor as to when issuers should provide the required disclosure or a Conflict Minerals Report regarding a necessary conflict mineral? If not, what would be a more appropriate test and why?

60. Should our rules allow individual issuers to establish their own criteria for determining which reporting period to include any required conflict minerals disclosure or Conflict Minerals Report, provided that the issuers are consistent and clear with their criteria from year-to-year?

61. We note it is possible issuers may have stockpiles of existing conflict minerals that they previously obtained. Do we adequately address issuers' disclosure and reporting obligations regarding their existing stockpiles of conflict minerals? If not, how can we address existing stockpiles of conflict

[147] In the industry, tantalite-columbite, cassiterite, and wolframite are "smelted" into their component metals whereas gold is "refined." Even so, both processes are substantially similar. When we refer to "smelting" those references are intended to include the "refining" of gold as well.

[148] *See* Exchange Act Section 13(p)(1)(A) (stating that an issuer must "disclose annually, beginning with the [issuer's] first full fiscal year that begins after the date of promulgation of [our] regulations").

[149] 17 CFR 210.3–09.

[150] *See* letter from the American Bar Association.

[151] Exchange Act Section 13(p)(1)(A).

minerals? Should our rules permit a transition period so that issuers would not have to provide any conflict minerals disclosure or report regarding any conflict mineral extracted before the date on which our rules are adopted? Alternatively, would the reasonable country of origin inquiry standard for determining the origin of the conflict minerals and the due diligence standard or guidance for determining the source and chain of custody of the conflict minerals that originated in the DRC countries accomplish the same goal? For example, should issuers be required to inquire about the origin of their conflict minerals extracted before the date on which our rules are adopted? As another example, should issuers file a Conflict Minerals Report regarding conflict minerals that originated in the DRC countries before the date on which our rules are adopted?

F. Thresholds, Alternatives, Termination, Revisions, and Waivers

1. Materiality Threshold

As discussed above, the Conflict Minerals Provision's only limiting factor is that the conflict minerals must be "necessary to the functionality or production" of an issuer's products.[152] The provision has no materiality thresholds for disclosure based on the amount of conflict minerals an issuer uses in its production processes. Therefore, we are not proposing to include a materiality threshold for the disclosure or reporting requirements in our proposed rules.

Request for Comment

62. Should there be a *de minimis* threshold in our rules based on the amount of conflict minerals used by issuers in a particular product or in their overall enterprise? If so, what would be a proper threshold amount? Would this be consistent with the Conflict Minerals Provision? [153]

2. Recycled and Scrap Minerals

Our proposed rules would allow for different treatment of conflict minerals from recycled and scrap sources than from mined sources due to the difficulty of looking through the recycling or scrap process to determine the origin of the minerals. As suggested in a letter, we would consider conflict minerals "recycled" that are reclaimed end-user or post-consumer products, but we would not consider those minerals "recycled" if they are partially processed, unprocessed, or a byproduct from another ore.[154] Given the difficulty of looking through the recycling or scrap process, we expect that issuers generally will not know the origins of their recycled or scrap conflict minerals, so we believe it would be appropriate for our proposed rules to require that issuers using recycled or scrap conflict minerals furnish a Conflict Minerals Report subject to special rules. Under our proposed rules,[155] if issuers obtain conflict minerals from a recycled or scrap source, they may consider those conflict minerals to be DRC conflict free.[156] We believe that including this alternative approach in our proposed rules is consistent with the Conflict Minerals Provision because issuers purchasing conflict minerals from recycled or scrap sources would not implicate the concerns of the provision.[157]

Issuers whose conflict minerals originated from recycled or scrap sources would be required to disclose in their annual report, under the "Conflict Minerals Disclosure" heading, that their conflict minerals were obtained from recycled or scrap sources and that they furnished a Conflict Minerals Report regarding those recycled or scrap minerals. Under our proposed rules, issuers would state in their Conflict Minerals Report that their recycled or scrap minerals are considered DRC conflict free. In addition, such issuers would describe the measures taken to exercise due diligence in determining that their conflict minerals were recycled or scrap. Again, however, our proposed rules would not specify the due diligence required of such issuers. Further, our proposed rules would not define when a conflict mineral is recycled or scrap. Instead, any issuer seeking to use this alternative approach would provide its reasons for believing that the conflict mineral is from recycled or scrap sources in its Conflict Minerals Report, which would include due diligence on the source of the mineral.

A number of those that have submitted letters indicated that our rules should allow conflict minerals from recycled or scrap sources to be considered as not originating in the DRC countries or as DRC conflict free.[158] A number of these letters primarily discussed recycled gold.[159] Other letters, however, stated that our proposed rules should exempt all recycled or reclaimed conflict metals.[160] Additionally, most of the letters that expressed a view on a recycled and scrap alternative approach indicated that the approach should include a certain level of due diligence in determining that the conflict minerals were derived from recycled or scrap sources.[161]

Our proposed rules regarding recycled and scrap conflict minerals would apply to all conflict minerals. If recycled or scrap minerals are mixed with new minerals, the recycled and scrap

[152] Exchange Act Section 13(p)(2)(B).

[153] *See* letter from Senator Richard J. Durbin and Representative Jim McDermott, United States Congress (stating that a *de minimis* rule would create an overly generous loop-hole because the weight of essential conflict minerals in many products is very small).

[154] *See* Multi-Stakeholder Group Letter.

[155] *See* new Items 104(b)(2) and (c)(4) of Regulation S–K, new Items 16(b)(2) and (c)(4) of Form 20–F, and new General Instructions B(16)(b)(2) and (c)(4) of Form 40–F.

[156] Because our proposed rules would automatically classify recycled or scrap conflict minerals DRC conflict free, issuers with products containing such minerals would not need to provide in the Conflict Minerals Report a description of the recycled or scrap conflict minerals' processing facilities or country of origin, nor would they be required to describe their efforts to determine the mine or location of origin with the greatest possible specificity.

[157] *See* Section 1502(a) of the Act. *See also,* 156 Cong. Rec. S3816–17 (daily ed. May 17, 2010) (statement of Sen. Durbin) ("We can't begin to solve the problems of eastern Congo without addressing where the armed groups are receiving their funding, mainly from the mining of a number of key conflict minerals. We, as a nation of consumers as well as industry, have a responsibility to ensure that our economic activity does not support such violence. That is why I join with Senators Brownback and Feingold to support the Congo conflict minerals amendment, which is now pending on this bill."). One of the provision's sponsors, however, indicated that the Conflict Minerals Provision was intended, in part, to allow investors to make informed decisions. *See* 156 Cong. Rec. S3865–66 (statement of Sen. Feingold) (daily ed. May 18, 2010) (stating that the provision would "enhance transparency [and] will help the United States and our allies more effectively deal with these complex problems, at the same time that they will also *help American consumers and investors make more informed decisions*" [emphasis added]).

[158] *See, e.g.* letters from Jewelers Vigilance Committee, Howland Greene Consultants LLC, International Precious Metals Institute, and the National Association of Manufacturers.

[159] *See* letters from Jewelers Vigilance Committee (stating that recycled gold would be impossible to trace, making an exemption appropriate) and International Precious Metals Institute (stating that "[w]e also believe that recycled gold waste and scrap should be deemed to be a conflict-free source").

[160] *See* letters from Howland Greene Consultants LLC (stating that "[r]ecycling should be encouraged and recognized as a legitimate way to classify a listed metal as DRC Conflict Free") and the National Association of Manufacturers (stating that our proposed rules should exempt recycled or scrap minerals because it "is impossible to track" the source of these minerals "due to the various forms of recycling and thousands of consolidators, reclaims, and scrap dealers both domestic and foreign" and because exempting recycled or scrap minerals "does not contradict the congressional intent" of the Conflict Minerals Provision).

[161] *See* letters from Howland Greene Consultants LLC (stating that recycled minerals should be classified as DRC Conflict Free only "if specific criteria are met") and International Precious Metals Institute (stating that recycled gold waste and scrap should be deemed to be a conflict-free source only "in the absence of particular geographical risk or other red flags").

alternative approach would apply only to the portion of the minerals that are recycled or scrap and the issuer would be required to furnish a Conflict Minerals Report regarding at least the recycled or scrap minerals. If the issuer's new conflict minerals did not originate in the DRC countries, that Conflict Minerals Report would contain only information regarding the recycled or scrap minerals. If, however, the new conflict minerals originated in the DRC countries, or the issuer was unable to determine that its new conflict minerals did not originate in the DRC countries, the Conflict Minerals Report would include information regarding both the new conflict minerals and the recycled or scrap conflict minerals.

Request for Comment

63. Should our rules, as proposed, include an alternative approach for conflict minerals from recycled or scrap sources as proposed? If so, should that approach permit issuers with necessary conflict minerals to classify those minerals as DRC conflict free, as proposed? Should we require, as proposed, issuers using conflict minerals from recycled or scrap sources to furnish a Conflict Minerals Report, including a certified independent private sector audit, disclosing that their conflict minerals are from these sources? If not, why not?

64. Instead, should our rules require issuers with recycled or scrapped conflict minerals to undertake reasonable inquiry to determine they are recycled or scrapped and to disclose the basis for their belief that their minerals are, in fact, from these sources?

65. Should our rules, as proposed, require that issuers use due diligence in determining whether their conflict minerals are from recycled or scrap sources as proposed and file a Conflict Minerals Report including an independent private sector audit of that report? If so, should our rules prescribe the due diligence required? If our rules should not require due diligence, should our rules require any alternative standard or guidance? If so, what standard or guidance? Should our rules define what constitutes recycled or scrap conflict minerals? If so, what would be an appropriate definition?

66. Should this treatment be limited to gold, or should it apply to all conflict minerals, as proposed?

67. Is our alternative approach to recycled and scrap minerals appropriate? Is there a significant risk that conflict minerals that are not "DRC conflict free" may be inappropriately processed and "recycled" so as to take advantage of this alternate approach?

68. Should we allow exemptions to the information required by smaller reporting companies regarding their use of recycled or scrap minerals? For example, should we not require smaller reporting to furnish a Conflict Minerals Report regarding their recycled or scrap minerals? As another example, if we require smaller reporting companies to furnish a Conflict Minerals Report with respect to recycled or scrap minerals, should we not require those issuers to have such Conflict Minerals Reports audited?

3. Termination, Revisions, and Waivers

The Conflict Minerals Provision states that the Commission shall revise or temporarily waive its conflict minerals rules if the President transmits to the Commission a determination that a revision or waiver is in the national security interest of the United States and the President provides reasons for this determination.[162] However, any exemption to the Conflict Minerals Provision may last no longer than two years from the date of the exemption's initial publication.[163] Also, the Conflict Minerals Provision's disclosure and reporting requirements shall terminate when the President determines and certifies to the appropriate congressional committees that "no armed groups continue to be directly involved and benefitting from commercial activity involving conflict minerals."[164] The Conflict Minerals Provision may not, however, terminate earlier than five years after the Act was enacted.[165] We plan to act in accordance with these provisions should any of the situations they describe occur. Our proposed rules, however, would not include these sections of the Conflict Minerals Provision because we do not believe that a rule to implement this section is necessary at this time.

Request for Comment

69. Should our rules address specifically the Conflict Minerals Provision's revision, waiver, or termination requirements? If so, how should our rules address this?

[162] *See* Exchange Act Section 13(p)(3).

[163] *Id.*

[164] Section 1502(e)(4) of the Act defines the term "appropriate congressional committees" as the Committee on Appropriations, the Committee on Foreign Affairs, the Committee on Ways and Means, and the Committee on Financial Services of the House of Representatives and the Committee on Appropriations, the Committee on Foreign Relations, the Committee on Finance, and the Committee on Banking, Housing, and Urban Affairs of the Senate.

[165] *See* Exchange Act Section 13(p)(4).

G. General Request for Comment

We request and encourage any interested person to submit comments on any aspect of our proposals, other matters that might have an impact on the amendments, and any suggestions for additional changes. With respect to any comments, we note that they are of greatest assistance to our rulemaking initiative if accompanied by supporting data and analysis of the issues addressed in those comments and by alternatives to our proposals where appropriate.

III. Paperwork Reduction Act

A. Background

The proposed amendments contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 (the "PRA").[166] We are submitting the proposed amendments to the Office of Management and Budget (the "OMB") for review in accordance with the PRA.[167] The title for the collection of information is:

(1) "Regulation S–K" (OMB Control No. 3235–0071);[168]

(2) "Form 10–K" (OMB Control No. 3235–0063);

(3) "Form 20–F" (OMB Control No. 3235–0288); and

(4) "Form 40–F" (OMB Control No. 3235–0381).

The regulation and forms were adopted under the Securities Act and the Exchange Act. The regulation and forms set forth the disclosure requirements for periodic reports and registration statements filed by companies to help shareholders make informed investment and voting decisions. The hours and costs associated with preparing and filing the form constitute reporting and cost burdens imposed by each collection of information. 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.

The proposed rules and form amendments would implement Section 13(p) of the Exchange Act, which was added by Section 1502 of the Act. As discussed in detail above, the proposed rules and form amendments would require an issuer to provide statutorily-

[166] 44 U.S.C. 3501 *et seq.*

[167] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

[168] The paperwork burden from Regulation S–K is imposed through the forms that are subject to the disclosures in Regulation S–K and is reflected in the analysis of those forms. To avoid a Paperwork Reduction Act inventory reflecting duplicative burdens, for administrative convenience we estimate the burdens imposed by Regulation S–K to be a total of one hour.

mandated information regarding conflict minerals that are necessary to the functionality or production of a product manufactured or contracted to be manufactured by such an issuer. In this regard, we are proposing to add new disclosure and reporting requirements to the above forms, which would be substantially the same in each form.[169] The same conflict minerals disclosure requirements would apply to U.S. and foreign issuers.

The proposed rules would require any issuer filing reports under the Exchange Act to disclose in its annual reports whether conflict minerals that are necessary to the functionality or production of a product manufactured or contracted to be manufactured by the issuer originated in the DRC countries. If so, the issuer would be required to furnish as an exhibit to its annual report a Conflict Minerals Report that includes a description of the measures taken by the issuer to exercise due diligence on the source and chain of custody of those minerals, which measures shall include an independent private sector audit of the Conflict Minerals Report that is certified by the issuer. Also, the Conflict Minerals Report would include a description of the issuer's products manufactured or contracted to be manufactured that are not DRC conflict free, the identity of the independent private sector auditor, the facilities used to process the conflict minerals, the country of origin of the conflict minerals, and the efforts to determine the mine or location of origin with the greatest possible specificity.

These proposed rules would increase the amount of information that certain issuers must compile and disclose in their forms and would increase the disclosure burden in annual reports for certain issuers. Issuers filing reports under the Exchange Act that do not have conflict minerals necessary to the functionality or production of a product manufactured or contracted to be manufactured by those issuers would have no disclosure or reporting requirements under the rules, but they would have the burden of determining whether conflict minerals are necessary to the functionality or production of products they manufacture or contract to manufacture. Under our proposed rules implementing the Conflict Minerals Provision, issuers that have conflict minerals necessary to the functionality or production of a product manufactured or contracted to be manufactured by those issuers must determine whether those conflict minerals originated in the DRC countries. Our proposed rules would require issuers to conduct a reasonable country of origin inquiry in determining whether their conflict minerals originated in the DRC countries. This reasonable country of origin inquiry could vary among issuers, but we believe that issuers would generally have to conduct a relatively thorough investigation to meet this standard. Therefore, we believe that the burden on issuers to determine the origin of their conflict minerals could be significant. If an issuer determines, however, that its conflict minerals did not originate in the DRC countries, its subsequent disclosure burden would be relatively insignificant. Such an issuer would be required to disclose in its annual report and on its Web site only that its conflict minerals did not originate in the DRC countries and disclose in its annual report the reasonable country of origin inquiry it used to make this determination.

Issuers with conflict minerals that originated in the DRC countries, or issuers that were unable to determine that their conflict minerals did not originate in the DRC countries, would be required to furnish a Conflict Minerals Report and would be required to use due diligence in determining the information required in that Conflict Minerals Report. Our proposed rules would require issuers to disclose, in their Conflict Minerals Report, the measures they took to exercise due diligence on the source and chain of custody of their conflict minerals. Additionally, issuers would have to disclose, based on their due diligence, whether any of the products they manufactured or contracted to be manufactured are not DRC conflict free. Also, issuers would be required to disclose the facilities used to process their conflict minerals, the country from which their conflict minerals originated, and the efforts to determine the mine or location of origin with the greatest possible specificity. Further, issuers would have to obtain an independent private sector audit of their Conflict Minerals Report and include in the Conflict Minerals Report a certification that they obtained such an audit, the identity of the auditor, and the audit report. Finally, the issuer would be required to post the Conflict Minerals Report, including the audit report, on its Internet Web site.

The type of reasonable country of origin inquiry and the due diligence standard for determining this information could vary among issuers. Regardless, we expect that all issuers with conflict minerals that originated in the DRC countries, or issuers that were unable to determine that their conflict minerals did not originate in the DRC countries, would have to conduct a thorough investigation to meet the reasonable country of origin inquiry and due diligence standards, which could be another significant burden on these issuers. The burden would be greater on issuers whose products contained conflict minerals that were not "DRC conflict free" because these issuers would have to determine which of their products contain conflict minerals that are not "DRC conflict free," whereas issuers with only "DRC conflict free" minerals would not have make such a determination. Compliance with the proposed amendments by affected issuers would be mandatory. The disclosure and reports submitted by issuers would not be kept confidential and there would be no mandatory retention period for the information disclosed.

B. Burden and Cost Estimates Related to the Proposed Amendments

The proposed rules and form amendments would require, if adopted, additional disclosure for an annual report filed on Form 10–K, Form 20–F, or Form 40–F by an issuer with necessary conflict minerals, which would increase the burden hour and cost estimates for each of those forms. For purposes of the PRA, we estimate the total annual increase in the paperwork burden for all affected companies to comply with our proposed collection of information requirements to be approximately 153,864 of company personnel time and to be approximately $71,243,000 for the services of outside professionals. These estimates include the time and cost of collecting the information, preparing and reviewing disclosure, filing documents, and retaining records.

In deriving our estimates, we recognize that the burdens will likely vary among individual companies based on a number of factors, including the size and complexity of their operations and the number of products they manufacture or contract to manufacture and the number of those products that contain conflict minerals. We believe that some issuers will experience costs in excess of this average in the first year of compliance with the proposals and

[169] New Item 4(a) in the Form 10–K would require issuers to furnish in the Form 10–K the information located in new Item 104 of Regulation S–K, which would set forth the new disclosure and reporting requirements to be included in the Form 10–K. For Forms 20–F and 40–F, the new disclosure and reporting requirements are contained within the form itself.

some issuers may experience less than these average costs.[170]

We have based our estimates of the effect that the adopted rules and form amendments, if adopted, would have on those collections of information as a result of the required due diligence process and independent private sector audit of the Conflict Minerals Report primarily on information that we have obtained from various stakeholder groups.

We do not expect all issuers' conflict minerals to have originated in the DRC countries. The DRC accounts for approximately 15% to 20% of the world's tantalum, and for considerably smaller percentage of the other three conflict minerals.[171] Therefore, for the purposes of the PRA, we assume that only 20% of the 5,994 affected issuers [172] will have to furnish an audited Conflict Minerals Report, which would be 1,199 issuers.

Although no entity has yet conducted due diligence for its conflict minerals supply chain or obtained an audit of this due diligence, we obtained estimates from one entity that works with NGOs and one industry group of possible costs associated with conducting the due diligence and the audit based on the preliminary information they currently have. The entity that works with NGOs has estimated that the annual cost of conducting the due diligence for the four conflict minerals ranges between $20 million and $25 million. An industry group provided a much lower range of between $8 million and $10 million to set up a mineral source validation scheme. Although our rules do not require issuers to use an industry-wide due diligence process to comply with their due diligence obligations, we expect that most affected issuers will contribute to and rely on an industry wide due diligence process as part of their overall compliance.[173]

Therefore, for purposes of the PRA, we have averaged the highest and the lowest estimates we received of the due diligence costs to obtain an aggregate estimate of $16.5 million [174] for the 1,199 issuers estimated to be required to file Conflict Minerals Reports.

Issuers that are required to file Conflict Minerals Reports must also obtain and certify an audit of the Conflict Minerals Report. One industry group indicated that it preliminarily estimates that each independent private sector audit of the Conflict Minerals Report will cost approximately $25,000 on average. We estimate that the 1,199 affected issuers' $25,000 cost would result in to an industry wide audit of approximately $29,975,000. Therefore, based on these figures, we estimate the PRA burden for the audit and due diligence requirements to the industry would be approximately $46,475,000.[175] We expect that the rules' effect will be higher during the first year of their effectiveness, due to the initial costs of creating minerals tracking systems, and diminish in subsequent years.

We have derived the burden hour and cost estimates for preparing the required disclosure in the annual reports and for determining when a registrant has conflict minerals necessary to the functionality or production of a product manufactured or contracted to be manufactured by the registrant by estimating the total amount of time it will take the company to prepare the disclosure and make the determination. We estimate that the disclosure preparation for all affected registrants will take 36 hours per Form 10–K (27 hours in-house personnel time and a cost of approximately $3,600 for professional services). We estimate that for Forms 20–F and 40–F, the disclosure preparation will also take 36 hours (9 hours in-house personnel time and a cost of approximately $10,800 for professional services).

We derived the above estimates by estimating the average number of hours it would take an issuer to prepare and review the proposed disclosure requirements. These estimates represent the average burden for all companies, both large and small.

When determining these estimates, we have assumed that:

- For Form 10–K, 75% of the burden of preparation is carried by the company internally and that 25% of the burden of the preparation is carried by outside professionals retained by the company at an average cost of $400 per hour; and
- For Forms 20–F and 40–F, 25% of the burden of preparation is carried by the company internally and that 75% of the burden of preparation is carried by outside professionals retained by the company at an average cost of $400 per hour.

The portion of the burden carried by outside professionals is reflected as a cost, while the portion of the burden carried by the company internally is reflected in hours.

1. Form 10–K

For purposes of the PRA, we estimate that, of the 13,545 Form 10–Ks filed annually, approximately 5,551 are filed by companies that would be affected by the proposed rules and form amendments.[176] We further estimate that the annual incremental paperwork burden for the Forms 10–K as a result of the proposed rule and form amendments would be 27 burden hours per affected form associated with the company's preparation of the disclosure, and $19,983,600 [177] associated with the cost of hiring professionals to help prepare the disclosure. In addition, we estimate for these purposes that those issuers required to submit a Conflict Minerals Report would also expend a total of $43,040,161 [178] associated with the cost of hiring professionals to conduct the due diligence and the independent private sector audit of the Conflict Minerals Report.

2. Regulation S–K

While the proposed rule and form amendments would make revisions to Regulation S–K, the collection of information requirements for that regulation are reflected in the burden hours estimated for Form 10–K. The rules in Regulation S–K do not impose any separate burden. Consistent with historical practice, we are proposing to retain an estimate of one burden hour to Regulation S–K for administrative convenience.

3. Form 20–F

For purposes of the PRA, we estimate that, of the 942 Form 20–F annual reports, approximately 377 are filed

[170] *See* letter from the National Association of Manufacturers (suggesting that any change to an issuer's supply chain computer systems "is likely to range from $1 million to $25 million" per issuer "depending on the size and complexity of the supply chain"). We expect that the internal collection burden will vary from company to company depending on each company's needs and circumstances.

[171] *See* Jessica Holzer, *Retailers Fight to Excape 'Conflict Minerals' Law, The Wall Street Journal*, Dec. 2, 2010, at B1. The DRC also accounts for approximately 4% of the world's tin, *see id.,* and approximately 0.3% of global gold mine production, *see* letter from Jewelers Vigilance Committee (citing to GFMS Gold Survey 2010).

[172] We estimate that approximately 5,551 Forms 10–K, 377 Forms 20–F, and 66 Forms 40–F will be affected by the proposed amendments.

[173] *See* Multi-Stakeholder Group Letter (stating that, although individual issuers are responsible for their own due diligence, an issuer "may rely on an industry wide process where applicable and appropriate").

[174] ($25 million + $8 million)/2 = $16.5 million.

[175] $16,500,000 + $29,975,000 = $46,475,000.

[176] We arrived at this number by estimating the number of issuers that fall under all the SIC codes that our staff believes most likely to manufacture or contract to manufacture products with conflict minerals necessary to the functionality or production of products manufactured or contracted to be manufactured by those issuers, and subtracted from that figure the number of issuers that file reports on Form 20–F and Form 40–F.

[177] $3,600 × 5,551 = $19,983,600.

[178] $46,475,000 × (5551/5994) = $43,040,161.

each year by companies that would be affected by the proposed rule and form amendments.[179] We estimate that the annual incremental paperwork burden for the Forms 20–F as a result of the proposed rule and form amendments would be nine burden hours per affected form associated with the company's preparation of the disclosure, and $4,071,600 [180] associated with the cost of hiring professionals to help prepare the disclosure. In addition, we estimate for these purposes that those issuers required to prepare a Conflict Minerals Reports would also expend a total of $2,923,102 [181] associated with the cost of hiring professionals to conduct the due diligence and the independent private sector audit.

4. Form 40–F

For purposes of the PRA, we estimate that, of the 205 Form 40–F annual reports filed each year, approximately 66 are filed by companies that would be affected by the proposed rule and form amendments.[182] We estimate that the annual incremental paperwork burden for the Forms 40–F as a result of the proposed rule and form amendments would be nine burden hours per affected form associated with the company's preparation of the disclosure, and $712,800 [183] associated with the cost of hiring professionals to help prepare the disclosure. In addition, we estimate for these purposes that those issuers required to prepare a Conflict Minerals Report would also expend a total of $511,737 [184] associated with the cost of hiring professionals to conduct the due diligence and the independent private sector audit.

C. Summary of Proposed Changes to Annual Compliance Burden in Collection of Information

The following table illustrates the estimated changes in annual compliance burden in the collection of information in hours and costs for Exchange Act annual reports as a result of the proposed rule and form amendments.

TABLE 1

Form	Number of responses [185]	Incremental company	Incremental professional cost
10–K	5,551	149,877	$63,023,761
20–F	377	3,393	6,994,702
40–F	66	594	1,224,537

TABLE 2

Form	Current annual response [186]	Current burden hours (A)	Increase in burden hours (B)	Proposed burden hours (C)=(A)+(B)	Current professional costs (D)	Increase in professional costs (E)	Proposed professional costs (F)=(D)+(E)
10–K	13,545	21,363,548	149,877	21,513,425	$2,848,473,000	$63,023,761	$2,911,496,761
20–F	942	622,907	3,393	626,300	743,089,980	6,994,702	750,084,682
40–F	205	21,884	594	22,478	26,260,500	1,224,537	27,485,037

D. Request for Comment

We request comment on the accuracy of our estimates. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments to: (i) Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (ii) evaluate the accuracy of the Commission's estimate of burden of the proposed collection of information; (iii) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; (iv) evaluate whether there are ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology; and (v) evaluate whether the proposed amendments will have any effects on any other collections of information not previously identified in this section.

In particular, we request comment and supporting empirical data for purposes of the PRA on whether the proposed rule and form amendments:

- Will affect the burden hours and costs required to produce the annual reports on Forms 10–K, 20–F, and 40–F; and
- If so, whether the resulting change in the burden hours and costs required to produce those Exchange Act annual reports is the same as or different than the estimated incremental burden hours and costs proposed by the Commission.

Any member of the public may direct to us any comments concerning the accuracy of these burden estimates and any suggestions for reducing these burdens. Persons submitting comments on the collection of information requirements should direct the comments to the Office of Management and Budget, *Attention:* Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Room 10102, New Executive Office Building, Washington, DC 20503, and should send a copy to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090, with reference to File No. S7–40–10. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7–40–10, and be submitted to the Securities and Exchange Commission, Office of Investor Education and Advocacy, 100 F Street NE., Washington, DC 20549–0213. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

[179] We arrived at this estimate by determining the number of issuers that fall under all the SIC codes that our staff believes are most likely to manufacture or contract to manufacture products with conflict minerals necessary to the functionality or production of products manufactured or contracted to be manufactured by those issuers that file reports on Form 20–F.

[180] $10,800 × 377 = $4,071,600.

[181] $46,475,000 × (377/5994) = $2,923,102.

[182] We arrived at this estimate by determining the number of issuers that fall under all the SIC codes that our staff believes are most likely to manufacture or contract to manufacture products with conflict minerals necessary to the functionality or production of products manufactured or contracted to be manufactured by those issuers that file reports on Form 40–F.

[183] $10,800 × 66 = $712,800.

[184] $46,475,000 × (66/5994) = $511,737.

[185] This number corresponds to the estimated number of forms expected to be affected by the proposed rules and form amendments.

[186] The proposed rules and form amendments would not change the number of annual responses.

IV. Cost-Benefit Analysis

Section 1502 of the Act amends the Exchange Act by adding new Section 13(p),[187] which requires the Commission to promulgate disclosure and reporting regulations regarding the use of conflict minerals from the DRC countries. In response to the requirements of Exchange Act Section 13(p) as set forth in Section 1502 of the Act, the Commission is proposing new rules and form amendments that would provide for the disclosure and reporting of the use of conflict minerals from the DRC countries. The proposed rules and form amendments implement the requirements in Section 1502 of the Act and, as necessary or appropriate, require additional disclosure in a manner that we believe is consistent with Congress's intent.

First, Section 13(p)(1)(A) indicates that the Conflict Minerals Provision applies to a "person described," who is defined in Section 13(p)(2)(B) as one for whom conflict minerals are necessary to the functionality or production of a product manufactured by that person.[188] This provision could be read quite broadly to apply to any business, including individuals and companies that are not subject to SEC reporting, so long as conflict minerals are necessary to the functionality or production of a product manufactured by that entity or individual. We believe that such a broad reading of the provision is not warranted, however, given the provision's background and its location in the section of the Exchange Act that pertains to reporting issuers.[189] As a result, our proposed rules would apply only to issuers that file reports with the Commission under the Exchange Act, provided that conflict minerals are necessary to the functionality or production of a product manufactured by any such an issuer.

While our proposed amendments would not define specifically when a conflict mineral is "necessary to the functionality or production of a product," we intend our proposed rules to provide that a conflict mineral is "necessary to the production of a product" if a conflict mineral is intentionally included in a product's production process and the conflict mineral is necessary to that process, even if that conflict mineral is not ultimately included anywhere in the final product. Our proposed amendments would specify that, although a conflict mineral is necessary to the functionality or production of a product manufactured or contracted to be manufactured by the issuer, if that conflict mineral was obtained from recycled or scrap minerals, that mineral would be considered DRC conflict free. This approach for recycled or scrap minerals is not included in the Conflict Minerals Provision, but we believe it is appropriate because such conflict minerals would not be implicating the concerns that prompted the enactment of this statutory provision.[190]

Third, Section 13(p)(1)(A) indicates that issuers must disclose whether their necessary conflict minerals originated in the DRC countries.[191] The Conflict Minerals Provision, however, is silent as to how issuers would determine whether their conflict minerals originated in the DRC countries. Our proposed amendments would indicate that an issuer's determination of whether or not any of its necessary conflict minerals originated in the DRC countries would be required to be based on a reasonable country of origin inquiry into the minerals' origins and, if the issuer determines its necessary conflict minerals did not originate in the DRC countries, that the issuer would have to disclose in the body of its annual report the reasonable country of origin inquiry it undertook to make its determination and would have to maintain reviewable business records to support this determination.

Fourth, our proposed amendments would specify where the Conflict Minerals report required by Section 13(p)(1)(A) of the Exchange Act should be provided.[192] The statutory provision does not indicate how issuers should submit their Conflict Minerals Reports to the Commission. Our proposed amendments would require issuers with necessary conflict minerals that originated in the DRC countries to furnish their Conflict Minerals Reports as an exhibit to their annual report on Form 10–K, Form 20–F, or Form 40–F, as applicable. In addition, although the Conflict Minerals Provision indicates that the Conflict Minerals Report must include an independent private sector audit of such report submitted through the Commission, it is unclear what record of that independent private sector audit an issuer must submit to the Commission and how it must do so, if at all. Our proposed amendments would require issuers to furnish an audit report of the independent private sector audit as part of and in the same exhibit to the annual report as the issuer's Conflict Minerals Report. Our proposed amendments also specify the required certification of the independent private sector audit. Our proposed amendments would require an issuer that furnishes a Conflict Minerals Report to include a statement in the body of its annual report that the Conflict Minerals Report is furnished as an exhibit to the annual report, that the Conflict Minerals Report and the certified audit report are available on its Internet Web site, and the Internet address of the Web site where the Conflict Minerals Report and audit report are located. Our proposed amendments would also require that the disclosure be posted on the issuer's Internet Web site at least until the issuer files its subsequent annual report.

Finally, our proposed amendments would require that the Conflict Minerals Report be furnished with the Commission, rather than filed. The Conflict Minerals Provision indicates that the report should be "submitted" to us,[193] but it does not indicate whether the report should be filed or furnished. Information that is furnished, rather than filed, with us is not subject to liability under Section 18 of the Exchange Act. By requiring the Conflict Minerals Report to be furnished with us, we are subjecting such reports to less liability than would exist if the reports were filed with us. However, under Exchange Act Section 13(p)(1)(C), failure to comply with the Conflict Minerals Provision would deem the issuer's due diligence process "unreliable" and, therefore, the Conflict Minerals Report "shall not satisfy" our proposed rules.[194] Also, issuers that fail to comply with our proposed rules would be subject to liability for violations of Exchange Act Sections 13(a) or 15(d), as applicable.[195]

The Commission is sensitive to the costs and benefits imposed by the proposed rules and form amendments. The discussion below focuses on the costs and benefits of the proposals made by the Commission to implement the Act within its permitted discretion, rather than the costs and benefits of the Act itself.

A. Benefits

Overall, we expect that our proposed rules will have the benefit of furthering Congress's goal of deterring the financing of armed groups in the DRC countries through commercial activity in conflict minerals. The proposed rules, if adopted, would specify which companies are covered by the disclosure and reporting requirements in Section

[187] *See* Exchange Act Section 13(p).

[188] *See supra* note 12.

[189] *See supra* note 38.

[190] *See supra* note 157.

[191] *See* Exchange Act Section 13(p)(1)(A).

[192] *Id.*

[193] *See* Exchange Act Section 13(p)(1)(A).

[194] *See* Exchange Act Section 13(p)(1)(C).

[195] 15 U.S.C. 78m(a) and 15 U.S.C. 78o(d).

1502 of the Act and the alternative approach to disclosure for recycled or scrap minerals. The proposed rules would also specify the information that reporting companies with necessary conflict minerals would be required to disclose. This specification would benefit reporting companies by reducing uncertainty about their compliance with Commission rules.

Our proposal specifies the location of the initial disclosure of conflict minerals' origin and the location of the Conflict Minerals Report and should make it easier for interested parties to locate this information. In addition, our proposal to require reporting companies to furnish the independent private sector audit report would make the report easily accessible to interested parties. Thus, market participants and observers may benefit from the increased disclosure and improved reporting to the extent that they find information about conflict mineral use relevant to their decision making.

Additionally, our decision to require issuers to furnish with the Commission the independent private sector audit report instead of filing it would free the independent private sector auditors preparing these reports from assuming expert liability. Relative to the filing option that we could have proposed, this should decrease the cost to independent private sector auditors of providing such audits to conflict minerals-reporting companies. Depending on the state of competition in the market for independent private sector audits, the lower costs due to auditors not being required to assume expert liability could result in lower audit fees, which in turn should decrease conflict minerals-reporting companies' cost of compliance with the statute.

We are proposing that reporting companies covered by Section 1502 of the Act use a reasonable country of origin inquiry in determining whether their conflict minerals originated in the DRC countries and use due diligence in making their supply chain determinations. We have chosen not to provide guidance on what would constitute a "reasonable country of origin inquiry." Similarly, we have chosen not to propose a specific standard for due diligence. We believe that these decisions should benefit reporting issuers by allowing them the flexibility to use the reasonable country of origin inquiry and due diligence standards that are best suited to their circumstances. We believe that disclosure of the inquiry performed and the due diligence undertaken may benefit market participants if they are interested in learning such information.

In addition, our proposed rules and form amendments would provide that conflict minerals obtained from recycled or scrap sources would be considered DRC conflict free. This should benefit issuers by providing an alternative approach for recycled or scrap minerals and reduce their compliance costs with the disclosure requirements in Section 1502 of the Act, particularly for recycled or scrap minerals, the origins of which are difficult to trace.

B. Costs

We anticipate that reporting companies would incur costs in meeting the additional disclosure required for their Exchange Act annual reports under Section 13(p) and the proposed rules and form amendments. The Commission's proposal to require an exhibit for the Conflict Minerals Report and that reporting companies furnish with the Commission the independent private sector audit report as an exhibit to their annual reports will result in costs related to the preparation of such exhibits. In addition, including manufacturing companies, companies contracting to manufacture products, companies contracting for the manufacture of products to sell under their own brand name or a separately established brand name, and mining companies as "persons described" would result in a larger number of companies incurring the disclosure compliance costs, compared to an interpretation that excluded some of these companies. Not requiring auditors to assume expert liability could increase the costs to market participants and other observers because auditors may not have as strong incentives to ensure their determinations are correct. Also, the Commission's proposal would require issuers that determine following a reasonable country of origin inquiry that their conflict minerals did not originate in the DRC countries must keep reviewable records, which will result in costs related to obtaining and maintaining these records. Further, such issuers would also incur costs in disclosing the reasonable country of origin inquiry in their annual reports. However, as described above, we believe these approaches are consistent with the Conflict Minerals Provision.

If a reporting company chose to incorporate by reference its independent private sector audit report into a Securities Act document, the independent private sector auditor would assume expert liability, if the auditor consented to the inclusion of its report. This would not be required under our proposals but, if an issuer chose to do so, this might increase the cost to independent private sector auditors of providing such audits to issuers furnishing Conflict Minerals Reports. Depending on the state of competition in the market for independent private sector audits, the additional cost stemming from the assumption of expert liability could be passed on to issuers furnishing Conflict Minerals Reporting in the form of higher audit fees, which in turn would increase these companies' cost of compliance with the statute, although, as noted, issuers could avoid such costs by not incorporating the audit report into their Securities Act filings. In any event, since this audit market is still in its nascence, and issuers presumably would not choose to incorporate the report by reference, the above effects are difficult to assess but are likely insignificant.

C. Request for Comment

We request comment on the disclosures and accuracy of our estimates in this section.

V. Consideration of Burden on Competition and Promotion of Efficiency, Competition and Capital Formation

Section 3(f) of the Exchange Act requires the Commission, whenever it engages in rulemaking and is required to consider or determine if an action is necessary or appropriate in the public interest, also to consider whether the action will promote efficiency, competition, and capital formation.[196] Section 23(a)(2) of the Exchange Act also requires the Commission, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition.[197] In addition, Section 23(a)(2) prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.[198]

The Commission is proposing the new rules and form amendments discussed in this release to implement the requirements of Exchange Act Section 13(p) as set forth in Section 1502 of the Act. We believe that our proposed rulemaking would have a different impact on competition in different industries. In industries where most or all companies are subject to disclosure or reporting requirements under the statute, we believe anti-competitive

[196] 15 U.S.C. 78c(f).

[197] 15 U.S.C. 78w(a)(2).

[198] *Id.*

effects to be unlikely. In industries where not all or only a few companies are subject to the disclosure or reporting requirements, issuers that must provide disclosure or furnish Conflict Mineral Reports would incur competitive costs because of our disclosure and reporting requirements and clarifications.

Although the costs to perform the investigative work required and, if necessary, the independent private sector audit fees could increase the disclosure and reporting compliance costs for issuers that provide disclosure or furnish Conflict Minerals Reports versus companies who do not provide disclosure or furnish such reports, the net effect on competition would depend on how these costs compare to the benefits that companies obtain by using conflict minerals from the DRC countries, such as lower input costs.

Anti-competitive effects might be of larger magnitude in industries where the proportion of companies not covered by the Exchange Act Section 13(p) is larger. For instance, mining issuers might suffer a competitive disadvantage with respect to mining companies that are not required to provide disclosure or Conflict Minerals Reports but use DRC minerals, such as U.S. private mining companies or foreign mining companies, because the issuers would be required to incur investigative, disclosure, and reporting costs as a result of the statute and our rules.

We are proposing to require issuers to furnish the Conflict Minerals Report with the Commission instead of filing it and have it included in Exchange Act reports and Securities Act registration statements. This requirement may limit the costs to, and the potential negative impact on, capital formation. We are not currently aware of any effects on efficiency or capital formation, but we seek comment on whether there are any such effects.

Request for Comment

70. We request comment on whether the proposed rules, if adopted, would promote efficiency, competition, and capital formation or have an impact or burden on competition. Commentators are requested to provide empirical data and other factual support for their view, if possible.

VI. Initial Regulatory Flexibility Act Analysis

This Initial Regulatory Flexibility Act Analysis[199] relates to proposed rules and form amendments to implement Section 13(p) of the Exchange Act, which concerns certain disclosure and reporting obligations of issuers with conflict minerals necessary to the functionality or production of any product manufactured or contracted to be manufactured by those issuers. As set forth by Section 13(p), an issuer with such necessary conflict minerals must disclose whether those minerals originated in the DRC countries and, if so, must submit to the Commission a Conflict Minerals Report.

A. Reasons for, and Objectives of, the Proposed Action

The proposed rule and form amendments are designed to implement the requirements of Section 1502 of the Act. Specifically, the proposed rules and form amendments would require all issuers with necessary conflict minerals to disclose in their annual reports whether those conflict minerals originated in the DRC countries. Issuers with necessary conflict minerals that originate in the DRC countries, or that are unable to determine that their necessary conflict minerals did not originate in the DRC countries, must provide the conflict minerals disclosure specified by our rules in their Exchange Act annual reports.

Any issuer with necessary conflict minerals that did originate in the DRC countries, or that is unable to determine that its necessary conflict minerals did not originate in DRC countries, also must furnish as an exhibit to its Exchange Act annual reports a Conflict Minerals Report, which requires the issuer to describe the measures it has taken to exercise due diligence on the source and chain of custody of such minerals, which measures shall include an certified independent private sector audit that shall constitute a critical component of due diligence. The Conflict Minerals Report must include a description of the products manufactured or contracted to be manufacture that are not DRC conflict free, the identification of the independent private sector auditor, and the disclosure of the facilities used to process the conflict minerals, the country of origin of the conflict minerals, and the efforts to determine the mine or location of origin with the greatest possible specificity. Also, issuers shall make available to the public on their Internet Web sites their Conflict Minerals Reports.

B. Legal Basis

We are proposing the rule and form amendments contained in this document under the authority set forth in Sections 6, 7, 10, and 19(a) of the Securities Act, and Sections 12, 13, 15, and 23(a) of the Exchange Act.

C. Small Entities Subject to the Proposed Amendments

The proposals would affect small entities that file annual reports with the Commission under the Exchange Act, and that have conflict minerals necessary to the functionality or production of products they manufacture or contract to manufacture. Exchange Act Rule 0–10(a)[200] defines an issuer to be a "small business" or "small organization" for purposes of the Regulatory Flexibility Act if it had total assets of $5 million or less on the last day of its most recent fiscal year. We believe that the proposals would affect small entities with necessary conflict minerals as defined under Section 13(p). We estimate that there are approximately 793 companies to which conflict minerals are necessary and that may be considered small entities.

D. Reporting, Recordkeeping, and Other Compliance Requirements

The proposed rule and form amendments would add to the annual disclosure requirements of companies with necessary conflict minerals, including small entities, by requiring them to comply with the disclosure and reporting obligations under Section 13(p) and provide certain additional disclosure in their Exchange Act annual reports. Among other matters, that information must include, as applicable:

- Disclosure as to whether conflict minerals necessary to the functionality or production of a product manufactured or contracted to be manufacture by an issuer did originate in the DRC countries; and, if so,
- A Conflict Minerals Report furnished as an exhibit to the annual report, which includes a certified independent private sector audit report.
- Reviewable business records regarding any determination that an issuer's conflict minerals did not originate in the DRC countries.

The same disclosure and reporting requirements would apply to U.S. and foreign issuers. We are proposing to amend Form 10–K and Regulation S–K to require domestic issuers to provide the conflict minerals information. Because Regulation S–K does not directly apply to Forms 20–F and 40–F,[201] we propose to amend those forms to include the same disclosure

[199] This analysis has been prepared in accordance with 5 U.S.C. 603.

[200] 17 CFR 240.0–10(a).

[201] While Form 20–F may be used by any foreign private issuer, Form 40–F is only available to a Canadian issuer that is eligible to participate in the U.S.-Canadian Multijurisdictional Disclosure System ("MJDS").

requirements for issuers that are foreign private issuers.[202]

E. Duplicative, Overlapping, or Conflicting Federal Rules

We believe there are no federal rules that duplicate, overlap or conflict with the proposed rules.

F. Significant Alternatives

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish the stated objectives, while minimizing any significant adverse impact on small entities. In connection with the proposals, we considered the following alternatives:

(1) Establishing different compliance or reporting requirements which take into account the resources available to smaller entities;

(2) Exempting smaller entities from coverage of the disclosure requirements, or any part thereof;

(3) The clarification, consolidation, or simplification of disclosure for small entities; and

(4) Use of performance standards rather than design standards.

We believe that separate disclosure requirements for small entities that would differ from the proposed reporting requirements, or exempting them from those requirements, would not achieve the disclosure objectives of Section 13(p). The proposed rules are designed to implement the conflict minerals disclosure and reporting requirements of Section 13(p). That statutory section applies to all issuers with necessary conflict minerals, regardless of size. However, the reasonable country of origin inquiry standard for determining whether conflict minerals originated in the DRC countries and the due diligence standard necessary for making the supply chain determinations in the Conflict Minerals Report are performance standards and would vary based on the facts and circumstances of each individual issuer. We have requested comment as to whether we should provide an exemption for smaller reporting companies and whether doing so would be consistent with the statute.

The proposed rules would require clear disclosure about the source and chain of custody of an issuer's necessary conflict minerals, which may result in increased transparency about the origin of those minerals. The proposed requirement to disclose the information in the body of and as an exhibit to an issuer's Exchange Act annual report may simplify the process of submitting the proposed conflict minerals disclosure and Conflict Minerals Reports. In addition, furnishing the Conflict Minerals Reports and the audit reports as exhibits would simplify the search and retrieval of this information regarding issuers, including small entities, for investors and other interested persons.

We have otherwise used design rather than performance standards in connection with the proposed amendments because, based on our past experience, we believe the proposed amendments would be more useful if there were specific disclosure requirements. In addition, the specific disclosure requirements in the proposed amendments would promote consistent and comparable disclosure among all issuers with necessary conflict minerals.

G. Solicitation of Comment

We encourage the submission of comments with respect to any aspect of this Initial Regulatory Flexibility Analysis. In particular, we request comments regarding:

- How the proposed amendments can achieve their objective while lowering the burden on small entities;
- The number of small entity companies that may be affected by the proposed amendments;
- Whether small entity companies should be exempt from the rule;
- The existence or nature of the potential impact of the proposed amendments on small entity companies discussed in the analysis; and
- How to quantify the impact of the proposed amendments.

Respondents are asked to describe the nature of any impact and provide empirical data supporting the extent of the impact. Such comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, if the proposed rule amendments are adopted, and will be placed in the same public file as comments on the proposed amendments themselves.

VII. Small Business Regulatory Enforcement Fairness Act

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"),[203] a rule is "major" if it has resulted, or is likely to result in:

- An annual effect on the economy of $100 million or more;
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effects on competition, investment or innovation.

Request for Comment

71. We request comment on whether our proposals would be a "major rule" for purposes of SBREFA. We solicit comment and empirical data on:

- The potential effect on the U.S. economy on an annual basis;
- Any potential increase in costs or prices for consumers or individual industries; and
- Any potential effect on competition, investment or innovation.

VIII. Statutory Authority and Text of The Proposed Amendments

The amendments described in this release are being proposed under the authority set forth in Sections 6, 7 10, 19(a), and 28 of the Securities Act, as amended, and Sections 12, 13, 15(d), 23(a), and 36 of the Exchange Act, as amended.

List of Subjects 17 CFR Parts 229 and 249

Reporting and recordkeeping requirements, Securities.

Text of The Proposed Amendments

For the reasons set out in the preamble, the Commission proposes to amend title 17, chapter II, of the Code of Federal Regulations as follows:

PART 229—STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975—REGULATION S–K

1. The authority citation for part 229 continues to read in part as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z–2, 77z–3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78l, 78m, 78n, 78o, 78u–5, 78w, 78ll, 78mm, 80a–8, 80a–9, 80a–20, 80a–29, 80a–30, 80a–31(c), 80a–37, 80a–38(a), 80a–39, 80b–11, and 7201 *et seq.;* and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

2. Add § 229.104 to read as follows:

§ 229.104 (Item 104) Conflict minerals disclosure.

(a) If any conflict minerals, as defined by paragraph (c)(3) of this section, are necessary to the functionality or production of a product manufactured or contracted to be manufactured by the registrant in the year covered by the annual report, the registrant must disclose in its annual report under a separate heading entitled "Conflict Minerals Disclosure" whether any of

[202] Proposed Item 16 under Part II of Form 20–F and proposed General Instruction B(16) of Form 40–F.

[203] Public Law 104–121, Title II, 110 Stat. 857 (1996).

these conflict minerals originated in the Democratic Republic of the Congo or an adjoining country, as defined by paragraph (c)(1) of this section or that the registrant is not able to determine that its conflict minerals did not originate in the Democratic Republic of the Congo or an adjoining country. The registrant's determination of whether or not any of these conflict minerals originated in the Democratic Republic of the Congo or an adjoining country, or its inability to determine that these conflict minerals did not originate in the Democratic Republic of the Congo or an adjoining country, must be based on its reasonable country of origin inquiry. If the registrant determines that its conflict minerals necessary to the functionality or production of a product manufactured or contracted to be manufactured by it did not originate in the Democratic Republic of the Congo or an adjoining country, the registrant must make that disclosure available on its Internet Web site and must also disclose this determination in its annual report under the separate "Conflict Minerals Disclosure" heading along with the reasonable country of origin inquiry it undertook to make its determination, that its disclosure is located on its Internet Web site, and the address of that Internet Web site. The disclosure must remain on the registrant's Internet Web site at least until the registrant files its subsequent annual report. Also, the registrant must maintain reviewable business records to support any such negative determination.

(b) If any conflict minerals necessary to the functionality or production of a product manufactured or contracted to be manufactured by the registrant originated in the Democratic Republic of the Congo or an adjoining country, if the registrant is unable to determine that such conflict minerals did not originate in the Democratic Republic of the Congo or an adjoining country, or if such conflict minerals came from recycled or scrap sources, the registrant must:

(1) Furnish a Conflict Minerals Report as an exhibit to its annual report with the following information:

(i) A description of the measures taken by the registrant to exercise due diligence on the source and chain of custody of the conflict minerals or to exercise due diligence in determining that the conflict minerals came from recycled or scrap sources, which shall include but not be limited to a certified independent private sector audit of the Conflict Minerals Report, conducted in accordance with standards established by the Comptroller General of the United States, that shall constitute a critical component of the registrant's due diligence in establishing the source and chain of custody of the conflict minerals or that the conflict minerals came from recycled or scrap sources;

(ii) A certification by the registrant that it obtained such an independent private sector audit;

(iii) A description of any of the registrant's products manufactured or contracted to be manufactured containing conflict minerals that are not "DRC conflict free," as defined in paragraph (c)(4) of this section, the facilities used to process those conflict minerals, the country of origin of those conflict minerals, and the efforts to determine the mine or location of origin with the greatest possible specificity; and

(iv) The audit report prepared by the independent private sector auditor, which identifies the entity that conducted the audit.

(2) In addition to the disclosures required by paragraph (a) of this section, disclose under the separate "Conflict Minerals Disclosure" heading in the annual report that the registrant has furnished a Conflict Minerals Report as an exhibit to the annual report; that the Conflict Minerals Report and the certified independent private sector audit report are available on its Internet Web site; and the Internet address of its Internet Web site where the Conflict Minerals Report and audit report are located.

(3) Make the Conflict Minerals Report, including the certified audit report, available to the public by posting the text of the report on its Internet Web site. The text of the Conflict Minerals Report must remain on the registrant's Internet Web site at least until the registrant files its subsequent annual report.

(c) For the purposes of this section, the following definitions apply:

(1) *Adjoining country.* The term *adjoining country* means a country that shares an internationally recognized border with the Democratic Republic of the Congo.

(2) *Armed group.* The term *armed group* means an armed group that is identified as a perpetrator of serious human rights abuses in the most recently issued annual Country Reports on Human Rights Practices under sections 116(d) and 502B(b) of the Foreign Assistance Act of 1961 (22 U.S.C. 2151n(d) and 2304(b)) relating to the Democratic Republic of the Congo or an adjoining country for the year the annual report is due.

(3) *Conflict mineral.* The term *conflict mineral* means:

(i) Columbite-tantalite (coltan), cassiterite, gold, wolframite, or their derivatives; or

(ii) Any other mineral or its derivatives determined by the Secretary of State to be financing conflict in the Democratic Republic of the Congo or an adjoining country.

(4) *DRC conflict free.* The term *DRC conflict free* means that a product does not contain conflict minerals that directly or indirectly finance or benefit armed groups in the Democratic Republic of the Congo or an adjoining country. Conflict minerals that a registrant is unable to determine did not originate in the Democratic Republic of the Congo or an adjoining country are not "DRC conflict free." Conflict minerals that a registrant obtains from recycled or scrap sources are considered DRC conflict free.

Instructions to Item 104

(1) A registrant that files reports with the Commission under Sections 13(a) (15 U.S.C. 78m(a)) or 15(d) (15 U.S.C. 78o(d)) of the Exchange Act, for whom conflict minerals are necessary to the functionality or production of a product manufactured or contracted to be manufactured by that registrant, shall provide the information required by this item. A registrant that mines conflict minerals would be considered to be manufacturing those minerals for the purpose of this item.

(2) The information required by this Item shall not be deemed to be "filed" with the Commission or subject to the liabilities of section 18 of the Exchange Act (15 U.S.C. 78r), except to the extent that the registrant specifically incorporates the information by reference into a document filed under the Securities Act or the Exchange Act. The disclosure required by this Item need not be provided in any filings other than an annual report on Form 10–K (§ 249.310 of this chapter). Such information will not be deemed to be incorporated by reference into any filing under the Securities Act or the Exchange Act, except to the extent that the registrant specifically incorporates it by reference.

3. Amend § 229.601 in the exhibit table to add entry (96) and add paragraph (b)(96) to read as follows:

§ 229.601 (Item 601) Exhibits.

(a) * * *

Exhibit Table * * *

EXHIBIT TABLE

	Securities Act Forms								Exchange Act Forms				
	S–1	S–3	S–4 [3]	S–8	S–11	F–1	F–3	F–4 [3]	10	8–K [5]	10–D	10–Q	10–K
* *		*			*		*			*		*	
(36) through (95) [Reserved]	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
(96) Conflict Minerals Report	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	X
(97) [Reserved]	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
(98) [Reserved]	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A

* * * * *

(b) * * *

(96) *Report on conflict minerals from the Democratic Republic of the Congo or an Adjoining Country.* The report required by Item 104(b)(1) of Regulation S–K, if applicable.

* * * * *

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

4. The authority citation for part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a *et seq.* and 7201 *et seq.;* and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

5. Amend Form 20–F (referenced in § 249.220f) by adding Item 16 and by adding paragraph 16 to the Instructions as to Exhibits.

The addition reads as follows:

Note: The text of Form 20–F does not, and this amendment will not, appear in the Code of Federal Regulations.

UNITED STATES

SECURITIES AND EXCHANGE COMMISSION

Washington, DC 20549

FORM 20–F

* * * * *

PART II

* * * * *

Item 16. Conflict Minerals Disclosure

(a) If any conflict minerals, as defined by paragraph (c)(3) of this Item, are necessary to the functionality or production of a product manufactured or contracted to be manufactured by the registrant in the year covered by the annual report, the registrant must disclose in its annual report under a separate heading entitled "Conflict Minerals Disclosure" whether any of these conflict minerals originated in the Democratic Republic of the Congo or an adjoining country, as defined by paragraph (c)(1) of this Item, or that the registrant is not able to determine that its conflict minerals did not originate in the Democratic Republic of the Congo or an adjoining country. The registrant's determination of whether or not any of these conflict minerals originated in the Democratic Republic of the Congo or an adjoining country, or its inability to determine that these conflict minerals did not originate in the Democratic Republic of the Congo or an adjoining country, must be based on its reasonable country of origin inquiry. If the registrant determines that its conflict minerals necessary to the functionality or production of a product manufactured or contracted to be manufactured by it did not originate in the Democratic Republic of the Congo or an adjoining country, the registrant must make that disclosure available on its Internet Web site and must also disclose this determination in its annual report under the separate "Conflict Minerals Disclosure" heading along with the reasonable country of origin inquiry it undertook to make its determination, that its disclosure is located on its Internet Web site, and the address of that Internet Web site. The disclosure must remain on the registrant's Internet Web site at least until the registrant files its subsequent annual report. Also, the registrant must maintain reviewable business records to support any such negative determination.

(b) If any conflict minerals necessary to the functionality or production of a product manufactured or contracted to be manufactured by the registrant originated in the Democratic Republic of the Congo or an adjoining country, if the registrant is unable to determine that such conflict minerals did not originate in the Democratic Republic of the Congo or an adjoining country, or if such conflict minerals came from recycled or scrap sources, the registrant must:

(1) Furnish a Conflict Minerals Report as an exhibit to its annual report with the following information:

(i) A description of the measures taken by the registrant to exercise due diligence on the source and chain of custody of the conflict minerals or to exercise due diligence in determining that the conflict minerals came from recycled or scrap sources, which shall include but not be limited to a certified independent private sector audit of the Conflict Minerals Report, conducted in accordance with standards established by the Comptroller General of the United States, that shall constitute a critical component of the registrant's due diligence in establishing the source and chain of custody of the conflict minerals or that the conflict minerals came from recycled or scrap sources;

(ii) A certification by the registrant that it obtained such an independent private sector audit;

(iii) A description of any of the registrant's products manufactured or contracted to be manufactured containing conflict minerals that are not "DRC conflict free," as defined in paragraph (c)(4) of this Item, the facilities used to process those conflict minerals, the country of origin of those conflict minerals, and the efforts to determine the mine or location of origin with the greatest possible specificity; and

(iv) The audit report prepared by the independent private sector auditor, which identifies the entity that conducted the audit.

(2) In addition to the disclosures required by paragraph (a) of this Item, disclose under the separate "Conflict Minerals Disclosure" heading in the annual report that the registrant has furnished a Conflict Minerals Report as an exhibit to the annual report; that the Conflict Minerals Report and the certified independent private sector audit report are available on its Internet Web site; and the Internet address of its Internet Web site where the Conflict Minerals Report and audit report are located.

(3) Make the Conflict Minerals Report, including the certified audit report, available to the public by posting the text of the report on its Internet Web site. The text of the Conflict Minerals Report must remain on the registrant's Internet Web site at least until the registrant files its subsequent annual report.

(c) For the purposes of this Item, the following definitions apply:

(1) *Adjoining country.* The term *adjoining country* means a country that shares an internationally recognized border with the Democratic Republic of the Congo.

(2) *Armed group.* The term *armed group* means an armed group that is identified as a perpetrator of serious human rights abuses in the most recently issued annual Country Reports on Human Rights Practices under sections 116(d) and 502B(b) of the Foreign Assistance Act of 1961 (22 U.S.C. 2151n(d) and 2304(b)) relating to the Democratic Republic of the Congo or an adjoining country for the year the annual report is due.

(3) *Conflict mineral.* The term *conflict mineral* means:

(i) columbite-tantalite (coltan), cassiterite, gold, wolframite, or their derivatives; or

(ii) any other mineral or its derivatives determined by the Secretary of State to be financing conflict in the Democratic Republic of the Congo or an adjoining country.

(4) *DRC conflict free.* The term *DRC conflict free* means that a product does not contain conflict minerals that directly or indirectly finance or benefit armed groups in the Democratic Republic of the Congo or an adjoining country. Conflict minerals that a registrant is unable to determine did not originate in the Democratic Republic of the Congo or an adjoining country are not "DRC conflict free." Conflict minerals that a registrant obtains from recycled or scrap sources are considered DRC conflict free.

Instructions to Item 16

(1) Item 16 applies only to annual reports, and does not apply to registration statements on Form 20–F. A registrant must provide the information required in Item 16 beginning with the annual report that it files for its first full fiscal year beginning after [April 15, 2011].

(2) A registrant that files reports with the Commission under Sections 13(a) (15 U.S.C. 78m(a)) or 15(d) (15 U.S.C. 78o(d)) of the Exchange Act, for whom conflict minerals are necessary to the functionality or production of a product manufactured or contracted to be manufactured by that registrant, shall provide the information required by this item. A registrant that mines conflict minerals would be considered to be manufacturing those minerals for the purpose of this item.

(3) The information required by this Item shall not be deemed to be "filed" with the Commission or subject to the liabilities of section 18 of the Exchange Act (15 U.S.C. 78r), except to the extent that the registrant specifically incorporates the information by reference into a document filed under the Securities Act or the Exchange Act. The disclosure required by this Item need not be provided in any filings other than an annual report on Form 20–F (§ 249.220f of this chapter). Such information will not be deemed to be incorporated by reference into any filing under the Securities Act or the Exchange Act, except to the extent that the registrant specifically incorporates it by reference.

* * * * *

Instructions as to Exhibits

* * * * *

16. The Conflict Minerals Report required by Item 16 of this Form, if applicable.

* * * * *

6. Amend Form 40–F (referenced in § 249.240f) by adding paragraph (16) to General Instruction B as follows:

Note: The text of Form 40–F does not, and this amendment will not, appear in the Code of Federal Regulations.

UNITED STATES

SECURITIES AND EXCHANGE COMMISSION

Washington, DC 20549

FORM 40–F

* * * * *

GENERAL INSTRUCTIONS

* * * * *

B. Information To Be Filed on This Form

* * * * *

(16) *Conflict Minerals Disclosure*

(a) If any conflict minerals, as defined by paragraph (c)(3) of this Instruction, are necessary to the functionality or production of a product manufactured or contracted to be manufactured by the registrant in the year covered by the annual report, the registrant must disclose in its annual report under a separate heading entitled "Conflict Minerals Disclosure" whether any of these conflict minerals originated in the Democratic Republic of the Congo or an adjoining country, as defined by paragraph (c)(1) of this Instruction, or that the registrant is not able to determine that its conflict minerals did not originate in the Democratic Republic of the Congo or an adjoining country. The registrant's determination of whether or not any of these conflict minerals originated in the Democratic Republic of the Congo or an adjoining country, or its inability to determine that these conflict minerals did not originate in the Democratic Republic of the Congo or an adjoining country, must be based on its reasonable country of origin inquiry. If the registrant determines that its conflict minerals necessary to the functionality or production of a product manufactured or contracted to be manufactured by it did not originate in the Democratic Republic of the Congo or an adjoining country, the registrant must make that disclosure available on its Internet Web site and must also disclose this determination in its annual report under the separate "Conflict Minerals Disclosure" heading along with the reasonable country of origin inquiry it undertook to make its determination, that its disclosure is located on its Internet Web site, and the address of that Internet Web site. The disclosure must remain on the registrant's Internet Web site at least until the registrant files its subsequent annual report. Also, the registrant must maintain reviewable business records to support any such negative determination.

(b) If any conflict minerals necessary to the functionality or production of a product manufactured or contracted to be manufactured by the registrant originated in the Democratic Republic of the Congo or an adjoining country, if the registrant is unable to determine that such conflict minerals did not originate in the Democratic Republic of the Congo or an adjoining country, or if such conflict minerals came from recycled or scrap sources, the registrant must:

(1) Furnish a Conflict Minerals Report as an exhibit to its annual report with the following information:

(i) a description of the measures taken by the registrant to exercise due diligence on the source and chain of custody of the conflict minerals or to exercise due diligence in determining that the conflict minerals came from recycled or scrap sources, which shall include but not be limited to a certified independent private sector audit of the Conflict Minerals Report, conducted in accordance with standards established by the Comptroller General of the United States, that shall constitute a critical component of the registrant's due diligence in establishing the source and chain of custody of the conflict minerals or that the conflict minerals came from recycled or scrap sources;

(ii) a certification by the registrant that it obtained such an independent private sector audit;

(iii) a description of any of the registrant's products manufactured or contracted to be manufactured containing conflict minerals that are not "DRC conflict free," as defined in paragraph (c)(4) of this Instruction, the

facilities used to process those conflict minerals, the country of origin of those conflict minerals, and the efforts to determine the mine or location of origin with the greatest possible specificity; and

(iv) the audit report prepared by the independent private sector auditor, which identifies the entity that conducted the audit.

(2) In addition to the disclosures required by paragraph (a) of this Instruction, disclose under the separate "Conflict Minerals Disclosure" heading in the annual report that the registrant has furnished a Conflict Minerals Report as an exhibit to the annual report; that the Conflict Minerals Report and the certified independent private sector audit report are available on its Internet Web site; and the Internet address of its Internet Web site where the Conflict Minerals Report and audit report are located.

(3) Make the Conflict Minerals Report, including the certified audit report, available to the public by posting the text of the report on its Internet Web site. The text of the Conflict Minerals Report must remain on the registrant's Internet Web site at least until the registrant files its subsequent annual report.

(c) For the purposes of this Instruction, the following definitions apply:

(1) *Adjoining country.* The term *adjoining country* means a country that shares an internationally recognized border with the Democratic Republic of the Congo.

(2) *Armed group.* The term *armed group* means an armed group that is identified as a perpetrator of serious human rights abuses in the most recently issued annual Country Reports on Human Rights Practices under sections 116(d) and 502B(b) of the Foreign Assistance Act of 1961 (22 U.S.C. 2151n(d) and 2304(b)) relating to the Democratic Republic of the Congo or an adjoining country for the year the annual report is due.

(3) *Conflict mineral.* The term *conflict mineral* means:

(i) columbite-tantalite (coltan), cassiterite, gold, wolframite, or their derivatives; or

(ii) any other mineral or its derivatives determined by the Secretary of State to be financing conflict in the Democratic Republic of the Congo or an adjoining country.

(4) *DRC conflict free.* The term *DRC conflict free* means that a product does not contain conflict minerals that directly or indirectly finance or benefit armed groups in the Democratic Republic of the Congo or an adjoining country. Conflict minerals that a registrant is unable to determine did not originate in the Democratic Republic of the Congo or an adjoining country are not "DRC conflict free." Conflict minerals that a registrant obtains from recycled or scrap sources are considered DRC conflict free.

Notes to Paragraph (16) of General Instruction B

(1) Paragraph (16) of General Instruction B applies only to annual reports, and does not apply to registration statements on Form 40–F. A registrant must provide the information required in paragraph (16) beginning with the annual report that it files for its first full fiscal year beginning after [April 15, 2011].

(2) A registrant that files reports with the Commission under Sections 13(a) (15 U.S.C. 78m(a)) or 15(d) (15 U.S.C. 78o(d)) of the Exchange Act, for whom conflict minerals are necessary to the functionality or production of a product manufactured or contracted to be manufactured by that registrant, shall provide the information required by this Instruction. A registrant that mines conflict minerals would be considered to be manufacturing those minerals for the purpose of this Instruction.

(3) The information required by this Instruction shall not be deemed to be "filed" with the Commission or subject to the liabilities of section 18 of the Exchange Act (15 U.S.C. 78r), except to the extent that the registrant specifically incorporates the information by reference into a document filed under the Securities Act or the Exchange Act. The disclosure required by this Instruction need not be provided in any filings other than an annual report on Form 40–F (§ 249.240f of this chapter). Such information will not be deemed to be incorporated by reference into any filing under the Securities Act or the Exchange Act, except to the extent that the registrant specifically incorporates it by reference.

* * * * *

7. Amend Form 10–K (referenced in § 249.310) by adding Item 4(a) as follows:

Note: The text of Form 10–K does not, and this amendment will not, appear in the Code of Federal Regulations.

UNITED STATES

SECURITIES AND EXCHANGE COMMISSION

Washington, DC 20549

FORM 10–K

* * * * *

PART I

* * * * *

Item 4. Specialized Disclosures

(a) Furnish the information required by Item 104 of Regulation S–K (§ 229.104 of this chapter).

Instruction

A registrant must provide the information required in Item 4 beginning with the annual report that it files for its first full fiscal year beginning after [April 15, 2011].

* * * * *

By the Commission.

Dated: December 15, 2010.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2010–31940 Filed 12–22–10; 8:45 am]

BILLING CODE 8011–01–P



Federal Register

Thursday,
December 23, 2010

Part IV

Securities and Exchange Commission

17 CFR Parts 229 and 249
Disclosure of Payments by Resource Extraction Issuer; Proposed Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 229 and 249

[Release No. 34–63549; File No. S7–42–10]

RIN 3235–AK85

Disclosure of Payments by Resource Extraction Issuers

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: We are proposing amendments to our rules pursuant to Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act relating to disclosure of payments by resource extraction issuers. Section 1504 added Section 13(q) to the Securities Exchange Act of 1934, which requires the Commission to issue rules requiring resource extraction issuers to include in an annual report information relating to any payment made by the issuer, or by a subsidiary or another entity controlled by the issuer, to a foreign government or the Federal Government for the purpose of the commercial development of oil, natural gas, or minerals. Section 13(q) requires a resource extraction issuer to provide information about the type and total amount of payments made for each project related to the commercial development of oil, natural gas, or minerals, and the type and total amount of payments made to each government. In addition, Section 13(q) requires a resource extraction issuer to provide certain information regarding those payments in an interactive data format, as specified by the Commission.

DATES: Comments should be received on or before January 31, 2011.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/proposed.shtml*);
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number S7–42–10 on the subject line; or
- Use the Federal eRulemaking Portal (*http://www.regulations.gov*). Follow the instructions for submitting comments.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.
- All submissions should refer to File Number S7–42–10. This file number should be included on the subject line if e-mail is used.

To help us 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/proposed.shtml*). Comments also are available for Web site viewing and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Tamara Brightwell, Senior Special Counsel, Division of Corporation Finance, or Elliot Staffin, Special Counsel in the Office of International Corporate Finance, Division of Corporation Finance, at (202) 551–3290, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–4553.

SUPPLEMENTARY INFORMATION: We are proposing new Item 105 [1] of Regulation S–K,[2] an amendment to Item 601 of Regulation S–K,[3] and amendments to Forms 10–K,[4] 20–F,[5] and 40–F [6] under the Securities Exchange Act of 1934 ("Exchange Act").[7]

Table of Contents

I. Background
II. Proposed Rules Under Section 13(q)
A. Summary
B. Definition of "Resource Extraction Issuer"
C. Definition of "Commercial Development of Oil, Natural Gas, or Minerals"
D. Definition of "Payment"
1. Types of Payments
2. The "Not De Minimis" Requirement
3. The "Project" Requirement
4. Payments by "a Subsidiary * * * or an Entity Under the Control of the Resource Extraction Issuer"
5. Other Matters
E. Definition of "Foreign Government"
F. Disclosure Required and Form of Disclosure
1. Annual Report Requirement
2. Exhibits and Interactive Data Format Requirement
3. Treatment for Purposes of the Securities Act and the Exchange Act
G. Effective Date
H. General Request for Comment
III. Paperwork Reduction Act
A. Background
B. Burden and Cost Estimates Related to the Proposed Amendments
1. Form 10–K
2. Regulation S–K
3. Form 20–F
4. Form 40–F
C. Summary of Proposed Changes to Annual Compliance Burden in Collection of Information
D. Solicitation of Comment
IV. Cost-Benefit Analysis
A. Benefits
B. Costs
V. Consideration of Burden on Competition and Promotion of Efficiency, Competition and Capital Formation
VI. Initial Regulatory Flexibility Analysis
A. Reasons for, and Objectives of, the Proposed Action
B. Legal Basis
C. Small Entities Subject to the Proposed Amendments
D. Reporting, Recordkeeping, and Other Compliance Requirements
E. Duplicative, Overlapping, or Conflicting Federal Rules
F. Significant Alternatives
G. Solicitation of Comment
VII. Small Business Regulatory Enforcement Fairness Act
VIII. Statutory Authority and Text of Proposed Rule and Form Amendments

I. Background

This release is one of several we are required to issue to implement provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Act").[8] This release proposes a new rule [9] and certain rule [10] and form amendments [11] to implement Section 13(q) of the Exchange Act, which was added by Section 1504 of the Act. New Section 13(q) requires the Commission to "issue final rules that require each resource extraction issuer to include in an annual report of the resource extraction issuer information relating to any payment made by the resource extraction issuer, a subsidiary of the resource extraction issuer, or an entity under the control of the resource extraction issuer to a foreign government or the Federal Government

[1] Proposed 17 CFR 229.105.

[2] 17 CFR 229.10 *et al.*

[3] 17 CFR 229.601.

[4] 17 CFR 249.310.

[5] 17 CFR 249.220f.

[6] 17 CFR 249.240f.

[7] 15 U.S.C. 78a *et seq.*

[8] Public Law 111–203 (July 21, 2010). To facilitate public input on the Act, the Commission has provided a series of e-mail links, organized by topic, on its Web site at *http://www.sec.gov/spotlight/regreformcomments.shtml*. The public comments we received are available on our Web site at *http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specialized-disclosures.shtml*.

[9] *See* proposed Regulation S–K Item 105 [17 CFR 229.105].

[10] *See* proposed Regulation S–K Item 601(b)(97) and (98) [17 CFR 229.601(b)(97) and (98)].

[11] *See* proposed Item 16I under Part II of Form 20–F, and proposed paragraph (17) to General Instruction B of Form 40–F.

for the purpose of the commercial development of oil, natural gas, or minerals, including—(i) the type and total amount of such payments made for each project of the resource extraction issuer relating to the commercial development of oil, natural gas, or minerals, and (ii) the type and total amount of such payments made to each government."[12]

Section 13(q) provides the following definitions and descriptions of several key terms:

- "Resource extraction issuer" means an issuer that is required to file an annual report with the Commission and engages in the commercial development of oil, natural gas, or minerals;[13]
- "Commercial development of oil, natural gas, or minerals" includes exploration, extraction, processing, export, and other significant actions relating to oil, natural gas, or minerals, or the acquisition of a license for any such activity, as determined by the Commission;[14]
- "Foreign government" means a foreign government, a department, agency or instrumentality of a foreign government, or a company owned by a foreign government, as determined by the Commission;[15] and
- "Payment" means a payment that:
- Is made to further the commercial development of oil, natural gas, or minerals;
- Is not de minimis; and
- Includes taxes, royalties, fees (including license fees), production entitlements, bonuses, and other material benefits, that the Commission, consistent with the guidelines of the Extractive Industries Transparency Initiative (to the extent practicable), determines are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals.[16]

Section 13(q) specifies that "[t]o the extent practicable, the rules issued under [the section] shall support the commitment of the Federal Government to international transparency promotion efforts relating to the commercial development of oil, natural gas, or minerals."[17] As noted above, the statute explicitly refers to one international initiative, the Extractive Industries Transparency Initiative ("EITI"),[18] in the definition of "payment." Although the provision regarding international transparency efforts does not explicitly mention the EITI, the legislative history indicates that the EITI was considered in connection with the new statutory provision.[19] The United States is one of several countries that support the EITI.[20]

The Commission's rules under Section 13(q) must require a resource extraction issuer to submit the payment information included in an annual report in an interactive data format[21] using an interactive data standard established by the Commission.[22] Section 13(q) defines "interactive data format" to mean an electronic data format in which pieces of information are identified using an interactive data standard.[23] The section also defines "interactive data standard" as a standardized list of electronic tags that mark information included in the annual report of a resource extraction issuer.[24] The rules issued pursuant to Section 13(q)[25] must include electronic tags that identify:

- The total amount of payments, by category;
- The currency used to make the payments;
- The financial period in which the payments were made;
- the business segment of the resource extraction issuer that made the payments;
- The government that received the payments and the country in which the government is located; and
- The project of the resource extraction issuer to which the payments relate.[26] Section 13(q) further authorizes the Commission to require electronic tags for other information that it determines is necessary or appropriate in the public interest or for the protection of investors.[27]

Section 13(q) provides that the final rules "shall take effect on the date on which the resource extraction issuer is required to submit an annual report relating to the fiscal year * * * that ends not earlier than 1 year after the date on which the Commission issues final rules[.]"[28]

Finally, Section 13(q) requires the Commission to make publicly available online, to the extent practicable, a compilation of the information required to be submitted by resource extraction issuers under the new rules.[29] The

[12] 15 U.S.C. 78m(q)(2)(A).

[13] 15 U.S.C. 78m(q)(1)(D).

[14] 15 U.S.C. 78m(q)(1)(A).

[15] 15 U.S.C. 78m(q)(1)(B).

[16] 15 U.S.C. 78m(q)(1)(C).

[17] 15 U.S.C. 78m(q)(2)(E).

[18] The EITI was announced by former UK Prime Minister Tony Blair at the World Summit on Sustainable Development in Johannesburg in September 2002. *See http://www.eiti.org/eiti/history.* The World Bank Group officially endorsed the EITI in 2003. *See Implementing the Extractive Industries Transparency Initiative* (2008) ("*Implementing the EITI*") (available at *http://eiti.org/document/implementingtheeiti*). The EITI is a voluntary coalition of oil, natural gas, and mining companies, foreign governments, investor groups, and other international organizations dedicated to fostering and improving transparency and accountability in countries rich in oil, natural gas, and minerals through the publication and verification of company payments and government revenues from oil, natural gas, and mining. *See Implementing the EITI.* According to the EITI, "[b]y encouraging greater transparency and accountability in countries dependent on the revenues from oil, gas and mining, the potential negative impacts of mismanaged revenues can be mitigated, and these revenues can instead become an important engine for long-term economic growth that contributes to sustainable development and poverty reduction." *EITI Source Book* (2005) at p. 4 (available at *http://eiti.org/files/document/sourcebookmarch05.pdf).*

Currently five countries—Liberia, Azerbaijan, Timor Leste, Ghana, and Mongolia—have achieved "EITI compliant" status by completing a validation process in which company payments are matched with government revenues by an independent auditor (available at *http://eiti.org/countries/compliant*). Some 27 other countries are EITI candidates in good standing and are in the process of complying with EITI standards (available at *http://eiti.org/candidatecountries*). Several other countries have indicated their intent to implement the EITI (available at *http://eiti.org/othercountries*). Implementation of the EITI varies across countries—the EITI provides criteria and a framework for implementation, but allows countries to make key decisions on the scope of its program (*e.g.* degree of aggregation of data, inclusion of subnational or social or community payments). *See Source Book,* pp. 23–24.

[19] *See, e.g.,* statement by Senator Lugar, one of the authors of Section 1504 ("This domestic action will complement multilateral transparency efforts such as the Extractive Industries Transparency Initiative—the EITI—under which some countries are beginning to require all extractive companies operating in their territories to publicly report their payments."), 111 *Cong. Rec.* S3816 (daily ed. May 17, 2010). Other examples of international transparency efforts include the recent amendments of the Hong Kong Stock Exchange listing rules for mineral companies and the London Stock Exchange AIM rules for extractive companies. *See* Amendments to the GEM Listing Rules of the Hong Kong Stock Exchange, Chapter 18A.05(6)(c) (effective June 3, 2010) (available at *http://www.hkex.com.hk/eng/rulesreg/listrules/gemrulesup/Documents/gem34_miner.pdf*) (requiring a mineral company to include in its listing document, if relevant and material to the company's business operations, information regarding its compliance with host country laws, regulations and permits, and payments made to host country governments in respect of tax, royalties and other significant payments on a country by country basis) and Note for Mining and Oil & Gas Companies—June 2009 (*available at http://www.londonstockexchange.com/companies-and-advisors/aim/advisers/rules/guidance-note.pdf*) (requiring disclosure in the initial listing of "any payments aggregating over £10,000 made to any government or regulatory authority or similar body made by the applicant or on behalf of it, in regards to the acquisition of, or maintenance of its assets.").

[20] *See* the list of EITI supporting countries at *http://eiti.org/supporters/countries.*

[21] 15 U.S.C. 78m(q)(2)(C).

[22] 15 U.S.C. 78m(q)(2)(D).

[23] 15 U.S.C. 78m(q)(1)(E).

[24] 15 U.S.C. 78m(q)(1)(F).

[25] 15 U.S.C. 78m(q)(2)(D)(i).

[26] 15 U.S.C. 78m(q)(2)(D)(ii).

[27] 15 U.S.C. 78m(q)(2)(D)(ii).

[28] 15 U.S.C. 78m(q)(2)(F).

[29] 15 U.S.C. 78m(q)(3).

statute does not dictate a particular form or content for that compilation.

II. Proposed Rules Under Section 13(q)

A. Summary

As discussed in detail below, we are proposing amendments to Form 10–K, Form 20–F, and Form 40–F to require the disclosures mandated by Section 13(q). The disclosure requirements for Form 10–K would be set forth in new Item 105 of Regulation S–K,[30] which would require a resource extraction issuer to provide information relating to any payment made by it, a subsidiary, or an entity under its control to a foreign government or the U.S. Federal Government during the fiscal year covered by the annual report for the purpose of the commercial development of oil, natural gas, or minerals. The item would specify that this information would be set forth in two exhibits to the filing—one exhibit filed in HyperText Markup Language ("HTML") or American Standard Code for Information Interchange ("ASCII") format and another exhibit filed in eXtensible Business Reporting Language ("XBRL") format. We are proposing to amend Item 601 of Regulation S–K to add these new exhibits to Form 10–K for the disclosure.[31] We also propose to add new Item 4(c) to Form 10–K to require a resource extraction issuer to provide disclosure in Part I of Form 10–K noting that the information required by Section 13(q) and new Item 105 of Regulation S–K is included in exhibits to the filing.[32] An issuer would be required to include in the proposed exhibits the type and total amount of payments made for each project, as well as the type and total amount of payments made to each government, relating to the commercial development of oil, natural gas, or minerals.[33] The proposed rules also would require a resource extraction issuer to include certain detailed information about the payments made.

Section 13(q) applies to any issuer that is required to file an annual report with the Commission and that engages in the commercial development of oil, natural gas, or minerals, which includes foreign private issuers that file annual reports on Forms 20–F and 40–F.[34] Because Regulation S–K does not apply to those forms, we propose to amend Forms 20–F and 40–F to include the same disclosure requirements as those proposed for resource extraction issuers that are not foreign private issuers.[35]

As noted above, Section 13(q) requires the Commission to issue rules requiring the payment information to be submitted in an interactive data format. We propose to require a resource extraction issuer to submit the information in an exhibit using the interactive data standard known as XBRL.

B. Definition of "Resource Extraction Issuer"

Under the proposed rule and form amendments, "resource extraction issuer" would be defined as it is under Section 13(q). Specifically, a resource extraction issuer would be defined as an issuer that:

- Is required to file an annual report with the Commission; and
- Engages in the commercial development of oil, natural gas, or minerals.[36]

Section 13(q) specifically applies to issuers that are required to file an annual report with the Commission and that engage in the commercial development of oil, natural gas, or minerals. The provision does not indicate that the Commission, in adopting implementing rules, should provide different standards for different issuers or should exempt any issuers from the new requirements.[37] Thus, under the proposal, all U.S. companies and foreign companies that are engaged in the commercial development of oil, natural gas, or minerals, and that are required to file annual reports with the Commission, regardless of size or the extent of business operations constituting commercial development of oil, natural gas, or minerals, would be subject to Section 13(q). Likewise, the proposed rules would apply equally to companies that fall within this definition whether or not they are owned or controlled by governments.

Request for Comment

1. Should the Commission exempt certain categories of issuers, such as smaller reporting companies or foreign private issuers,[38] from the proposed rules? If so, which ones and why? If not, why not? Would providing an exemption for certain issuers be consistent with the statute? [39] If we do not provide such an exemption when adopting final rules, would foreign private issuers or any other issuers deregister to avoid the disclosure requirement?

2. Would our proposed rules present undue costs to smaller reporting companies? If so, how could we mitigate those costs? Also, if our proposed rules present undue costs to smaller reporting companies, do the benefits of making their resource extraction payment information publicly available justify these costs? Should our rules provide more limited disclosure and reporting obligations for smaller reporting companies? If so, what should these limited requirements entail? Should our rules provide for a delayed implementation date for smaller reporting companies in order to provide them additional time to prepare for the requirement and the benefit of observing how larger companies comply?

3. Should the Commission provide an exemption to allow foreign private issuers to follow their home country rules and disclose in their Form 20–F the required home country disclosure?

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[30] *See* proposed Item 105 of Regulation S–K.

[31] *See* proposed Items 601(b)(97) and (98) of Regulation S–K.

[32] *See* proposed Item 4(c) under Part I of Form 10–K.

[33] *See* proposed Item 105(a) and Items 601(b)(97) and (b)(98) of Regulation S–K.

[34] While Form 20–F may be used by any foreign private issuer, Form 40–F is only available to a Canadian issuer that is eligible to participate in the U.S.-Canadian Multijurisdictional Disclosure System ("MJDS").

[35] *See* proposed Item 16I under Part II of Form 20–F and proposed paragraph (17) to General Instruction B of Form 40–F.

[36] *See* proposed Item 105(b)(4) of Regulation S–K, proposed Item 16I.B.(4) under Part II of Form 20–F, and proposed paragraph B.(17)(b)(4) under the General Instructions of Form 40–F.

[37] A commentator requested that the Commission consider an exemption to allow foreign private issuers to follow their home country rules and disclose in their Form 20–F the required home country disclosure. The commentator expressed concern that foreign private issuers will be required to provide multiple payment disclosures in their Form 20–F to satisfy U.S., UK, and EU requirements. *See* letter from Royal Dutch Shell plc ("RDS") (October 25, 2010).

[38] *See* the definition of "smaller reporting company" in Exchange Act Rule 12b–2 [17 CFR 240.12b–2] and the definition of "foreign private issuer" in Exchange Act Rule 3b-4 [17 CFR 240.3b–4].

[39] *Cf.,* Statement of Senator Cardin in support of Amendment No. 3732 to Restoring American Financial Stability Act (S. 3217) (indicating the legislation was intended to cover foreign private issuers by stating that "The provisions of this amendment would apply to all oil, gas, and mining companies required to file periodic reports with the SEC; namely, 90 percent of the major internationally operating oil companies and 8 out of the 10 largest mining companies in the world—only 2 of which are U.S. companies. We are talking about foreign-owned companies, not U.S. companies, by and large. Of the top 50 oil and gas companies by proven oil reserves, 20 are national oil companies that do not usually operate internationally. These companies are not registered with the SEC and * * * do not compete with internationally operating companies. Of the remaining 30 companies that do operate internationally, 27 would be covered by this legislation—27 of the 30. These include Canadian, European, Russian, Chinese, Brazilian, and other international companies."), 111 Cong. Rec. S3316 (daily ed. May 6, 2010). *See also* letter from Senator Cardin (December 1, 2010) ("Senator Cardin") (stating that, with respect to the meaning of resource extraction issuer, "the intent was to include all issuers, including foreign issuers, which have a reporting requirement to the SEC.").

4. Should the rules apply to issuers that are owned or controlled by governments, as proposed? If so, why? If not, why not? Should the disclosure requirements be varied for such entities?

5. General Instructions I and J to Form 10–K contain special provisions for the omission of certain information by wholly-owned subsidiaries and asset-backed issuers. Should either or both of these types of registrants be permitted to omit the proposed resource extraction payment disclosure in the annual reports on Form 10–K?

C. Definition of "Commercial Development of Oil, Natural Gas, or Minerals"

As noted above, Section 13(q) defines "commercial development of oil, natural gas, or minerals" for purposes of the section.[40] Consistent with Section 13(q), we propose to define "commercial development of oil, natural gas, or minerals" to include the activities of exploration, extraction, processing, export and other significant actions relating to oil, natural gas, or minerals, or the acquisition of a license for any such activity.[41] While Section 13(q) provides the Commission with flexibility to define commercial development, we believe it is appropriate to use the statutory direction in the proposed rules and to seek comment on the scope of activities included in the proposed definition.

We understand that the EITI criteria primarily focus on exploration and production activities.[42] Thus, the statutory language appears to include activities beyond what is currently contemplated by the EITI.[43] However, because the statute sets forth a clear list of activities, we preliminarily believe that our rules should be consistent with that list.

The proposed definition is intended to capture only activities that are directly related to the commercial development of oil, natural gas, or minerals. It is not intended to capture activities that are ancillary or preparatory to such commercial development. Accordingly, we would not consider a manufacturer of a product used in the commercial development of oil, natural gas, or minerals to be engaged in the commercial development of the resource.[44] For example, a manufacturer of drill bits or other machinery used in the extraction of oil would not fall within the definition of commercial development. Similarly, transportation activities generally would not be included within the proposed definition. On the other hand, an issuer engaged in the removal of impurities, such as sulfur, carbon dioxide, and water, from natural gas after extraction but prior to its transport through the pipeline would be included in the definition of commercial development because such removal is generally considered to be a necessary part of the processing of natural gas in order to prevent corrosion of the pipeline.

Request for Comment

6. Should we, as proposed, define "commercial development of oil, natural gas, or minerals" as the term is described in the statute? Should it be defined differently (*e.g.* more broadly or more narrowly)? If we should define the term, what definition would be appropriate?

7. Should the definition of "commercial development of oil, natural gas, or minerals" include the activities of exploration, extraction, processing, and export, as proposed?[45] Should we exclude any of these activities? If so, which activities and why? If not, why not? Would excluding certain activities be consistent with the statute?

• In this regard, we note that, as discussed above, disclosing payments beyond those related to exploration and production is not required by the EITI criteria, and other countries have focused on identifying, reporting and verifying revenue streams related to those activities only.[46] Should the definition only include the activities of exploration and extraction, consistent with the EITI, and not include processing, export, and other significant actions?[47] Should the definition include the activities of exploration, extraction, and only some processing activities, such as those related to the upgrading of bitumen and heavy oil?[48] Should the definition explicitly include production, consistent with the use of that term by the EITI?[49] Does "production" in the oil, natural gas, and mining industries include activities that are different than those covered by "extraction" so that if we do not include production in the definition of commercial development, some payments may go unreported?

8. Are there other significant activities that we should include in the definition?[50] Should we provide further guidance regarding activities that may not be covered by the list of activities, but could constitute a "significant action?" If so, what activities should be covered?

9. As noted, we do not believe the proposed definition of "commercial development of oil natural gas, or minerals" would include transportation to the extent that the oil, natural gas, or minerals are transported for purposes

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[40] *See* Section I. above and 15 U.S.C. 78m(q)(1)(A).

[41] *See* proposed Item 105(b)(1) of Regulation S–K, proposed Item 16I.B.(1) under Part II of Form 20–F, and proposed paragraph B.(17)(b)(1) under the General Instructions of Form 40–F.

[42] *See, e.g., Implementing the EITI* at p. 24. Exploration and production activities often are referred to as "upstream activities." *Id.* We note, however, that at least one EITI program has included the disclosure of payments made in connection with or following processing activities, such as excise and export taxes, in addition to those relating to exploration and production activities. *See* Liberian Extractive Industries Transparency Initiative Secretariat, *Final Report of the Administrators of the Second LEITI Reconciliation,* Annex 2 (February 2010) ("*Liberian Final Report*") (available at *http://leiti.org.lr/doc/LEITI2ndReconciliationFinalReport.pdf*).

[43] *See also* letter from Senator Cardin, stating that " * * * EITI is a minimum reporting standard, and the intent of Sec. 1504 was to go beyond these requirements.").

[44] In this regard, we have received a letter suggesting that we clarify whether selling equipment to a resource extraction company, which is then used to explore for oil, natural gas, or minerals, is a significant action relating to oil, natural gas, or minerals. *See* letter from Mike Koehler, Assistant Professor of Business Law, Butler University (September 3, 2010).

[45] In this regard, we have received a letter suggesting that we interpret the statutory definition of commercial development to include "upstream" activities involved in the exploration and production of resources, "midstream" activities involved in the trading and transport of resources, and "downstream" activities involved in the refining, ore processing and marketing of resources. *See* the letter from Calvert Investments and Social Investment Forum ("Calvert and SIF") (November 15, 2010).

[46] *See Implementing the EITI* at p. 35.

[47] Some commentators support limiting the definition of commercial development to "upstream" activities only. *See* letters from American Petroleum Institute ("API") (October 12, 2010); National Mining Association ("NMA") (November 16, 2010) (submitted as a "White Paper"); and RDS. In contrast, other commentators support a definition of commercial development that covers "upstream," "midstream," and "downstream" activities. *See* letters from Calvert and SIF and Publish What You Pay United States ("PWYP") (November 22, 2010).

[48] *See* letter from API, which suggests this approach.

[49] We believe the term "extraction" would include the production of oil and natural gas as well as the extraction of minerals. The EITI appears to use the terms "extraction" and "production" interchangeably. For example, the EITI recognizes that "the benefits of resource extraction occur as revenue streams over many years * * *." *EITI Source Book* at p. 8. However, when discussing various aspects of benefit streams, such as their materiality, the EITI refers to a company's or host government's estimated total production value. *See EITI Source Book,* p. 27.

[50] We have received a request to specify that other significant actions "includes the transport of oil, natural gas or ores, such as in pipelines or other mechanisms" and "may include, but not be limited to, contracting for services such as security operations that may be necessary to the operation of a particular element of the resource extraction life cycle." Letter from PWYP.

other than export, and we note that payments related to transportation activities generally are not included in EITI programs.[51] Should the definition include transportation of oil, natural gas, or minerals? [52] Should compression of natural gas be treated as processing, and therefore subject to the proposed rules, or transportation, and therefore not subject to the proposed rules?

10. Should the definition of "commercial development of oil, natural gas, or minerals" explicitly exclude any other oil, natural gas, or mining activities? If so, please tell us what types of activities should be excluded and why.

11. Should we provide any additional guidance regarding the types of activities that may be within or outside of the scope of the definition?

D. Definition of "Payment"

Section 13(q) defines "payment" to mean a payment that:

- Is made to further the commercial development of oil, natural gas, or minerals;
- Is not de minimis; and
- Includes taxes, royalties, fees (including license fees), production entitlements, bonuses, and other material benefits, that the Commission, consistent with EITI's guidelines (to the extent practicable), determines are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals.[53]

We propose to define the term "payment" in the proposed rule and form amendments using the definition provided in the statute.[54]

1. Types of Payments

We interpret Section 13(q) to provide that the types of payments that are included in the statutory language should be subject to disclosure under our rules to the extent that the Commission determines that the types of payments and any "other material benefits" are part of the "commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals." Consistent with Section 13(q), we propose to require resource extraction issuers to disclose payments of the type identified in the statute because, as discussed below, we preliminarily believe that they are part of the "commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals." Therefore, we are proposing to include the statutory list as the list of payments covered by the rules. We note that the types of payments listed in the statute generally are consistent with the types of payments the EITI suggests should be disclosed, which we believe is evidence that the payment types are part of the commonly recognized revenue stream for this purpose. As noted above, the statute provides that our determination should be consistent with the EITI's guidelines, to the extent practicable. Guidance for implementing the EITI suggests that a country's disclosure requirements might include the following benefit streams: [55]

Benefit Stream [56]	Further description
Host government's production entitlement	This is the host government's share of the total production. This production entitlement can either be transferred directly to the host government or to the national state-owned company. Also, this stream can either be in kind and/or in cash.
National state-owned company production entitlement	This is the national state-owned company's share of the total production. This production entitlement is derived from the national state-owned company's equity interest. This stream can either be in kind and/or in cash.
Profits taxes	Taxes levied on the profits of a company's upstream activities.
Royalties	Royalty arrangements will differ between host government regimes. Royalty arrangements can include a company's obligation to dispose of all production and pay over a proportion of the sales proceeds. On other occasions, the host government has a more direct interest in the underlying production and makes sales arrangements independently of the concession holder. These "royalties" are more akin to a host government's production entitlement.
Dividends [57]	Dividends paid to the host government as shareholder of the national state-owned company in respect of shares and any profit distributions in respect of any form of capital other than debt or loan capital.
Bonuses (such as signature, discovery, production)	Payments related to bonuses for and in consideration of: • Awards, grants and transfers of extraction rights; • Achievement of certain production levels or certain targets; and • Discovery of additional mineral reserves/deposits.
Licence fees, rental fees, entry fees and other considerations for licences and/or concessions.	Payments to the host government and/or national state-owned company for: • Receiving and/or commencing exploration and/or for the retention of a licence or concession (licence/concession fee)[.] • Performing exploration work and/or collecting data (entry fees). These are likely to be made in the pre-production phase. • Leasing or renting the concession or licence area.
Other significant benefits to host governments [58]	These benefit streams include tax that is levied on the income, production or profits of companies. These exclude tax that is levied on consumption, such as value-added taxes, personal income taxes or sales taxes.

[51] *Implementing the EITI* at p. 35. While transporting, processing, and refining are activities that are outside the scope of most EITI programs, the EITI has stated that "a country may find it useful to cover these 'downstream' oil, gas, and mining transactions in order to gain a better understanding of overall sector financial flows, and possibly to obtain a better understanding of the link between the value of downstream transactions and original, upstream transactions (exploration and production-related)." *Implementing the EITI* at pp. 35–36.

[52] PWYP advocated including transportation under the definition of commercial development "[g]iven the potential size of the payments involved, and the capacity of vertically integrated companies to substitute payments to governments at different levels * * *." Letter from PWYP.

[53] 15 U.S.C. 78m(q)(1)(C).

[54] *See* proposed Item 105(b)(3) of Regulation S–K, proposed Item 16I.B.(3) under Part II of Form 20–F, and proposed paragraph B.(17)(b)(3) under the General Instructions of Form 40–F.

[55] *EITI Source Book,* pp. 27–28.

[56] Under the EITI, benefit streams are defined as being any potential source of economic benefit which a host government receives from an extractive industry. *See EITI Source Book,* p. 26.

[57] Dividends are not included in the list of payments identified in Section 13(q) and the proposed rules do not include dividends in the list of payments required to be disclosed.

[58] Under our proposed rules, taxes include both profit taxes and taxes that the EITI suggests are significant benefits to host governments. We have not identified any other material benefits at this time.

We preliminary believe that a definition that is generally consistent with EITI guidance furthers the intent of the statute to support international transparency efforts.

At this time we are not proposing to determine "other material benefits" that should be classified as payments subject to disclosure. We recognize that there may be other payments that should be included in, or excluded from, the list. In addition, it is possible that the nature of payments that are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals may change over time, including in response to final rules promulgated under Section 13(q). We also recognize that it may be appropriate to provide more specific guidance about the particular payments that should be disclosed. Our requests for comment are intended to elicit detailed information about what types of payments should be included in, or excluded from, the rules; what additional guidance may be helpful or necessary; and whether there are "other material benefits" that should be specified in the list of payments subject to disclosure because they are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals.

Request for Comment

12. Should the definition of "payment" include the list of the types of payments from Section 13(q), as proposed? Are there additional types of payments that we should include in the definition of "payment?" Should the definition exclude certain types of payments? Are there certain payments, for example, specific types of taxes, fees, or benefits that we should include in, or exclude from, the list? Alternatively, should we provide guidance in our rules in the form of examples of payments that we believe resource extraction issuers would be required to disclose?

13. As noted above, the definition of payment includes "taxes," which is consistent with Section 13(q) and the EITI.[59] In order to clarify the meaning of this term in a manner consistent with the EITI, we have included an instruction in our proposal noting that resource extraction issuers would be required to disclose taxes on corporate profits, corporate income, and production and would not be required to disclose taxies levied on consumption, such as value added taxes, personal income taxes, or sales taxes.[60] Consistent with the EITI, we are not proposing to require disclosure of consumption taxes because we do not believe such taxes are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, and minerals. Is our proposal regarding disclosure of taxes appropriate? Should the types of taxes listed as requiring disclosure, or not requiring disclosure, be revised? If so, how should they be revised? Are there other taxes that we should include in or exclude from the disclosure requirements?

14. While the definition of "payment" in Section 13(q) does not address the means by which a payment may be made, we believe it would cover payments made in cash or in kind. Should a resource extraction issuer be required to disclose payments regardless of how the payment is made (*e.g.* in cash or in kind)?[61] Should the rule be revised to make clear that "payment" would include payments made in cash or in kind?

15. The definition includes "fees (including license fees)," which is consistent with Section 13(q) and the EITI. As noted above, the EITI gives examples of the fees that should be disclosed, including concession fees, entry fees, and leasing and rental fees, which would likewise be covered under our proposal. In addition to license fees, should the rules specifically list other types of fees that would be subject to disclosure?

16. Are there other fees that we should identify in the rules or in guidance? For example, should we specify that disclosure would be required for fees paid for environmental permits, water and surface use permits, and other land use permits; fees for construction and infrastructure planning permits, air quality and fire permits, additional environmental permits, customs duties, and trade levies? Would these types of fees be considered to fall within the categories of fees that we have identified as being subject to disclosure?

17. Are there some types of fees that we should explicitly exclude from the definition?

18. The definition includes "bonuses," which is consistent with Section 13(q) and the EITI. "Bonuses" would include the examples of bonuses identified by the EITI as noted in the table above. Should we provide further guidance about the meaning of the term "bonus" for purposes of this disclosure?

19. Are there types of bonuses that we should exclude from the definition of "payment?"

20. Are there "other material benefits" that we should specify as being included within the definition of "payment?" In that regard, how should we determine what benefits "are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals?" Should we include a broad, non-exclusive definition of "other material benefits," such as benefits that are material to and directly result from or directly relate to the exploration, extraction, processing, or export of oil, natural gas, or minerals?[62] Or would including a broad definition be inconsistent with the statutory language directing us to identify other material benefits that "are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals?"

21. As noted, dividends are not included in the list of payments required to be disclosed under the proposed rules. Should we determine that dividends are "other material benefits" and require disclosure of dividends? Are dividends part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals?

22. We do not believe the proposed definition of payment should include payments resource extraction issuers make for infrastructure improvements, even if they are a direct cost of engaging in the commercial development of oil, natural gas, or minerals because it is not clear that such payments would be covered by the specific list of items in the statute or otherwise would be a part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals.[63] Should

[59] As noted above, the EITI includes in its suggested list of payments to be disclosed profits taxes and "other significant benefits," which include taxes levied on the "income, production or profits of companies." *EITI Source Book* at pp. 27–28.

[60] *See* proposed Instruction to paragraph (b)(3)(iii)(A) of Regulation S–K Item 105, proposed Instruction 3 to Item 16I of Form 20–F, and proposed Note 3 to Instruction B.(17) of Form 40–F.

[61] For example, the EITI permits the use of an "in kind" measure, such as the number of barrels or volume conveyed to the host government, instead of a cash value, for production entitlements and royalty arrangements that are similar to production entitlements. *See EITI Source Book,* p. 27.

[62] One commentator requested that we define broadly other material benefits as governmental payments "relating to the execution of any aspect of covered operations in the relevant jurisdiction that a reasonable person would find material to the project's net worth," including but not limited to activities involved in the exploration and production of resources, the trading and transport of resources, and the refining and marketing of resources. Letter from PWYP.

[63] Mining companies often make such payments either because, due to the poor level of development in a host country, infrastructure

Continued

our definition cover such payments? Would such payments be considered part of the commonly recognized revenue stream? Would these types of payments distort the disclosure of payments for extractive activities?

23. "Social or community" payments generally include payments that relate to improvements of a host country's schools or hospitals, or to contributions to a host country's universities or funds to further resource research and development. As proposed, our rules would not expressly include social or community payments within the definition of "payment." Some EITI programs include social or community payments while others do not.[64] Are such payments part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals? Should we require disclosure of only certain "social or community" payments under the "other material benefits" provision, such as if those payments directly fulfill a condition to engaging in resource extraction activities in the host country?[65] Would such payments be considered part of the commonly recognized revenue stream?

24. Are there other types of payments that we should include as "other material benefits?" For example, should we, as requested by one commentator, require disclosure of "ancillary payments made pursuant to the investment contract (including personnel training programs, local content, technology transfer and local supply requirements)" and payments "related to any liabilities incurred (including penalties for violations of law or regulation, environmental and remediation liabilities, and bond guarantees entered into with the central banks or similar national or multi-national entities, as well as costs arising in connection with any such bond guarantees)"?[66]

25. Should we provide additional guidance regarding the types of payments that resource extraction issuers should disclose? If additional guidance is appropriate, should we provide clarification in the rules or as interpretive guidance?

2. The "Not De Minimis" Requirement

Section 13(q) defines "payment," in part, to be a payment that is "not de minimis," without defining what would be considered "not de minimis." If a payment is de minimis, it would not be subject to disclosure; if it is not de minimis, it could be subject to disclosure if the other standards for disclosure are present.

Under the EITI, countries are free to establish a materiality level for disclosure. For example, countries may establish a materiality level based on the size of payments or the size of companies subject to disclosure.[67] As noted, Section 13(q) established the threshold for payment disclosure as "not de minimis" rather than requiring disclosure of "material" payments.[68] Given the use of the phrase "not de minimis," we preliminarily do not believe that "not de minimis" equates to a materiality standard. The term "de minimis" is defined generally as something that is "lacking significance or importance" or "so minor as to merit disregard."[69] We preliminarily believe the phrase "not de minimis" is sufficiently clear that further explication is unnecessary, and we do not propose to prescribe a standard for what amounts would be considered de minimis or not de minimis for purposes of the new disclosure requirement.

We preliminarily believe it is more appropriate to define the term "payment" consistent with the definition in Section 13(q) without specifically defining "not de minimis" for purposes of the requirement. However, we seek comment, as described below, on whether to define "not de minimis." We also are soliciting comment on several possible standards to include in our final rule, as necessary or appropriate, to provide additional certainty concerning what payments are required to be disclosed under these new rules. As described in more detail below, the possible standards could include an absolute dollar amount, a relative measure (*e.g.* a percentage of expenses, revenues or some other amount incurred per project or in total for the year covered by the annual report), or a combination of the two approaches.[70]

Request for Comment

26. Section 13(q) establishes the threshold for payment disclosure as "not de minimis," which we preliminarily believe is a standard different from a materiality standard.[71] Is our interpretation that "not de minimis" is not the same as "material" correct?

27. Should we define "not de minimis" for purposes of the proposed rules? Why or why not?[72] What would be the advantages or disadvantages of not defining that term? If the final rules do not provide a definition, should an issuer be required to disclose the basis and methodology it used in assessing whether a payment amount was "not de minimis?"

28. If we should define "not de minimis," what should that definition be?[73] Provide data to support your definition if you are able to do so.

29. What would be the advantages or disadvantages of defining "not de

improvements are necessary to gain access to the host country's minerals, or because the companies are contractually obligated to improve the host country's roads as a condition of engaging in exploration or extraction activities. The EITI has acknowledged that the scope of an EITI program might have to be expanded to include such infrastructure payments. *See Implementing the EITI,* p. 25.

[64] *See Implementing the EITI,* p. 24. *See also* letter from Senator Cardin (noting that many EITI implementing countries are considering reporting on social payments). One commentator has requested that we exclude payments relating to community development, including those pertaining to local purchasing or employment, from the disclosure requirements. *See* letter from NMA.

[65] *See* letter from PWYP (supporting the inclusion of "social" payments under the definition of payment, which it defines as payments "made by extractive industry participants in order to reduce operational risk by improving the welfare of local communities, individual citizens and organizations in the villages, cities or countries where these companies work, or in order to obtain a 'social license to operate'."). *Cf.* letter from NMA (opposing disclosure of payments "that provide only 'indirect economic benefits' such as construction of local infrastructure (like schools, roads, hospitals, and the like) that are not primarily used for extractive activities.").

[66] Letter from PWYP.

[67] *Implementing the EITI,* p. 30. The EITI Source Book notes that a benefit stream is material "if its omission or misstatement could distort the final EITI report" for the country. *EITI Source Book* at p. 26.

[68] In contrast, the definition of payment also includes the phrase "other material benefits."

[69] Merriam-Webster Dictionary (available at *http://www.merriam-webster.com/dictionary/deminimis*).

[70] For example, we could define "not de minimis" to be an amount that meets or exceeds the lesser of a dollar amount, such as $100,000, or a percentage, such as 1%, of an issuer's expenses, revenues or some other amount for the year.

[71] One commentator stated that "reporting only on material payments is contrary to Congress's distinction between a de minimis standard applied to individual payments and a materiality standard applied to benefit streams." *See* letter from Revenue Watch Institute (December 6, 2010) ("RWI").

[72] Some commentators have requested that we provide a definition of "not de minimis." *See* letter from Calvert and SIF (stating such a definition is necessary "due to the lack of applicable precedent regarding the de minimis concept featured in Section 1504* * *"); NMA; and PWYP.

[73] Calvert and SIF have suggested that we set the "de minimis threshold" at $15,000, which is similar to the level used by the London Stock Exchange's Alternative Investment Market ("AIM") listing rule that requires disclosure of any payment above £10,000 (approximately $15,000) made to any government or regulatory authority by an oil, gas or mining company. *See* letter from Calvert and SIF. PWYP has suggested both qualitative and quantitative definitions of de minimis. According to its qualitative definition, de minimis "means an item so insignificant that it is not relevant to a reasonable person in determining the net value of the project's annual liabilities." According to its quantitative definition, de minimis "means any payment that exceeds the equivalent of $1,000 or payments that, in the aggregate, exceed the equivalent of $15,000." Letter from PWYP.

minimis" as "material?" Would such a reading be consistent with the language and intent of the statute? Would such a standard be a reasonable means of encouraging consistent disclosure? Would it be necessary for the Commission to provide additional guidance on how to determine materiality if a materiality standard governed this disclosure? If so, what guidance would be appropriate in the context of this information?

30. Should we adopt a definition of "not de minimis" that uses an absolute dollar amount as the threshold? If so, what would be the appropriate dollar amount? Should the "not de minimis" payment threshold be $100,000, an amount less than $100,000, such as $1,000, $10,000, $15,000,[74] or $50,000, or an amount greater than $100,000, such as $200,000, $500,000, $1,000,000, or $10,000,000? Should some other dollar amount be used?

31. The type and amount of payments made by resource extraction issuers may vary greatly, depending on the size of the issuer and the nature and size of a particular project. Should the rules account for variations in size of issuers and projects? Would doing so be consistent with Section 13(q)?

32. Should a payment be considered "not de minimis" if it meets or exceeds a percentage of expenses incurred per project for the year that is the subject of the annual report? Is a per project basis appropriate because Section 13(q) requires an issuer to disclose payment information for each project as well as for each government? Instead of a per project basis, should we base a definition of "not de minimis" on a threshold that uses a percentage of an issuer's total expenses for the year or its total expenses incurred for all projects undertaken in a particular country for the year?[75] Should the percentage threshold be based on something else, such as revenues, profits or income? Would using a percentage threshold further the intent of the statute and help minimize the costs associated with providing the disclosure?

33. If a percentage threshold should be used to define "not de minimis," should the percentage be 1%, 2%, 3%, 4%, 5%, or a higher percentage? Should the definition use a percentage lower than 1%, such as 0.1%, 0.2%, 0.3%, 0.4%, or 0.5%?

34. Should we adopt a definition of "not de minimis" that uses the same dollar amount or the same percentage threshold for all resource extraction issuers, regardless of size?

35. Should we adopt a definition of "not de minimis" that depends on the size of a resource extraction issuer so that the dollar amount or percentage threshold would vary depending on the size of the issuer? For example, should the threshold be $1,000 for non-accelerated filers, $10,000 for accelerated filers, and $100,000 for large accelerated filers? Should some other dollar amount be used for each filer category? If so, what amount? If we use a percentage threshold, should the threshold be 1% for non-accelerated filers, 2% for accelerated filers, and 3% for large accelerated filers? Should some other percentage be used for each filer category? If so, what percentage?

36. Should we define "not de minimis" to be an amount that meets or exceeds the lesser of two measures, for example, a dollar amount, such as $100,000, or a percentage, such as 1%, of an issuer's expenses, revenues or some other amount for the year? Would such an approach be appropriate to address variations in the size of resource extraction issuers?

37. Should we define payments that are "not de minimis" to mean payments that are significant compared to the total expenses incurred by an issuer for a particular project, or with regard to a particular government for the year?

38. We note that the phrase "not de minimis" is used only in the definition of the term "payment." Would it be consistent with the statute to require disclosure of payments that are "not de minimis" only if they are related to material projects of a resource extraction issuer?[76]

3. The "Project" Requirement

While Section 13(q) requires a resource extraction issuer to disclose information regarding the type and total amount of payments made to a foreign government or the Federal Government for each project relating to the commercial development of oil, natural gas, or minerals, it does not define the term "project."[77] We note the EITI does not provide for the disclosure of payments on a per project basis, and thus, does not define the term or provide guidance on how we should define the term. Our rules currently do not include a definition of "project," although, as noted below, our rules include some references to the term "project" that may be useful in considering the term. We understand that, depending upon the particular industry or business in which an issuer operates, and other factors such as the size of an issuer, "project" may be defined in a variety of ways. In light of the fact that neither Section 13(q) nor our current disclosure rules include a definition of the term and to provide flexibility in applying the term to different business contexts, we are not proposing a specific definition for the term. However, we are soliciting comment regarding whether we should define "project," and, if so, what definition would be appropriate.

Request for Comment

39. Should we define "project" for purposes of this new disclosure requirement? If so, why? If not, why not?

40. If we should define "project," what definition would be appropriate?[78] Please be as specific as possible and discuss the basis for your recommendation.

41. Should we define "project" to mean a project as that term is used by a resource extraction issuer in the ordinary course of business? What are the advantages and disadvantages of such an approach? If the final rules were to use such an approach, should an issuer be required to disclose the basis and methodology it used in defining what constitutes a project?

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[74] *See* letter from Calvert and SIF and PWYP.

[75] One commentator suggested a definition of "de minimis" that would require an issuer to disclose payments to a government if, in the aggregate, payments across all categories exceeded five percent or more of the issuer's gross expenses. Once the aggregate amount of payments exceeded the specified threshold, "then all payments in that country otherwise meeting the definition in the Act would be reportable, even though each payment stream would not necessarily be material." Letter from NMA.

[76] Commentators have suggested such an approach, noting that this approach would be consistent with the EITI, which requires disclosure of material payments only. *See* letters from API and RDS. Under the EITI, countries can determine the appropriate threshold for materiality. *See, e.g., EITI Source Book,* p. 26. *Cf.* letter from Senator Cardin (stating that "[r]eporting under Sec. 1504 is designed to complement reporting done under the Extractive Industries Transparency Initiative (EITI), but does not mimic it, and purposefully requires reporting at the project level, disaggregated by payment stream.").

[77] The legislative history does not provide an indication as to how we should define the term.

[78] API suggested defining project to mean "technical and commercial activities carried out within a particular geological basin or province to explore for, develop and produce oil, natural gas or minerals. These activities include, but are not limited to, acreage acquisition, exploration studies, seismic data acquisition, exploration drilling, reservoir engineering studies, facilities engineering design studies, commercial evaluation studies, development drilling, facilities construction, production operations, and abandonment. A project may consist of multiple phases or stages." Letters from American Petroleum Institute (December 9, 2010). PWYP has requested that we define project "in relation to each lease, license and/or other concession-level arrangement entered into by a resource extraction issuer," so as to "capture information related to the discrete, project-specific financial flows affiliated with extractive industry development activities." Letter from PWYP.

42. Should we define "project" to mean a field, mining property, refinery or other processing plant, or pipeline or other mode of transport? Should we define "project" to permit the inclusion of more than one field, mining property, refinery or other processing plant, or pipeline or other mode of transport?

43. Should we adopt a definition of "project" that is substantially similar to the definition of "development project" under Rule 4–10(a)(8) of Regulation S–X? [79] Would reliance on that existing definition, with which oil and natural gas companies are already familiar, help to elicit appropriate payment disclosure under Section 13(q) without over-burdening issuers? [80] Or is that definition unsuitable for purposes of Section 13(q) because it does not explicitly encompass other types of projects, such as exploration projects, and does not relate to mining activities? What modifications to the Regulation S–X definition of "development project," if any, would be appropriate to provide a definition for "project" for it to be suitable for purposes of the disclosure required by Section 13(q)?

- In particular, similar to Rule 4–10(a)(8) and staff guidance regarding the rule, should we define project as:
- The means by which oil, natural gas, or mineral resources are brought to the status of being economically producible or commercially developed;
- typically involving a single engineering activity with a distinct beginning and end;
- having a definite cost estimate, time schedule, or investment decision, and approved for funding by management;
- one that, when completed, results in the exploration, extraction or production, processing, transportation or export of oil, natural gas, or minerals; and
- one that may involve a single reservoir, field or mine, the incremental development of a producing field or mine, or the integrated development of a group of several fields or mines and associated facilities with a common ownership?
- Would it be appropriate to include or exclude any of the aspects listed above? Why or why not?
- Should the definition of project include one that involves more than one engineering activity or an engineering activity that is open-ended? Would a definition that focuses on the level of engineering activity fail to elicit the disclosure of payments in connection with some projects, for example, an exploration project?
- Would a project always have a definite cost estimate, time schedule, or investment decision, or be approved by management? Should any of these characteristics be excluded from any definition of project? Are there any additional characteristics that we should include in any definition of project?
- Should any definition of project encompass only a single reservoir, field or mine? Why or why not?

44. Should we permit issuers to treat operations in a country as a "project?" Would doing so be consistent with the statute? [81]

45. We note that issuers currently use the concept of "reporting unit" for financial reporting purposes (*e.g.*, an operating segment or one level below an operating segment). Should the definition of "project" be consistent with the "reporting unit" concept? [82] Is that definition consistent with the statute? Would using such a definition ease implementation of the disclosure requirements for resource extraction issuers given that payments currently may be tracked on that basis? What concerns, if any, are raised by using such a concept as the basis for defining "project?" Are there other concepts, such as an "asset group" or "cash generating unit," that would provide a more appropriate basis for the definition of "project?"

46. Are there any other factors that we should include in the definition of "project?"

47. Should we define "project" to mean a material project? [83] If so, what should be the basis for determining whether a project is material for purposes of the resource extraction payment disclosure rules? Would defining project to mean a material project be consistent with Section 13(q)?

48. Should we permit issuers to aggregate payments by country rather than project? [84] Would that be consistent with Section 13(q)?

4. Payments by "a Subsidiary * * * or an Entity Under the Control of the Resource Extraction Issuer"

Section 13(q) requires a resource extraction issuer to disclose payments made by a subsidiary or an entity under the control of the resource extraction issuer, in addition to its own payments, to a foreign government or the Federal

[79] Under that rule, the term "development project" is defined as the "means by which petroleum resources are brought to the status of economically producible. As examples, the development of a single reservoir or field, an incremental development in a producing field, or the integrated development of a group of several fields and associated facilities with a common ownership may constitute a development project." 17 CFR 210.4–10(a)(8). *See also* Compliance and Disclosure Interpretation ("CDI") 108.01 under the Oil and Gas Rules issued by the Commission's Division of Corporation Finance on October 26, 2009 (available at *http://www.sec.gov/divisions/corpfin/guidance/oilandgas-interp.htm).* The CDI provides in relevant part that a "development project is typically a single engineering activity with a distinct beginning and end, which, when completed, results in the production, processing or transportation of crude oil or natural gas. A project typically has a definite cost estimate, time schedule and investment decision; is approved for funding by management; may include all classifications of reserves; and will be fully operational after the completion of the initial construction or development. The scope and scale of a project are such that, if a project were terminated before completion, for whatever reason, a significant portion of the previously invested capital would be lost."

[80] One commentator suggested the Commission could use this definition as a basis for defining project because it is well understood by the industry and investors. *See* letter from RDS.

[81] *See* statement from Senator Cardin (explaining the need for the statute because existing disclosures are "not useful in determining the extent of a company's operations in or its ongoing financial arrangements with a country."). 111 *Cong. Rec.* S3315 (daily ed. May 6, 2010). PWYP has suggested permitting an issuer to disclose certain payments on an entity level with respect to a particular jurisdiction but only when the payment, such as a corporate income tax, is calculated at the entity level rather than the project level. *See* letter from PWYP.

[82] One commentator suggested that we define project to be "consistent with the concepts of operating segments and reporting units under which mining companies currently provide information." The suggested definition would include preparation for, or exploitation of, mineral deposits in an identified geographic area, and "would exclude activities such as prospecting, surveying and exploration, which are undertaken well before a 'project' has materialized." Letter from NMA.

[83] Some commentators have suggested defining project in this way. *See* letters from API; Cravath, Swaine & Moore LLP, Cleary Gottlieb Steen & Hamilton LLP, Davis Polk & Wardwell LLP, Shearman & Sterling LLP, Simpson Thacher & Bartlett LLP, Skadden, Arps, Slate, Meagher & Flom LLP, Sullivan & Cromwell LLP, and Wilmer Cutler Pickering Hale and Dorr LLP (November 5, 2010) ("Eight Law Firms"); and RDS. *But see* letter from RWI (stating that "* * * limiting reporting to material projects contravenes Congress's intent to implement a level playing field through a project-by-project disclosure standard.").

[84] *See* letter from API suggesting such an approach. In addition, the NMA has suggested permitting disclosure of payments at the country level for prospecting, surveying, and exploration activities, and for payments that constitute commercially sensitive information or are subject to reasonable host government confidentiality restrictions, in addition to payments, such as corporate income tax payments, that are calculated at the country level. Letter from NMA. Another commentator noted that some payments may be made at the entity level rather than at the project level, and that establishing systems to apportion entity level payments may be prohibitively expensive and that such apportionment could be somewhat arbitrary. The commentator suggested that compliance costs could be mitigated by allowing entity-level payments to be reported at the country level rather than the project level. *See* letter from RWI. *See also* letter from PWYP ("Where * * * certain payments are made at an entity level rather than at the lease/license level * * * this fact should have no bearing on the definition of 'project' but, rather, may give rise to a limited reporting allowance whereby issuers could report at an entity level, rather than project-level, for that specific payment only.").

Government for the purpose of the commercial development of oil, natural gas, or minerals.[85] We are proposing to use the language from Section 13(q) in the disclosure requirements.

Under our proposal and consistent with the statutory language, a resource extraction issuer would be required to provide disclosure if control is present. Consistent with the definition of control under the securities laws, such as in Exchange Act Rule 12b–2, a resource extraction issuer would need to make a factual determination as to whether it has control of an entity based on a consideration of all relevant facts and circumstances.[86] At a minimum, under our proposal, payments made by a subsidiary or entity under the control of a resource extraction issuer would be subject to disclosure under this standard if the resource extraction issuer must provide consolidated financial information for the subsidiary or other entity in the issuer's financial statements included in its Exchange Act reports.[87]

Request for Comment

49. As noted above, our rules currently include definitions of "subsidiary" and "control," which would apply in this context as well. Should we include a different definition for "subsidiary" or "entity under the control of" a resource extraction issuer? If so, why? How should the definitions vary?

50. Under the definition of control, a resource extraction issuer may be determined to control entities that are not consolidated subsidiaries. Is the requirement to disclose payments by an entity under the control of the issuer even though the issuer does not consolidate the entity appropriate?

51. Under the proposed rules, a resource extraction issuer would be required to provide disclosure for an entity if it is consolidated in the financial statements of the resource extraction issuer presented under U.S. GAAP (or other jurisdictional GAAP that requires a U.S. GAAP reconciliation) and IFRS as issued by the IASB because entities meeting the consolidation requirement generally also meet the definition of control. Are there circumstances under U.S. GAAP and IFRS that would render different consolidation results, such as proportionate consolidation, that we should consider? If so, please describe the circumstances and indicate how the different circumstances should be addressed in the new rules. We understand that entities and operations that are proportionately consolidated are viewed as consolidated entities or operations of an extractive issuer, while investments presented on the equity method are not viewed as consolidated entities or operations. Should our rules specifically include these concepts? For instance, should our rules treat equity investees differently even if they are controlled by the resource extraction issuer? Should our rules, as proposed, include equity investees that the issuer controls but does not consolidate?

52. Are there instances, other than control in which a resource extraction issuer should have to disclose payments made by a subsidiary or other entity? If so, should we revise our proposal to mandate disclosure in those circumstances? [88] Would resource extraction issuers have access to payment information in those circumstances? Should our rules specify that an issuer would have to disclose payments made by a non-controlled entity only if the issuer is the operator of the joint venture or other project? [89] Would it be appropriate to require an issuer to disclose payments that correspond to its proportional interest in the joint venture rather than all of the payments made by or for the joint venture? [90]

53. Are there factors or concepts different than the ones discussed above that should determine whether a resource extraction issuer must disclose payments made for a subsidiary or other entity under the issuer's control for the purpose of commercial development of oil, natural gas, or minerals? For example, should the rules require disclosure only of information that the issuer knows or has reason to know?

5. Other Matters

Under the disclosure rules concerning oil and gas reserves adopted in 2008,[91] the Commission required disclosure of reserves in the aggregate and by geographic area and for each country containing 15% or more of a registrant's proved reserves.[92] The oil and gas disclosure rules provide an exception that a registrant need not provide disclosure of the reserves in a country containing 15% or more of the registrant's proved reserves if that country's government prohibits disclosure of reserves in that country.[93] Section 13(q) does not contain an exception to the requirement to disclose payments made to foreign governments for the purpose of commercial development of oil, natural gas, or minerals in circumstances when the host country prohibits the disclosure. The provision also does not include an exception for confidentiality clauses in existing or future agreements. Thus, we have not proposed any exceptions to the proposed disclosure requirements under Section 13(q). Nevertheless, we are interested in learning whether the disclosure requirement would potentially cause a resource extraction issuer to violate any host country's laws and whether an exception similar to the exception in the oil and gas disclosure

[85] 15 U.S.C. 78m(q)(2)(A).

[86] Under Exchange Act Rule 12b–2 [17 CFR 240.12b–2] and Rule 1.02 of Regulation S–X [17 CFR 210.1.02], "control" is defined to mean "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting shares, by contract, or otherwise." The rules also define "subsidiary" ("A 'subsidiary' of a specified person is an affiliate controlled by such person directly, or indirectly through one or more intermediaries. (*See also* 'majority-owned subsidiary,' 'significant subsidiary,' and 'totally-held subsidiary.' ").

[87] This would be the case whether the resource extraction issuer provides consolidated financial information under U.S. Generally Accepted Accounting Principles ("GAAP") or International Financial Reporting Standards as issued by the International Accounting Standards Board ("IFRS"). *See also* letters from API; NMA; and RDS. Those commentators support limiting disclosure of payments made by a subsidiary or other entity to only those entities for which an issuer must consolidate financial information in its Exchange Act reports.

[88] One commentator stated that "[d]isclosure of payment information with respect to unconsolidated equity investees and joint venture interests is crucial to fulfill the intent of the legislation as such information provides information necessary for analysts and investors to analyze issuer's future production and assess equity valuation on a risk-adjusted basis. The definition of 'control' must therefore be sufficiently broad to cover all relationships through which an issuer directly or indirectly exerts, or has the right to exert, significant influence, whether sole or shared, over an entity making extraction-related payments to a foreign government." Letter from PWYP.

[89] We note that, depending on the circumstances, a resource extraction issuer that is the operator of a joint venture may be deemed to control the joint venture, and therefore would be required to provide the payment disclosure for the joint venture pursuant to the disclosure requirements as proposed.

[90] PWYP supports proportionate reporting with respect to unconsolidated equity investees and joint venture interests. *See* letter from PWYP. The NMA also supports proportional reporting when an issuer controls a venture but holds less than a 100 percent interest in the venture and further suggests that proportional reporting would be appropriate if an issuer does not wholly own an entity even though it fully consolidates the financial results of that entity. *See* letter from NMA.

[91] *Modernization of Oil and Gas Reporting,* Release No. 33–8995 (December 31, 2008), 74 FR 2158 (January 14, 2009) ("Oil and Gas Adopting Release").

[92] *See* Item 1202(a)(2) of Regulation S–K [17 CFR 1202(a)(2)].

[93] Instruction 4 to Item 1202(a)(2). In addition, a registrant need not provide disclosure of the reserves in a country containing 15% or more of the registrant's proved reserves if that country's government prohibits disclosure in a particular field and disclosure of reserves in that country would have the effect of disclosing reserves in particular fields.

rules would be appropriate for the disclosure requirements under Section 13(q).

In this regard, some commentators have stated that, should a host government prohibit the disclosure of payments made by resource extraction issuers to the host government, without an appropriate exception for that prohibition, an issuer could be compelled to select between avoiding or abandoning projects in that country and maintaining its registration under the Exchange Act. According to those commentators, such a situation would be contrary to the interests of investors and the principles of competition and comity.[94]

Request for Comment

54. Would the disclosure requirement in Section 13(q) and the proposed rules potentially cause a resource extraction issuer to violate any host country's laws? Are there laws that currently prohibit such disclosure? Would the answer depend on the type of payment or the level of aggregation of the payment information required to be disclosed? If there are laws that currently prohibit the type of disclosure required by Section 13(q) and the proposed rules, please identify the specific law and the corresponding country.

55. Should the Commission include an exception to the requirement to disclose the payment information if the laws of a host country prohibit the resource extraction issuer from disclosing the information? [95] Would such an exception be consistent with the statutory provision and the protection of investors? If we provide such an exception, should it be similar to the exception provided in Instruction 4 to Item 1202 of Regulation S–K? [96] Should we require the registrant to disclose the project and the country and to state why the payment information is not disclosed? If so, should we revise Item 1202 to require the same disclosure of the country and reason for non-disclosure?

56. Should the rules provide an exception only if a host country's statutes or administrative code prohibits disclosure of the required payment information? Should we provide an exception if a judicial or administrative order or executive decree prohibits disclosing the required payment information as long as the order or decree is in written form? Should we limit any exception provided to circumstances in which such a prohibition on disclosure was in place prior to the enactment of the Act?

57. Should the rules provide an exception for existing or future agreements that contain confidentiality provisions? [97] Would an exception be consistent with the statute and the protection of investors?

58. Are there circumstances in which the disclosure of the required payment information would jeopardize the safety and security of a resource extraction issuer's operations or employees? If so, should the rules provide an exception for those circumstances? [98]

59. Should we permit a foreign private issuer that is already subject to resource payment disclosure obligations under its home country laws or the rules of its home country stock exchange to follow those home country laws or rules instead of the resource extraction disclosure rules mandated under Section 13(q)? [99]

60. Are there any other circumstances in which an exception to the disclosure requirement would be appropriate? For instance, would it be appropriate to provide an exception for commercially or competitively sensitive information,[100] or when disclosure would cause a resource extraction issuer to breach a contractual obligation?

E. Definition of "Foreign Government"

Under Section 13(q), Congress defined "foreign government" to mean a foreign government, a department, agency, or instrumentality of a foreign government, or a company owned by a foreign government, while granting the Commission the authority to determine the scope of the definition.[101] For purposes of the disclosure requirement, we propose to define the term "foreign government" consistent with the statute and to specifically include foreign subnational governments in the definition to provide additional clarity regarding the definition.[102] Resource extraction issuers may be required to pay fees for permits, licenses, concessions, and other entry requirements to a variety of national and subnational foreign governments, including a state, province, county, district, municipality or other level of subnational government.[103] The proposed definition, is intended to capture payments made by resource extraction issuers to any foreign government and would not be limited to payments made to foreign national governments.[104]

Section 13(q) requires that a resource extraction issuer disclose payments to the Federal Government in addition to payments made to a foreign government. While Congress left undefined the term "Federal Government," typically that term refers only to the U.S. national government, and not to the states or other subnational governments in the United States.[105] We propose to clarify in the rule text that "Federal Government" means the United States Federal Government.[106]

Request for Comment

61. Should the definition of foreign government include a foreign government, a department, agency, or

[94] *See, e.g.,* letter from Eight Law Firms. *But see* letter from Senator Cardin, stating that "[t]he language of Sec. 1504 is very clear: there should be no exemptions for confidentiality or for host-country restrictions. It would be too easy for countries who want to avoid disclosures to simply pass their own law against disclosure. The purpose of Sec. 1504 is to not allow for exemptions for confidentiality or other reasons that undermine the principle of transparency and full disclosure.").

[95] *See* letters from API; Eight Law Firms; NMA; and RDS supporting such an exception. One commentator suggested that laws prohibiting disclosure are uncommon, but "normal exemption procedures conducted on a case-by-case basis are sufficient to deal with such conflicts." Letter from RWI. *But see* letter from Senator Cardin.

[96] *See* discussion in footnote 93 and accompanying text above regarding the exception for disclosure of certain proved reserves.

[97] *See* letter from API supporting such an exception.

[98] *See* letter from API suggesting such an exception.

[99] *See* letter from RDS suggesting such an exception.

[100] *See* letter from API; NMA; and RDS. *But see* letter from PWYP (discussing concerns regarding competitiveness and commercially sensitive information and noting a study of "over 100 oil and mining contracts between host governments and extractive companies worldwide found that 'stock exchange disclosures are a widely stated exception in confidentiality clauses and where not explicitly stated, would be interpreted to include such an exception.'") (footnote omitted).

[101] 15 U.S.C. 78m(q)(1)(B).

[102] *See* proposed Regulation S–K Item 105(b)(2), proposed Item 16I.B.(2) under Part II of Form 20–F, and proposed paragraph B.(17)(b)(2) under the General Instructions of Form 40–F.

[103] Of course, if a resource extraction issuer makes a payment (that is otherwise covered by the definition of payment) to a third party to be paid to the government on its behalf, disclosure of that payment would be covered under our proposed rule.

[104] This is consistent with the EITI, which recognizes that payments to subnational governments may have to be included within the scope of an EITI program. *See Implementing the EITI,* p. 34. We also believe this is consistent with the statutory scheme of Section 13(q), which requires an issuer to identify, for each disclosed payment, the government that received the payment, and the country in which the government is located. *See* Exchange Act Section 13(q)(2)(D)(ii)(V) [15 U.S.C. 78m(q)(2)(D)(ii)(V)].

[105] In this regard, given that the statute requires disclosure of payments made to a "foreign government or the Federal Government," we believe the term "foreign government" is meant to refer to a non-U.S. government.

[106] *See* proposed Item 105(a) of Regulation S–K, proposed Item 16I.A. under Part II of Form 20–F, and proposed paragraph B.(17)(a) under the General Instructions of Form 40–F.

instrumentality of a foreign government, or a company owned by a foreign government, as proposed?

62. We note that the definition of foreign government would include a company owned by a foreign government. We understand that in the case of certain state owned companies, the government would be a shareholder. Thus, certain transactions may occur as transactions between the company and the government and as transactions between company and shareholder. Should we adopt specific rules or provide guidance regarding payments made by state owned companies that distinguish between such types of transactions?

63. Under Section 13(q) and the proposal, the definition of "foreign government" includes "a company owned by a foreign government." We are proposing to include an instruction in the rules clarifying that a company owned by a foreign government is a company that is at least majority-owned by a foreign government.[107] Is this clarification appropriate? Should a company be considered to be owned by a foreign government if government ownership is lower than majority-ownership? Should the rules provide that a company is owned by a foreign government if government ownership is at a level higher than majority-ownership? If so, what level of ownership would be appropriate? Are there some levels of ownership of companies by a foreign government that should be included in or excluded from the proposed definition of foreign government?

64. Should the definition of foreign government include a foreign subnational government, such as a state, province, county, district, municipality or territory of a non-U.S. government, in addition to a non-U.S. national government, as proposed?

65. Are there some levels of subnational government that should be excluded from the proposed definition of foreign government? If so, please provide specific examples of those levels of subnational government that should be excluded.

66. Should we also require a resource extraction issuer to disclose amounts paid to the states and other subnational governments in the United States in addition to payments to the Federal Government?

67. Is there additional guidance that we should provide regarding the definition of foreign government? [108]

F. Disclosure Required and Form of Disclosure

Section 13(q) mandates that a resource extraction issuer disclose in an annual report the type and total amount of payments made for each project relating to the commercial development of oil, natural gas, or minerals as well as the type and total amount of such payments made to each government.[109] Section 13(q) also mandates the submission of the payment information in an interactive data format, and provides the Commission with the discretion to determine the applicable interactive data standard.[110]

1. Annual Report Requirement

Section 13(q) mandates that a resource extraction issuer provide the payment disclosure required by that section in an annual report, but otherwise does not specify the location of the disclosure, either in terms of a specific form or in terms of location within a specific form. As proposed, a resource extraction issuer would have to provide the required payment disclosure in its Exchange Act annual report filed on Form 10–K, Form 20–F, or Form 40–F. We preliminarily believe this approach is an appropriate way to implement the Act's disclosure requirements for resource extraction issuers without imposing additional burdens that might be associated with submitting a separate annual report to the Commission.[111] In addition, to facilitate investors' ability to locate the disclosure within the annual report without over-burdening them with extensive information about resource extraction payments in the body of the report, our proposed rules would require issuers to include a brief statement under a separate heading entitled, "Payments Made By Resource Extraction Issuers," directing investors to the detailed information about payments provided in the exhibits.

While Section 13(q) mandates that a resource extraction issuer provide the payment disclosure required by that section in an annual report, it does not specifically mandate the time period for which a resource extraction issuer must provide the disclosure. Given that the statute requires the disclosure in an annual report and we are proposing to require resource extraction issuers to furnish the disclosure in the annual report on Form 10–K, Form 20–F, or Form 40–F, as applicable, we believe it is reasonable to require resource extraction issuers to provide the mandated payment information for the fiscal year covered by the applicable annual report.

Request for Comment

68. Section 13(q) requires disclosure of the payment information in an annual report but does not specify the type of annual report. Should we require resource extraction issuers to provide the payment disclosure mandated under Section 13(q) in its Exchange Act annual report, as proposed? [112] Should we require, or permit, resource extraction issuers to provide the payment information in an annual report other than an annual report on Form 10–K, Form 20–F, or Form 40–F? For example, should we require the disclosure in a new form filed annually on the Commission's Electronic Data Gathering, Analysis, and Retrieval system ("EDGAR")? [113] Would requiring resource extraction issuers to disclose the information in a separate annual report be consistent with Section 13(q)? Should we require an oil, natural gas, or mining company to file a separate annual report containing all of the specialized disclosures mandated by the Dodd-Frank Act? [114] What would be the benefits or burdens of such a form for investors or resource extraction issuers? If we should require, or permit, a separate annual report, what should be the due date of the report (*e.g.* 30, 60, 90, 120, or 150 days after the end of the fiscal year covered by the report)?

69. If we require resource extraction issuers to provide the disclosure of payment information in their Exchange

[107] *See* proposed Instruction to Item 105(b)(2) of Regulation S–K; proposed Instruction 2 to Item 16I.B.(2) of Form 20–F; and proposed Note 2 to Instruction B.17(b)(2) of Form 40–F.

[108] In this regard, one commentator has requested that we require an issuer to conduct an appropriate level of due diligence to determine whether a company to which it is making a payment is owned by a foreign government. *See* letter from PWYP.

[109] 15 U.S.C. 78m(q)(2)(A).

[110] 15 U.S.C. 78m(q)(2)(C) and (D).

[111] We received comment that due to the "tight annual reporting deadline," we should not require the payment disclosure to be part of the audited financial statements and that we should keep the reporting separate from annual reporting on Form 10–K and Form 20–F. Letter from API. The commentator recommended requiring the payment disclosure in a separate report with an annual deadline of 150 days following the fiscal year end. *See id.* We note that the statute does not require the payment disclosure to be part of the audited financial statements, and the rules do not propose to do so. Therefore, we preliminarily believe it could be less burdensome for resource extraction issuers, as well as more useful to investors, to provide the disclosure in a form that issuers are already required to file rather than requiring them to furnish a separate report; however, we are soliciting comment about this issue.

[112] *See* letters from Calvert and SIF and PWYP supporting that approach.

[113] *See* letters from API and NMA suggesting such an approach.

[114] *See* Sections 1502 and 1503 of the Dodd-Frank Act.

Act annual reports, should we permit resource extraction issuers to file an amendment to the annual report within a specified period of time subsequent to the due date of the report, similar to Article 12 schedules or financial statements provided in accordance with Regulation S–X Rule 3–09,[115] to provide the payment information? If so, what would be the appropriate time period (*e.g.* 30, 60 or 90 days after the due date of the report)?

70. As noted above, Section 13(q) mandates that a resource extraction issuer provide the payment disclosure required by that section in an annual report, but it does not specifically mandate the time period for which a resource extraction issuer must provide the disclosure. Is it reasonable to require resource extraction issuers to provide the mandated payment information for the fiscal year covered by the applicable annual report, as proposed? Why or why not? Should the rules instead require disclosure of payments made by resource extraction issuers during the most recent calendar year?

71. Should we also require an issuer to provide the resource extraction payment disclosure in a registration statement under the Securities Act of 1933 [116] or under the Exchange Act? If so, what time period should the disclosure cover?

72. Should we require an issuer that has a class of securities exempt from Exchange Act registration pursuant to Exchange Act Rule 12g3–2(b) [117] to provide the resource extraction payment disclosure in its home country annual report or in a report on EDGAR? [118] Would such an approach be consistent with the Exchange Act? [119]

2. Exhibits and Interactive Data Format Requirement

We propose to require a resource extraction issuer to present the mandated payment information in two exhibits to its annual report on Form 10–K, Form 20–F, or Form 40–F, as applicable.[120] Specifically, the proposed rules would add new exhibits (97) and (98) to Item 601 of Regulation S–K, new paragraphs 17 and 18 to the "Instructions as to Exhibits" in Form 20–F, and new paragraph B(17) of the "General Instructions" in Form 40–F.[121] We believe two exhibits are necessary to provide investors with the information in a format that is useful to them. Resource extraction issuers would be required to file the information in HTML or ASCII format in one exhibit, which would enable investors to easily read the disclosure about payment information without additional computer programs or software. Resource extraction issuers also would be required to file an exhibit with the information electronically tagged in XBRL format and the disclosure would be readable through a viewer. As noted above, Section 13(q) requires that the rules issued pursuant to the section require that the information included in the annual report be submitted in an interactive data format. We are proposing to require resource extraction issuers to submit the mandated payment information in XBRL in an exhibit.[122] Some commentators indicated a preference for XBRL.[123]

In addition, we propose to require a resource extraction issuer to provide a statement, under an appropriate heading in the issuer's annual report, referring to the payment information provided in the exhibits to the report.[124] We believe this approach would facilitate access to the information by placing it outside the body of the annual report. By requiring resource extraction issuers to provide the payment information in exhibits to the annual report, the proposed rules would enable anyone accessing EDGAR to determine quickly whether an issuer provided disclosure in accordance with Section 13(q) and the rules issued pursuant to that section. In addition, we are concerned that presenting the information in interactive data format in the body of the annual report would not be comprehensible. Thus, we believe a brief reference in the body of the filing to the disclosure and the complete presentation in the exhibits to the filing is the most appropriate approach.

Resource extraction issuers currently are required to file their registration statements, current and periodic reports in ASCII or HTML.[125] Our electronic filing system also uses other formats for reporting related to corporate issuers, such as XML, to process reports of beneficial ownership of equity securities on Forms 3, 4, and 5 under Section 16(a) of the Exchange Act,[126] and a form of XML known as XBRL to provide financial statement data.[127] As we explained in the XBRL Adopting Release and the proposing release for asset-backed securities,[128] electronic formats such as HTML, XML, and XBRL are open standards [129] that define or

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[115] 17 CFR 210.3–09.

[116] 15 U.S.C. 77a *et seq.*

[117] 17 CFR 240.12g3–2(b). A foreign private issuer may claim that exemption as long as it meets a foreign listing requirement, publishes its material home country documents in English on its Internet Web site or through another electronic information delivery system that is generally available to the public in its primary trading market, and otherwise is not required to file Exchange Act reports. A foreign private issuer typically relies on the Rule 12g3–2(b) exemption in order to establish an unlisted American Depositary Receipt ("ADR") facility for the issuance and trading of ADRs through the over-the-counter market.

[118] *See* letters from Calvert and SIF and PWYP supporting such an approach.

[119] The Commission has not considered Rule 12g3–2(b)—exempt companies to be subject to Exchange Act reporting and filing requirements. Prior to the amendment to Rule 12g3–2(b) in 2008, we required issuers claiming the Rule 12g3–2(b) exemption to furnish paper copies of their material home country documents to the Commission. The documents were deemed furnished and not filed under the Exchange Act because they were subject to their home country, and not Exchange Act, disclosure rules. (*See* the discussion of "furnished" vs. "filed" in Section II.F.3 of this release.) Since the 2008 amendment, Rule 12g3–2(b)-exempt companies do not submit or file any document with the Commission, and must comply only with the rule's Internet publishing requirement.

[120] *See* proposed Regulation S–K Items 601(a), (b)(97), and (b)(98), proposed paragraphs 17 and 18 of the Instructions as to Exhibits for Form 20–F, and proposed paragraph B.(17)(a) under the General Instructions of Form 40–F.

[121] *See id.*

[122] *See* proposed Regulation S–K Item 601(b)(98), proposed paragraph 18 under Instructions as to Exhibits for Form 20–F, and proposed paragraph B.(17)(a)(2) under the General Instructions of Form 40–F.

[123] *See* letters from API; Calvert and SIF; and PWYP. Calvert and SIF stated that XBRL "reduces the costs for investors associated with obtaining and assimilating information from issuers, and, at the same time, reduces the costs to issuers submitting data to regulators." In addition, Calvert and SIF noted that "XBRL allows far more standardization and harmonization of international business reporting standards, thereby lowering the costs of compliance and reporting for issuers, while making the information far more valuable and easily interpreted and analyzed by investors." Letter from Calvert and SIF. PWYP recommended XBRL "in order to more seamlessly integrate with existing company filings formatted in XBRL, as well as the Commission's existing XBRL reporting platform, and with external XBRL-based databases managed by private sector companies." Letter from PWYP. *Cf.* letter from NMA (stating that "issuers should be given the flexibility to disclose the data in any format that would allow users to click through the information in a standard file type (*e.g.* Microsoft Word, Web-based HTML, Microsoft Excel, or .pdf) to reach data sorted by each of the electronic tags specified in the Act." According to this commentator, while XBRL could satisfy the statutory requirement, "issuers should not be prohibited from using other formats that allow for meaningful use of 'electronic tags'.").

[124] *See* proposed Item 4(c) under Part I of Form 10–K, proposed Item 16I.A. under Part II of Form 20–F, and proposed paragraph B.(17)(a) under the General Instructions of Form 40–F.

[125] Rule 301 under Regulation S–T [17 CFR 232.301] requires electronic filings to comply with the EDGAR Filer Manual, and Section 5.1 of the Filer Manual requires that electronic filings be in ASCII or HTML format. Rule 104 under Regulation S–T [17 CFR 232.104] permits filers to submit voluntarily as an adjunct to their official filings in ASCII or HTML unofficial PDF copies of filed documents.

[126] 15 U.S.C. 78p(a).

[127] *See Interactive Data to Improve Financial Reporting,* Release No. 33–9002 (January 30, 2009), 74 FR 6776 (February 10, 2009) ("XBRL Adopting Release").

[128] *See Asset-Backed Securities,* Release No. 33–9117 (April 7, 2010), 75 FR 23328 (May 3, 2010).

[129] The term "open standard" is generally applied to technological specifications that are widely

"tag" data using standard definitions. The tags establish a consistent structure of identity and context. This consistent structure can be recognized and processed by a variety of different software applications.

In the case of HTML, the standardized tags enable Web browsers to present Web sites' embedded text and information in a predictable format so that they are human readable. In the case of XML and XBRL, software applications, such as databases, financial reporting systems, and spreadsheets recognize and process tagged information. As noted above, some commentators have indicated we should require these data points in XBRL as we are proposing.[130]

As mandated by Section 13(q),[131] the proposed rules would require a resource extraction issuer to submit the payment information using electronic tags that identify, for any payments made by a resource extraction issuer to a foreign government or the U.S. Federal Government:

- The total amounts of the payments, by category;
- The currency used to make the payments;
- The financial period in which the payments were made;
- The business segment of the resource extraction issuer that made the payments;
- The government that received the payments, and the country in which the government is located; and
- The project of the resource extraction issuer to which the payments relate.[132]

In addition, under Section 13(q), a resource extraction issuer would be required to provide the type and total amount of payments made for each project and the type and total amount of payments made to each government in interactive data format. Consistent with the statute, the proposed rules require a resource extraction issuer to include an electronic tag that identifies the currency used to make the payments. The statute does not otherwise specify how the resource extraction issuer should present the type and total amount of payments for each project or to each government. We preliminarily believe it is appropriate to require resource extraction issuers to provide the type and total amount of payments for each project and to each government in the currency in which the payments were made, as we believe it may increase comparability with disclosure provided under EITI programs in other countries.

We expect that some of the electronic tags, such as those pertaining to category, currency, country, and financial period would have fixed definitions and would enable interested persons to evaluate and compare the payment information across companies and governments. Other tags, which could include those pertaining to business segment, government, and project, would allow for issuers to enter information specific to their business.

Section 13(q) requires the Commission, to the extent practicable, to make available online, to the public, a compilation of the information required under paragraph (2)(A) of that section.[133] We request comment on the particular form, content, or time period for the compilation.[134]

Request for Comment

73. Should we require that information concerning the type and total amount of payments made for each project and to each government relating to the commercial development of oil, natural gas, or minerals be provided in the exhibits to Form 10–K, Form 20–F, or Form 40–F, as proposed?

74. Should we require, as proposed, a resource extraction issuer to provide a statement, under an appropriate heading in the issuer's annual report, referring to the payment information provided in the exhibits to the report, as proposed?

75. Should we require a resource extraction issuer to present some or all of the required payment information in the body of the annual report instead of, or in addition to, presenting the information in the exhibits? If you believe we should require disclosure of some or all the payment information in the body of the annual report, please explain what information should be required and why. For example, should we require a resource extraction issuer to provide a summary of the payment information in the body of the annual report? If so, what items of information should be disclosed in the summary?

76. Section 13(q) does not require the resource extraction payment information to be audited or provided on an accrual basis.[135] Accordingly, the proposed rules do not include such requirements. Should we require resource extraction issuers to have the payment information audited or provide the payment information on an accrual basis? Why or why not? What would be the likely benefits and burdens? Would including such requirements be consistent with the statute?

77. Should we require two new exhibits for the resource extraction disclosure, as proposed?

78. Should we require that the resource extraction payment disclosure be provided in a new exhibit in HTML or ASCII, as proposed? Why or why not?

79. Should we require the resource extraction payment disclosure to be electronically formatted in XBRL and provided in a new exhibit, as proposed? Is XBRL the most suitable interactive data standard for purposes of this rule? If not, why not? Should the information be provided in XML format? If so, why? Are there characteristics of XML, such as ease of entering information into a form, which makes it a better interactive data standard for the payment information than XBRL? Would the use of the XBRL taxonomy based on U.S. GAAP cause confusion in light of the fact that the information required under Section 13(q) is information about cash or in kind payments (that are not computed in accordance with GAAP) made by resource extraction issuers? Should we require an interactive data standard for the payment information other than XML or XBRL?

80. Section 13(q) and our proposed rules require a resource extraction issuer to include an electronic tag that identifies the currency used to make the payments. If the currency in which the payment was made differs from the issuer's reporting currency, should the rules require issuers to convert the payments to the issuer's reporting currency at the applicable rate? If the rules should, as proposed, require disclosure of in kind payments, should the rules require in kind payments to be converted to the host country currency?

available to the public, royalty-free, and at minimal or no cost.

[130] *See* letter from API; Calvert and SIF; and PWYP.

[131] 15 U.S.C. 78m(q)(2)(D)(ii).

[132] *See* proposed Regulation S–K Item 601(b)(98), paragraph 18 under Instructions as to Exhibits of Form 20–F, and paragraph B.(17)(a)(2) under the General Instructions of Form 40–F.

[133] 15 U.S.C. 78m(q)(3)(A). That information includes the type and total amount of payments made by resource extraction issuers to foreign governments or the U.S. Federal Government for the purpose of the commercial development of oil, natural gas, or minerals on a per project and per government basis.

[134] Section 13(q) provides that "[n]othing in [Section 13(q)(3)(A)] shall require the Commission to make available online information other than the information required to be submitted under the rules issued under paragraph (2)(A)." 15 U.S.C. 78m(q)(3)(B).

[135] One commentator requested that we require issuers to disclose the payment information as a separate section of the audited financial statements that are filed with the Exchange Act annual report and that we require the payment disclosure on both a cash and accrual basis. *See* letter from Calvert and SIF. *See also* letter from PWYP (requesting that we require the information to be included in a separate section of the Exchange Act annual report and subject to "rigorous audit or review procedures by the company's independent external auditor").

Should the rules require in kind payments to be converted to the issuer's reporting currency at the applicable rate? Should the rules require disclosure of the in kind payments in the form in which the payments were made and also require the payments to be converted to the issuer's reporting currency? Should we require issuers to provide a conversion to U.S. dollars for payments made in cash and in kind, and to electronically tag that information?

81. Section 13(q) and our proposed rules require an issuer to include an electronic tag that identifies the financial period in which the payments were made.[136] Should we require an issuer to identify in the tag the particular fiscal year, quarter, or other period, such as a particular half-year, in which the payments were made?

82. Section 13(q) and our proposed rules require an issuer to include an electronic tag that identifies the issuer's business segment that made the payments.[137] Should we define "business segment" for purpose of disclosing and tagging the payment information required by Section 13(q)? If so, what definition should we use? Should we instead allow resource extraction issuers to disclose and identify the business segment in accordance with how it operates its business? What are the advantages and disadvantages of allowing an issuer to rely on its definition of business segment?

83. Section 13(q) and our proposed rules require an issuer to include an electronic tag that identifies the project to which the payments relate.[138] Are there some payments that would not relate to a particular project? If so, should we nevertheless require that each payment be allocated to a particular project? Should we instead permit an issuer to use only the electronic tag that identifies the government receiving the payments if those payments do not relate to, or cannot be allocated to, a particular project?

84. Section 13(q) requires an issuer to electronically tag "such other information as the Commission may determine is necessary or appropriate in the public interest or for the protection of investors."[139] Would it be useful to have additional information about the payments electronically tagged? If so, what additional tags should we require? Are there any other items of information that should be electronically tagged?

85. Should we permit issuers to aggregate their payments into three categories: "taxes and royalties," "production entitlements," and "other payments"?[140] Would that approach be consistent with Section 13(q)?

86. Section 13(q)(3) requires the Commission to provide a compilation of the disclosure made by resource extraction issuers. Should the Commission provide the compilation on an annual basis? Should the compilation be provided on a calendar year basis, or would some other time period be more appropriate? Should the compilation provide information as to the type and total amount of payments made on a country basis? What other information should be provided in the compilation?[141]

3. Treatment for Purposes of the Securities Act and the Exchange Act

The statutory language of Section 13(q) does not specify that the information about resource extraction payments must be "filed," rather, it states that the information should be "include[d] in an annual report[.]"[142] We are proposing that the disclosure required by Section 13(q) would be required to be "furnished" rather than "filed" and not be subject to liability under Section 18 of the Exchange Act, unless the issuer explicitly states that the resource extraction disclosure is filed under the Exchange Act. Issuers that fail to comply with the rules would be subject to violations of Exchange Act Sections 13(a) or 15(d), as applicable.[143] The disclosure would be treated in the same manner as other furnished documents, such as the certifications required to be submitted as exhibit 32[144] to Exchange Act documents under Rule 13a–14(b)[145] or Rule 15d–14(b)[146] and Section 1350 of Chapter 63 of Title 18 of the United States Code,[147] the Audit Committee Report required by Item 407(d) of Regulation S–K[148] and the Compensation Committee Report required by Item 407(e)(5) of Regulation S–K.[149]

We believe this approach is consistent with the statute. Section 13(q) does not mandate that the disclosure be included in the annual report on Form 10–K, Form 20–F, or Form 40–F.[150] In addition, we preliminarily believe this approach is appropriate in light of the nature and primary purpose of the disclosure. Section 13(q) requires the Commission, to the extent practicable, to issue rules under the section that support the Federal Government's commitment to international transparency promotion efforts relating to the commercial development of oil, natural gas, or minerals.[151] We believe the nature and purpose of the disclosure required by Section 13(q) is qualitatively different from the nature and purpose of existing disclosure that has historically been required under Section 13 of the Exchange Act. As a result, we preliminarily believe it is appropriate to require a resource extraction issuer to furnish the disclosure. Therefore, we are proposing new Instructions to Item 105 of Regulation S–K, Item 16I of Form 20–F, and Instruction B.(17) of Form 40–F, which would state that the disclosure provided in response to those items would not be deemed to be "filed" with the Commission or subject to the liabilities of Section 18 of the Exchange Act, and will not be deemed to be incorporated by reference into any filing under the Securities Act or the Exchange Act, except to the extent that

[136] 15 U.S.C. 78m(q)(2)(D)(ii)(III).

[137] 15 U.S.C. 78m(q)(2)(D)(ii)(IV).

[138] 15 U.S.C. 78m(q)(2)(D)(ii)(VI).

[139] 15 U.S.C. 78m(q)(2)(D)(ii)(VII).

[140] *See* letter from API.

[141] We received a suggestion that the compilation take the form of an online database and summary report. The online database would enable users to search by country and company, as well as by year or multiple years of reporting. The suggested summary report would list the total payments by each issuer for each government, total payments within each payment category, the total payments per project for each issuer, and project payments within each payment category. *See* letter from PWYP.

[142] 15 U.S.C. 78m(q)(2)(A).

[143] 15 U.S.C. 78m(a) and 15 U.S.C. 78o(d).

[144] Item 601(b)(32)(ii) of Regulation S–K [17 CFR 229.601(b)(32)].

[145] 17 CFR 240.13a–14(b).

[146] 17 CFR 240.15d–14(b).

[147] 18 U.S.C. 1350.

[148] 17 CFR 229.407(d).

[149] 17 CFR 229.407(e)(5).

[150] *See* letter from NMA.

[151] 15 U.S.C. 78m(q)(2)(E). In addition, an author of the legislation has noted that the purpose of the legislation is to provide information to investors. *See, e.g.,* Statement of Senator Cardin in support of Amendment No. 3732 to Restoring American Financial Stability Act (S3217), 111 *Cong. Rec.* S3316 (daily ed. May 6, 2010) (stating that "Investors need to be able to assess the risks of their investments. Investors need to know where, in what amount, and on what terms their money is being spent in what are often very high-risk operating environments. These environments are often poor developing countries that may be politically unstable, have lots of corruption, and have a history of civil unrest. The investor has a right to know about the payments. Secrecy of payments carries real bottom-line risks for investors. Creating a reporting requirement with the SEC will capture a larger portion of the international extractive industries corporations than any other single mechanism, thereby setting a global standard for transparency and promoting a level playing field. Investors should be able to know how much money is being invested up front in oil, gas, and mining projects. For example, oil companies often pay very large signature payments to secure the rights for an oilfield, long before the first drop of oil is produced. Such payments are in addition to the capital investment required.").

the issuer specifically incorporates it by reference.

Request for Comment

87. Should we, as proposed, require the resource extraction payment disclosure to be furnished as exhibits to the annual report? If not, why not? How should it be provided?

88. Should we require the resource extraction payment disclosure to be filed as exhibits, rather than furnished, which would affect issuers' liability under the Exchange Act or under the Securities Act (if any such issuer incorporates by reference its annual report into a Securities Act registration statement)?

89. Under Exchange Act section 18, "Any person who shall make or cause to be made any statement in any application, report, or document filed pursuant to [the Exchange Act] or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 15, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, shall be liable to any person (not knowing that such statement was false or misleading) who, in reliance upon such statement, shall have purchased or sold a security at a price which was affected by such statement, for damages caused by such reliance, unless the person sued shall prove that he acted in good faith and had no knowledge that such statement was false or misleading." [152] Is it appropriate not to have the disclosures subject to Section 18 liability even if the elements of Section 18 could otherwise be established? Should we require the resource extraction payment disclosure to be filed for purposes of Section 18 of the Exchange Act, but permit an issuer to elect not to incorporate the disclosure into Securities Act filings?

90. Should the resource extraction payment disclosure be furnished annually on Form 8–K? Would that approach be consistent with the statute? If so, should foreign private issuers, which do not file Forms 8–K, be permitted to submit the resource extraction payment disclosure either in their Form 20–F or Form 40–F, as applicable, or annually on Form 6–K, at their election?

G. Effective Date

Section 13(q) provides that, with respect to each resource extraction issuer, the final rules issued under that section shall take effect on the date on which the resource extraction issuer is required to submit an annual report relating to the issuer's fiscal year that ends not earlier than one year after the date on which the Commission issues the final rules under Section 13(q).[153] Because the Commission must enact final rules under Section 13(q) at the latest by April 15, 2011,[154] the statute appears to require disclosure in an issuer's annual report relating to the fiscal year ending on or after April 15, 2012.

Request for Comment

91. Should we provide a delayed effective date for the final rules, either for all issuers subject to the rules or for certain types of issuers (*e.g.* smaller reporting companies or foreign private issuers)? [155] Would doing so be consistent with the statute? Why or why not? If we should provide for a delayed effective date, should issuers be required to provide disclosure in an annual report for the fiscal year ending on or after June 30, 2012, September 30, 2012, December 31, 2012, or some other date?

H. General Request for Comment

We request and encourage any interested person to submit comments regarding:

- The proposed amendments that are the subject of this release;
- Additional or different changes; or
- Other matters that may have an effect on the proposals contained in this release.

We request comment from the point of view of companies, investors and other market participants. With regard to any comments, we note that such comments are of great assistance to our rulemaking initiative if accompanied by supporting data and analysis of the issues addressed in those comments.

III. Paperwork Reduction Act

A. Background

The proposed rule and form amendments contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[156] We are submitting the proposal to the Office of Management and Budget for review in accordance with the PRA.[157] The titles for the collections of information are:

(1) "Regulation S–K" (OMB Control No. 3235–0071); [158]

(2) "Form 10–K" (OMB Control No. 3235–0063);

(3) "Form 20–F" (OMB Control No. 3235–0288); and

(4) "Form 40–F" (OMB Control No. 3235–0381).

The regulation and forms were adopted under the Securities Act and the Exchange Act. The regulation and forms set forth the disclosure requirements for periodic reports and registration statements filed by companies to help shareholders make informed investment and voting decisions. The hours and costs associated with preparing and filing the forms constitute reporting and cost burdens imposed by each collection of information. 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 proposed rule and form amendments would implement Section 13(q) of the Exchange Act, which was added by Section 1504 of the Act. Section 13(q) requires the Commission to "issue final rules that require each resource extraction issuer to include in an annual report of the resource extraction issuer information relating to any payment made by the resource extraction issuer, a subsidiary of the resource extraction issuer, or an entity under the control of the resource extraction issuer to a foreign government or the Federal Government for the purpose of the commercial development of oil, natural gas, or minerals, including—(i) the type and total amount of such payments made for each project of the resource extraction issuer relating to the commercial development of oil, natural gas, or minerals, and (ii) the type and total amount of such payments made to each government." [159] Section 13(q) also mandates the submission of the payment information in an interactive data format, and provides the Commission with the discretion to

[152] Exchange Act Section 18(a).

[153] 15 U.S.C. 78m(q)(2)(F).

[154] Section 13(q)(2)(A) requires that the Commission issue final rules under that section no later than 270 days after the Dodd-Frank Act's enactment. The Act was signed into law on July 21, 2010; therefore the Commission must enact final rules no later than April 15, 2011.

[155] One commentator has requested that we delay the effective date of the resource extraction payment disclosure rules until fiscal year 2013. *See* letter from NMA. Another commentator recommended that "first reporting be for the 2012 fiscal year in 2013." Letter from API.

[156] 44 U.S.C. 3501 *et seq.*

[157] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

[158] The paperwork burden from Regulation S–K is imposed through the forms that are subject to the disclosures in Regulation S–K and is reflected in the analysis of those forms. To avoid a Paperwork Reduction Act inventory reflecting duplicative burdens, for administrative convenience we estimate the burdens imposed by Regulation S–K to be a total of one hour.

[159] 15 U.S.C. 78m(q)(2)(A).

determine the applicable interactive data standard.[160]

The proposed rule and form amendments would require an issuer to provide the statutorily-mandated information about resource extraction payments in an exhibit filed in HTML or ASCII format, which would enable investors to easily read the disclosure about payment information without additional computer programs or software. A resource extraction issuer also would be required to file another exhibit with the information electronically tagged in XBRL format, which would be readable through a viewer. In addition, the proposed rule and form amendments would require a resource extraction issuer to provide a statement, under an appropriate heading in the issuer's annual report, referring to the payment information provided in the exhibits to the report.

The same payment disclosure requirements would apply to U.S. and foreign resource extraction issuers. As discussed above, we propose to add new Item 105 to Regulation S–K [161] to require a resource extraction issuer to provide information relating to any payment made by it, a subsidiary, or an entity under its control to a foreign government or the U.S. Federal Government during the fiscal year covered by the annual report for the purpose of the commercial development of oil, natural gas, or minerals. We also propose to add new Item 4(c) to Form 10–K to require a resource extraction issuer to provide a statement that the information required by Section 13(q) and new Item 105 of Regulation S–K is included in two specified exhibits.[162] In addition, we are proposing to amend Regulation S–K Item 601 to add the two new exhibits to Form 10–K. Because Regulation S–K does not apply to Forms 20–F and 40–F,[163] we propose to amend those forms to include the same disclosure requirements as those proposed for resource extraction issuers that are not foreign private issuers.[164]

Compliance with the proposed rule and form amendments by affected issuers would be mandatory. The disclosure and reports submitted by issuers would not be kept confidential, and there would be no mandatory retention period for the information disclosed.

B. Burden and Cost Estimates Related to the Proposed Amendments

The proposed rule and form amendments would require, if adopted, additional disclosure for a resource extraction issuer's annual report filed on Form 10–K, Form 20–F or Form 40–F, which would increase the burden hour and cost estimates for each of those forms. For purposes of the Paperwork Reduction Act, we estimate the total annual increase in the paperwork burden for all affected companies to comply with our proposed collection of information requirements to be approximately 52,932 hours of company personnel time and to be approximately $11,857,200 for the services of outside professionals. These estimates include the time and cost of collecting the information, preparing and reviewing disclosure, filing documents, and retaining records.

We derived the above estimates by estimating the average number of hours it would take an issuer to prepare and review the proposed disclosure requirements. In deriving our estimates, we recognize that the burdens will likely vary among individual issuers based on a number of factors, including the size and complexity of their operations. We believe that some issuers will experience costs in excess of this average in the first year of compliance with the proposals and some issuers may experience less than these average costs. When determining these estimates, we have assumed that:

- For Form 10–K, 75% of the burden of preparation is carried by the issuer internally and 25% of the burden of preparation is carried by outside professionals retained by the issuer at an average cost of $400 per hour; and
- For Forms 20–F and 40–F, 25% of the burden of preparation is carried by the issuer internally and 75% of the burden of preparation is carried by outside professionals retained by the issuer at an average cost of $400 per hour.

The portion of the burden carried by outside professionals is reflected as a cost, while the portion of the burden carried by the issuer internally is reflected in hours. We request comment regarding the allocation of the annual burden. In particular, we request comment regarding whether the proposed rules would add more internal burden hours rather than costs for outside professionals.

We have based our estimates of the effect that the proposed rule and form amendments, if adopted, would have on those collections of information primarily on our review of the most recently completed PRA submissions for the affected rules and forms as well as on PRA submissions for similar rule and form amendments. We expect that the rules' effect will be greatest during the first year of their effectiveness and diminish in subsequent years.

1. Form 10–K

For purposes of the PRA, we estimate that, of the 13,545 Form 10–Ks filed annually, approximately 861 are filed by issuers that would be affected by the proposed rule and form amendments.[165] We further estimate that the annual incremental paperwork burden for the Forms 10–K as a result of the proposed rule and form amendments would be 75 burden hours per affected form.[166]

2. Regulation S–K

While the proposed rule and form amendments would make revisions to Regulation S–K, the collection of information requirements for that regulation are reflected in the burden hours estimated for Form 10–K. The rules in Regulation S–K do not impose any separate burden. Consistent with historical practice, we are proposing to retain an estimate of one burden hour to Regulation S–K for administrative convenience.

3. Form 20–F

For purposes of the PRA, we estimate that, of the 942 Form 20–F annual reports filed each year, approximately 166 are filed by issuers that would be affected by the proposed form amendments.[167] We estimate that the annual incremental paperwork burden for the Forms 20–F as a result of the proposed rule and form amendments would be 75 burden hours per affected form.

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[160] 15 U.S.C. 78m(q)(2)(C) and (D).

[161] *See* proposed Item 105 of Regulation S–K.

[162] *See* proposed Item 4(c) under Part I of Form 10–K.

[163] While Form 20–F may be used by any foreign private issuer, Form 40–F is only available to a Canadian issuer that is eligible to participate in the U.S.-Canadian Multijurisdictional Disclosure System ("MJDS").

[164] *See* proposed Item 16I under Part II of Form 20–F and proposed paragraph (17) to General Instruction B of Form 40–F.

[165] We derived this number by determining the number of issuers that fall under all the SIC codes that pertain to oil, natural gas, and mining companies and, thus, are most likely to be resource extraction issuers, and subtracting from that figure the number of issuers that file annual reports on Form 20–F and Form 40–F.

[166] In estimating 75 burden hours, we looked to the burden hours associated with the disclosure required by the oil and gas rules adopted in 2008, which estimated an increase of 100 hours for domestic issuers and 150 hours for foreign private issuers. We preliminarily believe that the disclosure required by the proposed rules is less extensive than the disclosure required by the oil and gas rules, and therefore we have estimated 75 burden hours.

[167] We derived this number by determining the number of issuers that fall under all the SIC codes that pertain to oil, natural gas, and mining companies and, thus, are most likely to be resource extraction issuers, and that file annual reports on Form 20–F.

4. Form 40–F

For purposes of the PRA, we estimate that, of the 205 Form 40–F annual reports filed each year, approximately 74 are filed by companies that would be affected by the proposed form amendments.[168] We estimate that the annual incremental paperwork burden for the Forms 40–F as a result of the proposed form amendments would be 75 burden hours per affected form.

C. Summary of Proposed Changes to Annual Compliance Burden in Collection of Information

The following tables summarize the estimated changes in annual compliance burden in the collection of information in hours and costs for Exchange Act annual reports as a result of the proposed rule and form amendments. Table 1 illustrates the incremental annual compliance burden of the collection of information in hours and cost for our amendments.

TABLE 1

Form	Number of responses[169] (A)	Incremental burden hours/form (B)	Total incremental burden hours (C)=(A)*(B)	Incremental company (D)=(C)*0.75 (Form 10–K) (D)=(C)*0.25 (Forms 20–F & 40–F)	Incremental professional (E)=(C)*0.25 (Form 10–K) (E)=(C)*0.75 (Forms 20–F & 40–F)	Incremental professional cost (F)=(E)*$400/hr.
10–K	861	75	64,575	48,431	16,144	$6,457,600
20–F	166	75	12,450	3,112.5	9,337.5	3,735,000
40–F	74	75	5,550	1,387.5	4,162.5	1,665,000

Table 2 illustrates the totalannual compliance burden of the collection of information in hours and cost resulting from the proposed amendments. That burden was calculated by adding the incremental burdens to the existing burdens.

TABLE 2

Form	Current annual response[170]	Current burden hours (A)	Increase in burden hours (B)	Proposed burden hours (C)=(A)+(B)	Current professional costs (D)	Increase in professional costs (E)	Proposed professional costs (F)=(D)+(E)
10–K	13,545	21,363,548	48,431	21,411,979	$2,848,473,000	$6,457,600	$2,854,930,600
20–F	942	622,907	3,112.5	626,019.5	743,089,980	3,735,000	746,824,980
40–F	205	21,884	1,387.5	23,271.5	26,260,500	1,665,000	27,925,500

D. Solicitation of Comment

We request comment on the accuracy of our estimates. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments to: (i) Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (ii) evaluate the accuracy of the Commission's estimate of burden of the proposed collections of information; (iii) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; (iv) evaluate whether there are ways to minimize the burden of the collections of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology; and (v) evaluate whether the proposed amendments will have any effects on any other collections of information not previously identified in this section.

In particular, we request comment and supporting empirical data for purposes of the PRA on whether the proposed rule and form amendments:

- Will affect the burden hours and costs required to produce the annual reports on Forms 10–K, 20–F and 40–F; and
- If so, whether the resulting change in the burden hours and costs required to produce those Exchange Act annual reports is the same as or different than the estimated incremental burden hours and costs proposed by the Commission.

Any member of the public may direct to us any comments concerning the accuracy of these burden estimates and any suggestions for reducing these burdens. Persons submitting comments on the collection of information requirements should direct the comments to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Room 10102, New Executive Office Building, Washington, DC 20503, and should send a copy to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090, with reference to File No. S7–42–10. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7–42–10, and be submitted to the Securities and Exchange Commission, Office of Investor Education and Advocacy, 100 F Street NE., Washington, DC 20549–0213. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is best assured of having its full effect if

[168] We derived this number by determining the number of issuers that fall under all the SIC codes that pertain to oil, natural gas, and mining companies and, thus, are most likely to be resource extraction issuers, and that file annual reports on Form 40–F.

[169] This number corresponds to the estimated number of forms expected to be affected by the proposed rule and form amendments.

[170] The proposed rule and form amendments would not change the number of annual responses.

OMB receives it within 30 days of publication.

IV. Cost-Benefit Analysis

We are proposing the rule and form amendments discussed in this release in order to implement Section 13(q), which was added to the Exchange Act by Section 1504 of the Act. As mandated by Section 13(q), the proposed rule and form amendments would require a resource extraction issuer to disclose in its annual report filed with the Commission certain information relating to any payment made by the issuer, a subsidiary, or an entity under the issuer's control to a foreign government or the U.S. Federal Government for the purpose of the commercial development of oil, natural gas, or minerals. The statutorily required information would include the type and total amount of payments made for each project of the issuer relating to the commercial development of oil, natural gas, or minerals as well as the type and total amount of those payments made to each government. We expect that the proposed rule and form amendments would affect in substantially the same way both U.S. companies and foreign companies that meet Section 13(q)'s definition of "resource extraction issuer," which is an issuer that is required to file an annual report with the Commission and engages in the commercial development of oil, natural gas, or minerals.

We are sensitive to the costs and benefits of the proposed rule and form amendments. Section 1504 of the Dodd-Frank Act added Section 13(q) to the Exchange Act, which establishes a disclosure requirement for payments made by resource extraction issuers. The rules proposed to implement the statute largely track the statutory provision. The cost-benefit analysis that follows focuses on the benefits and costs related to the aspects of the proposed rules in which we exercised discretion, and not on the overall benefits and costs of the statutory regime for disclosure of payments by resource extraction issuers.

A. Benefits

The proposed rulemaking is intended to implement the requirements of Exchange Act Section 13(q) as set forth in Section 1504 of the Dodd-Frank Act. Overall, we expect that the proposed rules will have the benefit of furthering Congress' goal of promoting international transparency efforts.

The proposed rules would clarify that resource extraction issuers would be required to provide information about certain payments made to foreign governments, including foreign subnational governments. This clarification may reduce uncertainty about compliance for resource extraction issuers and increase transparency with regard to the payments made to foreign governments. It also may provide increased consistency in the application of the requirement across resource extraction sectors to the extent that it is more common for certain resource extraction issuers, such as mining companies, to make payments to subnational governments than national governments.

The proposed rules do not provide a definition of what "other material benefits" should be classified as payments subject to disclosure. Specifically, the Commission is not proposing that social or community payments be included in the disclosure mandated by Section 13(q).

Section 13(q) provides that the resource extraction payment disclosure must be "included in an annual report." As proposed, the rules would specify the forms in which the required payment information must be disclosed and location of the required disclosure. The proposed rules would require a resource extraction issuer to provide the required payment disclosure in its Exchange Act annual report filed on Form 10–K, Form 20–F, or Form 40–F. We preliminarily believe this approach is an appropriate way to implement Section 13(q)'s disclosure requirements for resource extraction issuers without imposing additional burdens that might be associated with submitting a separate annual report to the Commission. To facilitate investors' ability to locate the disclosure within the annual report, our proposed rules would require issuers to provide the payment information in exhibits to the annual report and include a brief statement in the body of the annual report under a separate heading entitled, "Payments Made By Resource Extraction Issuers," directing investors to the detailed information about payments provided in the exhibits.

In this regard, the proposed rules would require that the resource extraction payment disclosure be furnished with the Commission, rather than filed. As noted above, Section 13(q) provides that the resource extraction payment disclosure must be "included in an annual report," but it does not indicate whether the disclosure should be filed or furnished. Information that is furnished, rather than filed, is not subject to liability under Section 18 of the Exchange Act, although issuers that fail to comply with the rules would be subject to violations of Exchange Act Sections 13(a) or 15(d), as applicable.[171] By requiring the resource extraction payment disclosure to be furnished rather than filed, we are subjecting the disclosure to less liability than would exist if the disclosure were filed.

To meet the mandate of Section 13(q), the proposed disclosure would have to be electronically formatted using an interactive data standard. We have considered two alternative standards, XML and XBRL, for this purpose. Either standard would benefit market participants and observers, including investors, by enabling them to more easily search, retrieve and analyze the formatted information. To the extent that requiring the specified information to be presented in XBRL format may promote consistency and standardization in business reporting standards and reduce compliance costs, it could benefit both issuers and users of the information. Moreover, the proposed rule and form amendments would require a resource extraction issuer to provide the required payment disclosure in two exhibits to its Exchange Act annual report—one exhibit formatted in HTML or ASCII so that it is easily readable as text and another exhibit formatted in XBRL and providing all of the electronic tags required by Section 13(q) and the proposed rules. We believe that requiring the specified information to be presented in two separate formats will benefit users of the information by allowing them to access the information in whatever format is most useful for their purposes.

B. Costs

Section 13(q) requires the Commission to adopt rules that support the U.S. Federal Government's commitment to international transparency promotion efforts relating to the commercial development of oil, natural gas, or minerals.[172] Resource extraction issuers would incur costs in meeting the additional disclosure required for their Exchange Act annual reports under Section 13(q) and the proposed rule and form amendments. Those costs would include costs related to tracking and collecting information about different types of payments across projects, governments, countries, subsidiaries and other controlled entities. Those tracking and collecting costs would vary depending upon how an issuer would need to modify its existing systems to track, collect, and report the proposed payment information. While some issuers are

[171] 15 U.S.C. 78(a) and 15 U.S.C. 78o(d).

[172] 15 U.S.C. 78m(q)(2)(E).

already providing some payment information on a voluntary basis under an EITI program, others are currently not reporting any payment information. Moreover, the EITI requires the disclosure of payment information on a per country basis, and not per project. Therefore, we expect that most resource extraction issuers would incur some costs to develop disclosure controls and procedures to record, process, summarize and report the required payment information.[173] However, we believe these costs are a result of the statutory requirements that we are required to implement.

The proposed rules do not define "other material benefits" that should be considered payments subject to disclosure, which could impose some costs. First, resource extraction issuers that predominantly make payments that would be required to be disclosed pursuant to the proposed rules (*e.g.* royalties, license fees, bonuses) may be at a competitive disadvantage as compared to resource extraction issuers that predominantly make payments that are not identified in the proposed rules (*e.g.* social and community payments). Second, to the extent that other types of payments could be used to substitute for explicitly defined payments, resource extraction issuers may try to circumvent the required disclosures by shifting to other, not explicitly defined payments, and away from payments defined by the statute. This could have the effect of reducing the transparency contemplated by Section 1504 of the Dodd-Frank Act.

The proposed rules would require a resource extraction issuer to provide the required payment disclosure in its Exchange Act annual report filed on Form 10–K, Form 20–F, or Form 40–F. While we preliminarily believe that requiring resource extraction issuers to provide the information in an existing form that they already file would be less burdensome than providing the information in a new separate form, to the extent that issuers have concerns with regard to the time period in which to provide the disclosure in the existing form,[174] the proposed rules could result in increased compliance costs.

The proposed rules would require resource extraction issuers to submit the information required by Section 13(q) in two separate exhibits, one formatted in HTML or ASCII so that it is easily readable as text and another exhibit formatted in XBRL and providing all of the electronic tags required by Section 13(q). The requirement to provide two separately formatted versions of the required information will result in some increased compliance costs for issuers; however, we believe it is appropriate to require the information in readable format as text in addition to the statutorily-mandated interactive data format in order for the information to be readily accessible to different users. In addition, the electronic formatting costs would vary depending upon an issuer's prior experience with XBRL. While many issuers are already familiar with XBRL because they currently use XBRL for their annual and quarterly reports filed with the Commission, issuers not already filing reports using XBRL would incur some start-up costs associated with XBRL.

V. Consideration of Burden on Competition and Promotion of Efficiency, Competition and Capital Formation

Section 23(a)(2) of the Exchange Act[175] requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition. In addition, Section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. Section 3(f) of the Exchange Act[176] requires us, when engaging in rulemaking that requires us to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition and capital formation.

The Commission is proposing the rule and form amendments discussed in this release to implement the requirements of Exchange Act Section 13(q) as added by Section 1504 of the Dodd-Frank Act. Section 13(q) mandates that the Commission adopt rules requiring resource extraction issuers to disclose in an annual report payments made to a foreign government or the Federal Government for the purpose of the commercial development of oil, natural gas, or minerals. In addition, Section 13(q) requires the Commission to adopt rules that support the U.S. Federal Government's commitment to international transparency promotion efforts relating to the commercial development of oil, natural gas, or minerals.[177]

A commentator stated that, should a host government prohibit the disclosure of payments made by resource extraction issuers to the host government, and if the Commission does not adopt an appropriate exception for that prohibition, an issuer could be compelled to select between avoiding or abandoning projects in that country and maintaining its registration under the Exchange Act.[178] According to the commentator, such a situation would harm the competitive position of issuers and be contrary to the interests of their investors. Some commentators have further maintained that, if the Commission adopts a rule requiring the disclosure of payments without regard to the materiality of the project to which the payments relate, that rule would result in voluminous disclosures of immaterial information of little to no benefit to investors, which may harm the competitive position of affected issuers and may harm efficient capital formation.[179]

Request for Comment

We request comment on whether the proposals, if adopted, would promote efficiency, competition and capital formation or have an impact or burden on competition. In particular, we request comment on the potential effect on efficiency, competition and capital formation should the Commission not adopt certain exceptions or accommodations. Commentators are requested to provide empirical data and other factual support for their views, if possible.

VI. Initial Regulatory Flexibility Analysis

This Initial Regulatory Flexibility Act Analysis has been prepared in accordance with 5 U.S.C. 603. It relates to proposed rule and form amendments to implement Section 13(q) of the Exchange Act, which concerns certain disclosure obligations of resource extraction issuers. As defined by Section 13(q), a resource extraction issuer is an issuer that is required to file an annual report with the Commission, and engages in the commercial development of oil, natural gas, or minerals.

A. Reasons for, and Objectives of, the Proposed Action

The proposed rule and form amendments are designed to implement the requirements of Section 13(q), which was added by Section 1504 of the Dodd-Frank Act. Specifically, the proposed rule and form amendments would require a resource extraction

[173] *See* 17 CFR 240.13a–15(e) and 17 CFR 240.15d–15(e).

[174] *See* letters from API and NMA.

[175] 15 U.S.C. 78w(a)(2).

[176] 15 U.S.C. 78c(f).

[177] 15 U.S.C. 78m(q)(2)(E).

[178] *See* letter from Eight Law Firms.

[179] *See* letters from API and Eight Law Firms.

issuer to disclose in an annual report certain information relating to any payment made by the issuer, a subsidiary, or an entity under the issuer's control to a foreign government or the United States Federal Government for the purpose of the commercial development of oil, natural gas, or minerals. An issuer would have to include that information in an exhibit to its Exchange Act annual report. An issuer also would have to submit the payment information in two exhibits—one formatted in HTML or ASCII and one formatted in XBRL.

B. Legal Basis

We are proposing the rule and form amendments pursuant to Sections 12, 13, 23(a), and 35A of the Exchange Act.

C. Small Entities Subject to the Proposed Amendments

The proposals would affect small entities that are required to file an annual report with the Commission under Section 13(a) or Section 15(d) of the Exchange Act, and are engaged in the commercial development of oil, natural gas, or minerals. Exchange Act Rule 0–10(a) [180] defines an issuer to be a "small business" or "small organization" for purposes of the Regulatory Flexibility Act if it had total assets of $5 million or less on the last day of its most recent fiscal year. We believe that the proposals would affect small entities that meet the definition of resource extraction issuer under Section 13(q). Based on a review of total assets for Exchange Act registrants filing under certain SICs, we estimate that there are approximately 196 oil, natural gas, and mining companies that are resource extraction issuers and that may be considered small entities.

D. Reporting, Recordkeeping, and Other Compliance Requirements

The proposed rule and form amendments would add to the annual disclosure requirements of companies meeting the definition of resource extraction issuer, including small entities, by requiring them to provide the payment disclosure mandated by Section 13(q) in their Exchange Act annual reports. That information must include:

- The type and total amount of payments made for each project of the issuer relating to the commercial development of oil, natural gas, or minerals; and
- The type and total amount of those payments made to each government.

[180] 17 CFR 240.0–10(a).

The same payment disclosure requirements would apply to U.S. and foreign resource extraction issuers. We are proposing to amend Form 10–K and Regulation S–K to require domestic resource extraction issuers to provide the information about payments made to foreign governments or the U.S. Federal Government. Because Regulation S–K does not apply to Forms 20–F and 40–F,[181] we propose to amend those forms to include the same disclosure requirements as those proposed for resource extraction issuers that are not foreign private issuers.[182]

E. Duplicative, Overlapping, or Conflicting Federal Rules

We believe there are no federal rules that duplicate, overlap or conflict with the proposed rules.

F. Significant Alternatives

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish the stated objectives, while minimizing any significant adverse impact on small entities. In connection with the proposals, we considered the following alternatives:

(1) Establishing different compliance or reporting requirements which take into account the resources available to smaller entities;

(2) Exempting smaller entities from coverage of the disclosure requirements, or any part thereof;

(3) The clarification, consolidation, or simplification of disclosure for small entities; and

(4) Use of performance standards rather than design standards.

Section 13(q) does not contemplate separate disclosure requirements for small entities that would differ from the proposed reporting requirements, or exempting them from those requirements. The proposed rules are designed to implement the payment disclosure requirements of Section 13(q). That statutory section applies to resource extraction issuers, regardless of size. We have requested comment as to whether we should provide an exemption or delayed compliance for smaller reporting companies and whether doing so would be consistent with the statute and the protection of investors.

The proposed rules would require clear disclosure about the payments made by resource extraction issuers to foreign governments and the U.S. Federal Government, which may result in increased transparency about those payments. The proposed requirement to disclose the payment information in exhibits to an issuer's Exchange Act annual report may simplify the process of submitting the proposed payment disclosure. In addition, the required electronic formatting of one of the exhibits would simplify the search and retrieval of payment information regarding resource extraction issuers, including small entities, for investors and other interested persons.

We have used design rather than performance standards in connection with the proposed amendments because, based on our past experience, we believe the proposed amendments would be more useful to investors if there were specific disclosure requirements. In addition, the specific disclosure requirements in the proposed amendments would promote consistent and comparable disclosure among all resource extraction issuers.

G. Solicitation of Comment

We encourage the submission of comments with respect to any aspect of this Initial Regulatory Flexibility Analysis. In particular, we request comments regarding:

- How the proposed amendments can achieve their objective while lowering the burden on small entities;
- The number of small entity companies that may be affected by the proposed amendments;
- The existence or nature of the potential impact of the proposed amendments on small entity companies discussed in the analysis; and
- How to quantify the impact of the proposed amendments.

Respondents are asked to describe the nature of any impact and provide empirical data supporting the extent of the impact. Such comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, if the proposed rule amendments are adopted, and will be placed in the same public file as comments on the proposed amendments themselves.

VII. Small Business Regulatory Enforcement Fairness Act

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"),[183] a rule is "major" if it has resulted, or is likely to result in:

- An annual effect on the economy of $100 million or more;

[181] While Form 20–F may be used by any foreign private issuer, Form 40–F is only available to a Canadian issuer that is eligible to participate in the U.S.-Canadian Multijurisdictional Disclosure System ("MJDS").

[182] *See* proposed Item 16I under Part II of Form 20–F and proposed paragraph (17) to General Instruction B of Form 40–F.

[183] Public Law 104–121, Title II, 110 Stat. 857 (1996).

• A major increase in costs or prices for consumers or individual industries; or

• Significant adverse effects on competition, investment or innovation.

Request for Comment

We request comment on whether our proposals would be a "major rule" for purposes of SBREFA. We solicit comment and empirical data on:

• The potential effect on the U.S. economy on an annual basis;

• Any potential increase in costs or prices for consumers or individual industries; and

• Any potential effect on competition, investment or innovation.

VIII. Statutory Authority and Text of Proposed Rule and Form Amendments

We are proposing the rule and form amendments contained in this document under the authority set forth in Sections 12, 13, 23(a), and 35A the Exchange Act.

List of Subjects in 17 CFR Parts 229 and 249

Reporting and recordkeeping requirements, Securities.

In accordance with the foregoing, we propose to amend Title 17, Chapter II of the Code of Federal Regulations as follows:

PART 229—STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975—REGULATION S–K

1. The authority citation for part 229 continues to read in part as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z–2, 77z–3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 777iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78*l,* 78m, 78n, 78o, 78u–5, 78w, 78*ll,* 78mm, 80a–8, 80a–9, 80a–20, 80a–29, 80a–30, 80a–31(c), 80a–37, 80a–38(a), 80a–39, 80b–11, and 7201 *et seq.;* and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

2. Add § 229.105 to read as follows:

§ 229.105 (Item 105) Disclosure of payments made by resource extraction issuers.

(a) Pursuant to Section 13(q) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(q)), a resource extraction issuer must include in an annual report filed with the Commission information relating to any payment made during the fiscal year covered by the annual report by the resource extraction issuer, a subsidiary of the resource extraction issuer, or an entity under the control of the resource extraction issuer to a foreign government or the United States Federal Government, for the purpose of the commercial development of oil, natural gas, or minerals. Specifically, the information must include:

(1) The type and total amount of such payments made for each project of the resource extraction issuer relating to the commercial development of oil, natural gas, or minerals;

(2) The type and total amount of such payments made to each government;

(3) The total amounts of the payments, by category;

(4) The currency used to make the payments;

(5) The financial period in which the payments were made;

(6) The business segment of the resource extraction issuer that made the payments;

(7) The government that received the payments, and the country in which the government is located; and

(8) The project of the resource extraction issuer to which the payments relate.

Instructions to paragraph (a).

1. The resource extraction issuer must provide the information required by this Item as specified by § 229.601(b)(97) and (b)(98) of this chapter. In addition, the resource extraction issuer must provide a statement, in an appropriately captioned section of the annual report, that the information required by Section 13(q) and this Item is included in exhibits 97 and 98 to the annual report.

2. The disclosure required by this Item and § 229.601(b)(97) and (b)(98) of this chapter shall not be deemed to be "filed" with the Commission or subject to the liabilities of section 18 of the Exchange Act (15 U.S.C. 78r), except to the extent that the registrant specifically incorporates the information by reference into a document filed under the Securities Act or the Exchange Act. The disclosure required by this Item need not be provided in any filings other than an annual report on Form 10–K (§ 249.310 of this chapter). Such information will not be deemed to be incorporated by reference into any filing under the Securities Act or the Exchange Act, except to the extent that the registrant specifically incorporates it by reference.

(b) For the purpose of this item:

(1) *Commercial development of oil, natural gas, or minerals* includes exploration, extraction, processing, export, and other significant actions relating to oil, natural gas, or minerals, or the acquisition of a license for any such activity.

(2) *Foreign government* means a foreign government, a department, agency, or instrumentality of a foreign government, or a company owned by a foreign government. As used in this item, foreign government includes a foreign national government as well as a foreign subnational government, such as the government of a state, province, county, district, municipality, or territory under a foreign national government.

(3) *Payment* means an amount paid that:

(i) Is made to further the commercial development of oil, natural gas, or minerals;

(ii) Is not de minimis; and

(iii) Includes:

(A) Taxes;

(B) Royalties;

(C) Fees (including license fees);

(D) Production entitlements; and

(E) Bonuses.

(4) *Resource extraction issuer* means an issuer that:

(i) Is required to file an annual report with the Commission; and

(ii) Engages in the commercial development of oil, natural gas, or minerals.

Instruction to paragraph (b)(2): For purposes of this item, a company owned by a foreign government is a company that is at least majority-owned by a foreign government.

Instruction to paragraph (b)(3)(iii)(A): A resource extraction issuer must disclose taxes on corporate profits, corporate income, and production. Disclosure of taxes levied on consumption, such as value added taxes, personal income taxes, or sales tax is not required.

3. Amend § 229.601 by adding entries (97) and (98) to the exhibit table in paragraph (a), and adding paragraphs (b)(97) and (b)(98), to read as follows:

§ 229.601 (Item 601) Exhibits.

(a) * * *

EXHIBIT TABLE

	Securities Act forms								Exchange Act forms				
	S–1	S–3	S–4[1]	S–8	S–11	F–1	F–3	F–4[1]	10	8–K[2]	10–D	10–Q	10–K
* * *			*			*			*			*	
(36) through (96) [Reserved]	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
(97) Resource Extraction Issuers Exhibit													X
(98) Resource Extraction Issuers Exhibit (Interactive Data)													X
* * *			*			*			*			*	

(b) * * *

(97) *Resource Extraction Issuers Exhibit.* A resource extraction issuer that is required to disclose information relating to payments made to foreign governments or the United States Federal Government under Exchange Act Section 13(q) (15 U.S.C. 78m(q)) must provide the information required by Item 105 of Regulation S–K (§ 229.105 of this chapter) in an exhibit to its Exchange Act annual report. This exhibit must be provided in HTML or ASCII format. Specifically, a resource extraction issuer must provide the following disclosure:

(i) The type and total amount of payments made for each project of the resource extraction issuer relating to the commercial development of oil, natural gas, or minerals;

(ii) The type and total amount of such payments made to each government;

(iii) The total amounts of the payments, by category;

(iv) The currency used to make the payments;

(v) The financial period in which the payments were made;

(vi) The business segment of the resource extraction issuer that made the payments;

(vii) The government that received the payments, and the country in which the government is located; and

(viii) The project of the resource extraction issuer to which the payments relate.

(98) *Resource Extraction Issuers Exhibit (Interactive Data).* A resource extraction issuer that is required to disclose information relating to payments made to foreign governments or the United States Federal Government under Exchange Act Section 13(q) (15 U.S.C. 78m(q)) must provide the information required by Item 105 of Regulation S–K (§ 229.105 of this chapter) in an exhibit to its Exchange Act annual report. This exhibit must be electronically formatted using the eXtensible Business Reporting Language (XBRL) interactive data standard. This exhibit must include electronic tags that identify the following information for any payments made by a resource extraction issuer to a foreign government or the United States Federal Government:

(i) The type and total amount of payments made for each project of the resource extraction issuer relating to the commercial development of oil, natural gas, or minerals;

(ii) The type and total amount of such payments made to each government;

(iii) The total amounts of the payments, by category;

(iv) The currency used to make the payments;

(v) The financial period in which the payments were made;

(vi) The business segment of the resource extraction issuer that made the payments;

(vii) The government that received the payments, and the country in which the government is located; and

(viii) The project of the resource extraction issuer to which the payments relate. Refer to the EDGAR Filer Manual (§ 232.301 of this chapter) and the corresponding technical specification for resource extraction issuers disclosure for further guidance.

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

4. The authority citation for part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a *et seq.,* 7202, 7233, 7241, 7262, 7264, and 265; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

5. Amend Form 20–F (referenced in § 249.220f) by adding Item 16I to Part II, and adding Instruction 17 and 18 to the Instructions as to Exhibits, of Form 20–F, to read as follows:

Note: The text of Form 20–F does not, and this amendment will not, appear in the Code of Federal Regulations.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

Washington, DC 20549

FORM 20–F

* * * * *

Part II

* * * * *

Item 16I. Disclosure of Payments Made by Resource Extraction Issuers

A. If you are a resource extraction issuer, pursuant to Section 13(q) of the Exchange Act (15 U.S.C. 78m(q)), include information relating to any payment made during the fiscal year covered by the annual report by you, your subsidiary, or an entity under your control to a foreign government or the United States Federal Government for the purpose of the commercial development of oil, natural gas, or minerals. Under the heading "Payments Made By Resource Extraction Issuers" in the annual report, provide a statement that the information concerning payments to governments required by Section 13(q) and paragraph A. of this Item is included in exhibits 17 and 18 to the annual report. Include the following information as specified in exhibits 17 and 18 to the annual report:

(1) The type and total amount of payments made for each project of the resource extraction issuer relating to the commercial development of oil, natural gas, or minerals;

(2) The type and total amount of those payments made to each government;

(3) The total amounts of the payments, by category;

(4) The currency used to make the payments;

(5) The financial period in which the payments were made;

(6) The business segment of the resource extraction issuer that made the payments;

(7) The government that received the payments, and the country in which the government is located; and

(8) The project of the resource extraction issuer to which the payments relate.

B. For the purpose of this item:

(1) *Commercial development of oil, natural gas, or minerals* includes exploration, extraction, processing, export, and other significant actions relating to oil, natural gas, or minerals, or the acquisition of a license for any such activity.

(2) *Foreign government* means a foreign government, a department, agency, or instrumentality of a foreign government, or a company owned by a foreign government. As used in this item, foreign government includes a foreign national government as well as a foreign subnational government, such as the government of a state, province, county, district, municipality, or territory under a foreign national government.

(3) *Payment* means an amount paid that:

(i) Is made to further the commercial development of oil, natural gas, or minerals;

(ii) Is not de minimis; and

(iii) Includes:

(a) Taxes;

(b) Royalties;

(c) Fees (including license fees);

(d) Production entitlements; and

(e) Bonuses.

(4) *Resource extraction issuer* means an issuer that:

(i) Is required to file an annual report with the Commission; and

(ii) Engages in the commercial development of oil, natural gas, or minerals.

Instructions to Item 16I:

1. Item 16I only applies to annual reports, and not to registration statements on Form 20–F.

2. For purposes of paragraph B.(2), a company owned by a foreign government is a company that is at least majority-owned by a foreign government.

3. For purposes of paragraph B.(3)(iii)(a), a resource extraction issuer must disclose taxes on corporate profits, corporate income, and production. Disclosure of taxes levied on consumption, such as value added taxes, personal income taxes, or sales tax is not required.

4. The exhibits described in paragraph A. of this Item must meet the requirements under Instruction 17 and 18 as to Exhibits of this Form.

5. The disclosure required by paragraph A. of this Item and Instructions 17 and 18 of this Form shall not be deemed to be "filed" with the Commission or subject to the liabilities of section 18 of the Exchange Act (15 U.S.C. 78r), except to the extent that the registrant specifically incorporates the information by reference into a document filed under the Securities Act or the Exchange Act. The disclosure required by this Item need not be provided in any filings other than an annual report on Form 20–F (§ 249.220f of this chapter). Such information will not be deemed to be incorporated by reference into any filing under the Securities Act or the Exchange Act, except to the extent that the registrant specifically incorporates it by reference.

* * * * *

INSTRUCTIONS AS TO EXHIBITS

* * * * *

17. The disclosure of payments by resource extraction issuers required by Exchange Act Section 13(q) (15 U.S.C. 78m(q)).

A registrant that is required to disclose the payments made to foreign governments or the United States Federal Government under Exchange Act Section 13(q) and Item 16I must provide the information required by Item 16I.A. in exhibit 17 to its annual report on Form 20–F. This exhibit must provide the following information in HTML or ASCII format:

(a) The type and total amount of payments made for each project of the resource extraction issuer relating to the commercial development of oil, natural gas, or minerals;

(b) The type and total amount of such payments made to each government;

(c) The total amounts of the payments, by category;

(d) The currency used to make the payments;

(e) The financial period in which the payments were made;

(f) The business segment of the resource extraction issuer that made the payments;

(g) The government that received the payments, and the country in which the government is located; and

(h) The project of the resource extraction issuer to which the payments relate.

18. The disclosure of payments by resource extraction issuers required by Exchange Act Section 13(q) (15 U.S.C. 78m(q)) (interactive data).

A registrant that is required to disclose the payments made to foreign governments or the United States Federal Government under Exchange Act Section 13(q) and Item 16I must provide the information required by Item 16I.A. in exhibit 18 to its annual report on Form 20–F. This exhibit must:

(a) Be electronically formatted using the eXtensible Business Reporting Language (XBRL) interactive data standard; and

(b) Include electronic tags that identify the following information specified by Exchange Act Section 13(q)(2)(D)(ii) (15 U.S.C. 78m(q)(2)(D)(ii)) for any payments made by a resource extraction issuer to a foreign government or the United States Federal Government:

(1) The type and total amount of payments made for each project of the resource extraction issuer relating to the commercial development of oil, natural gas, or minerals;

(2) The type and total amount of such payments made to each government;

(3) The total amounts of the payments, by category;

(4) The currency used to make the payments;

(5) The financial period in which the payments were made;

(6) The business segment of the resource extraction issuer that made the payments;

(7) The government that received the payments, and the country in which the government is located; and

(8) The project of the resource extraction issuer to which the payments relate.

Refer to the EDGAR Filer Manual (§ 232.301 of this chapter) and the corresponding technical specification for resource extraction issuers disclosure for further guidance.

19. through 99. [Reserved]

* * * * *

6. Amend Form 40–F (referenced in § 249.240f) by adding paragraph (17) to General Instruction B of Form 40–F to read as follows:

Note: The text of Form 40–F does not, and this amendment will not, appear in the Code of Federal Regulations.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

Washington, DC 20549

Form 40–F

* * * * *

GENERAL INSTRUCTIONS

* * * * *

B. Information To Be Filed on This Form

* * * * *

(17) *Disclosure of Payments Made By Resource Extraction Issuers.*

(a) If you are a resource extraction issuer, pursuant to Section 13(q) of the Exchange Act (15 U.S.C. 78m(q)), disclose information relating to any payment made during the fiscal year covered by the annual report by you, your subsidiary, or an entity under your

control to a foreign government or the United States Federal Government for the purpose of the commercial development of oil, natural gas, or minerals. Under the heading "Payments Made By Resource Extraction Issuers" in the annual report, provide a statement that the information concerning payments to governments required by Section 13(q) and paragraph (a) of this Item is included in specified exhibits to the annual report.

(1) Include the following information, provided in HTML or ASCII format, in an exhibit to the annual report:

(i) The type and total amount of payments made for each project of the resource extraction issuer relating to the commercial development of oil, natural gas, or minerals;

(ii) The type and total amount of those payments made to each government;

(iii) The total amounts of the payments, by category;

(iv) The currency used to make the payments;

(v) The financial period in which the payments were made;

(vi) The business segment of the resource extraction issuer that made the payments;

(vii) The government that received the payments, and the country in which the government is located; and

(viii) The project of the resource extraction issuer to which the payments relate.

(2) Include the following information, electronically formatted using the eXtensible Business Reporting Language (XBRL) interactive data standard in an exhibit to the annual report:

(i) The type and total amount of payments made for each project of the resource extraction issuer relating to the commercial development of oil, natural gas, or minerals;

(ii) The type and total amount of such payments made to each government;

(iii) The total amounts of the payments, by category;

(iv) The currency used to make the payments;

(v) The financial period in which the payments were made;

(vi) The business segment of the resource extraction issuer that made the payments;

(vii) The government that received the payments, and the country in which the government is located; and

(viii) The project of the resource extraction issuer to which the payments relate. Refer to the EDGAR Filer Manual (§ 232.301 of this chapter) and the corresponding technical specification for resource extraction issuers disclosure for further guidance.

(b) For the purpose of Item 17:

(1) *Commercial development of oil, natural gas, or minerals* includes exploration, extraction, processing, export, and other significant actions relating to oil, natural gas, or minerals, or the acquisition of a license for any such activity.

(2) *Foreign government* means a foreign government, a department, agency, or instrumentality of a foreign government, or company owned by a foreign government. As used in this item, foreign government includes a foreign national government as well as a foreign subnational government, such as the government of a state, province, county, district, municipality, or territory under a foreign national government.

(3) *Payment* means an amount paid that:

(i) Is made to further the commercial development of oil, natural gas, or minerals;

(ii) Is not de minimis; and

(iii) Includes:

(A) Taxes;

(B) Royalties;

(C) Fees (including license fees);

(D) Production entitlements; and

(E) Bonuses.

(4) *Resource extraction issuer* means an issuer that:

(i) Is required to file an annual report with the Commission; and

(ii) Engages in the commercial development of oil, natural gas, or minerals.

Notes to Instruction B.(17)

1. Instruction B.(17) only applies to annual reports, and not to registration statements on Form 40–F.

2. For purposes of paragraph (b)(2), a company owned by a foreign government is a company that is at least majority-owned by a foreign government.

3. For purposes of paragraph (b)(3)(iii)(A), a resource extraction issuer must disclose taxes on corporate profits, corporate income, and production. Disclosure of taxes levied on consumption, such as value added taxes, personal income taxes, or sales tax is not required.

4. The disclosure required by Instruction B.(17) of this Form shall not be deemed to be "filed" with the Commission or subject to the liabilities of section 18 of the Exchange Act (15 U.S.C. 78r), except to the extent that the registrant specifically incorporates the information by reference into a document filed under the Securities Act or the Exchange Act. The disclosure required by this Item need not be provided in any filings other than an annual report on Form 40–F (§ 249.240f of this chapter). Such information will not be deemed to be incorporated by reference into any filing under the Securities Act or the Exchange Act, except to the extent that the registrant specifically incorporates it by reference.

* * * * *

7. Amend Form 10–K (referenced in § 249.310) by adding paragraph (c) to Item 4 under Part I of Form 10–K to read as follows:

Note: The text of Form 10–K does not, and this amendment will not, appear in the Code of Federal Regulations.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

Washington, DC 20549

FORM 10–K

* * * * *

PART I

* * * * *

Item 4. Specialized Disclosures * * *

(c) *Disclosure of Payments Made By Resource Extraction Issuers.* If you are a resource extraction issuer, as defined under Section 13(q) of the Exchange Act and Item 105(b)(4) of Regulation S–K (§ 229.105(b)(4) of this chapter), provide a statement under the heading "Payments Made By Resource Extraction Issuers" that the information concerning payments to governments required by Section 13(q) and Item 105 of Regulation S–K (§ 229.105 of this chapter) is included in exhibits 97 and 98 to the annual report.

* * * * *

By the Commission.

Dated: December 15, 2010.

Elizabeth Murphy,

Secretary.

[FR Doc. 2010–31943 Filed 12–22–10; 8:45 am]

BILLING CODE 8011–01–P



Federal Register

Thursday,
December 23, 2010

Part V

Department of Health and Human Services

45 CFR Part 154
Rate Increase Disclosure and Review; Proposed Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

45 CFR Part 154

[OCIIO–9999–P; Docket No. HHS–OS–2010–0029]

RIN 0950–AA03

Rate Increase Disclosure and Review

AGENCY: Office of Consumer Information and Insurance Oversight (OCIIO), Department of Health and Human Services (HHS).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document contains proposed regulations implementing the rules for health insurance issuers regarding the disclosure and review of unreasonable premium increases under section 2794 of the Public Health Service Act. The proposed rule would establish a rate review program to ensure that all rate increases that meet or exceed an established threshold are reviewed by a State or HHS to determine whether the rate increases are unreasonable.

DATES: Send your comments on or before February 22, 2011.

ADDRESSES: All comments will be made available to the public.

Warning: Do not include any personally identifiable information (such as name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments are posted on the Internet exactly as received, and can be retrieved by most Internet search engines. No deletions, modifications, or redactions will be made to the comments received, as they are public records. Comments may be submitted anonymously.

In commenting, please refer to file code OCIIO–9999–P. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

You may submit comments using any of the following methods (please choose only one of the ways listed):

- *Electronically.* You may submit electronic comments on this regulation to *http://www.regulations.gov.* Follow the instructions under the "More Search Options" tab.
- *Mail.* You may mail written comments to the following address ONLY: Office of Consumer Information and Insurance Oversight, Department of Health and Human Services, Attention: OCIIO–9999–P, Room 445–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201. Please allow sufficient time for mailed comments to be received before the close of the comment period.
- *Hand or Courier.* If you prefer, you may deliver (by hand or courier) your written comments before the close of the comment period to the following address: Office of Consumer Information and Insurance Oversight, Department of Health and Human Services, Attention: OCIIO–9999–P, Room 445–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201.

(Because access to the interior of the Hubert H. Humphrey Building is not readily available to persons without Federal government identification, commenters are encouraged to leave their comments in the OCIIO drop slots located in the main lobby of the building. A stamp-in clock is available for persons wishing to retain a proof of filing by stamping in and retaining an extra copy of the comments being filed.)

Comments mailed to the address indicated as appropriate for hand or courier delivery may be delayed and received after the comment period.

Submission of comments on paperwork requirements. You may submit comments on this document's paperwork requirements by following the instructions at the end of the "Collection of Information Requirements" section in this document.

For information on viewing public comments, see the beginning of the "ADDITIONAL INFORMATION" section.

FOR FURTHER INFORMATION CONTACT:

For questions concerning this proposed rule, contact Sally McCarty, Office of Consumer Information and Insurance Oversight, Department of Health and Human Services, by phone at (301) 492–4489 OR by e-mail at *ratereview@hhs.gov.*

SUPPLEMENTARY INFORMATION:

Inspection of Public Comments: All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all comments received before the close of the comment period on the following Web site as soon as possible after they have been received: *http://regulations.gov.* Follow the search instructions on that Web site to view public comments.

Comments received timely will also be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, at the headquarters of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, Maryland 21244, Monday through Friday of each week from 8:30 a.m. to 4 p.m. To schedule an appointment to view public comments, phone 1–800–743–3951.

Table of Contents

I. Background
II. Provisions of the Proposed Rule
  A. Introduction and Overview
  B. Definitions (§ 154.102)
  C. Applicability (§ 154.103)
  D. Rate Increases Subject to Review (§ 154.200)
  E. Review of Rate Increases Subject to Review by HHS or by a State (§ 154.210)
  F. Effective Rate Review Program (§ 154.301)
  G. Unreasonable Rate Increases
  H. Issuer Disclosure Required Under Part 154
III. Collection of Information Requirements
IV. Response to Comments
V. Regulatory Impact Analysis

I. Background

The Patient Protection and Affordable Care Act (Pub. L. 111–148), was enacted on March 23, 2010; the Health Care and Education Reconciliation Act (Pub. L. 111–152), was enacted on March 30, 2010. In this preamble we refer to the two statutes collectively as the Affordable Care Act. The Affordable Care Act reorganizes, amends, and adds to the provisions of Part A of title XXVII of the Public Health Service Act (PHS Act) relating to group health plans and health insurance issuers in the group and individual markets.

The Department of Health and Human Services (HHS or the Department) is issuing regulations in several phases in order to implement revisions to the PHS Act made by the Affordable Care Act. Most of the previous regulations were issued jointly with the Departments of Labor and the Treasury. A request for comments relating to the medical loss ratio (MLR) provisions of PHS Act section 2718 was published in the **Federal Register** on April 14, 2010 (75 FR 19297) (notice, or request for comments). A request for comments relating to the premium review provisions of PHS Act section 2794 was also published by HHS in the **Federal Register** on April 14, 2010 (75 FR 19335) (notice, or request for comments). Additionally, a series of interim final regulations were published earlier this year implementing PHS Act provisions added by the Affordable Care Act. Specifically, interim final rules were published implementing (1) section 2714 (requiring dependent coverage of children to age 26) (75 FR 27122 (May 13, 2010)); (2) section 1251 of the Affordable Care Act (relating to status as a grandfathered health plan) (75 FR 34538 (June 17, 2010)); (3) sections 2704 (prohibiting preexisting condition exclusions), 2711

(regarding lifetime and annual dollar limits on benefits), 2712 (regarding restrictions on rescissions), and 2719A (regarding patient protections) (75 FR 37188 (June 28, 2010)); (4) section 2713 (regarding preventive health services) (75 FR 41726 (July 19, 2010)); (5) section 2719 (regarding internal claims and appeals and external review processes) (75 FR 43330 (July 23, 2010)). HHS published interim final regulations implementing PHS Act section 2718 (regarding medical loss ratio (75 FR 74864 (December 1, 2010)). HHS, Department of Labor, and Department of the Treasury also published an amendment to the interim final regulations relating to status as a grandfathered health plan (regarding change in health insurance issuers) in the **Federal Register** on November 17, 2010 (75 FR 70114). The Departments have also published sub-regulatory guidance regarding various issues related to the implementation of the Affordable Care Act, available at *http://www.dol.gov/ebsa* and *http://www.hhs.gov/ociio.*

These proposed regulations are being published to implement section 2794 of the PHS Act, relating to the disclosure and review of unreasonable premium increases.[1]

II. Provisions of the Proposed Rule

A. Introduction and Overview

Section 1003 of the Affordable Care Act adds a new PHS Act section 2794 which directs the Secretary, in conjunction with the States, to establish a process for the annual review of "unreasonable increases in premiums for health insurance coverage." The statute provides that this process shall require health insurance issuers to submit to the Secretary and the applicable State a justification for an unreasonable premium increase prior to the implementation of the increase.

The review process required under section 2794 does not preempt or supplant any existing State laws or processes governing the review of insurance premiums, including any State authority to prevent the implementation of unreasonable rates. Many States' laws already provide that rates may not be approved, or may not remain in effect, if they are excessive or unreasonable in relation to the benefits provided or fail to satisfy other statutory standards. Specifically, our review of State law indicates that 43 of the 50 States currently have some rate review process, in either the individual or small group markets, or both.

This proposed regulation recognizes the traditional role of the States in regulating insurance rates and builds on existing State-based rate review processes. In circumstances where HHS is reviewing rates rather than a State, which we believe will be a minority of States that have not yet established effective rate review programs as discussed below, a determination by HHS that a rate increase is "unreasonable" under section 2794 would not prevent any health insurance issuer from implementing a rate increase permitted by State law. In this regard, this proposed regulation preserves the opportunity for insurers to implement a proposed rate that is consistent with State law. Moreover, the process established by this proposed regulation would not result in any delay in an issuer's ability to implement a proposed rate increase. In other words, the requirements of Section 2794 only supplement and complement, rather than supplant, and do not interfere with, existing State laws and processes for rate review.

Section 2794 of the PHS Act directs the Secretary, in conjunction with the States, to establish a process for the annual review of unreasonable increases in "premiums." "Premium" is the final amount charged to a specific insured. For those States that currently review proposed increases in "premiums," it is the underlying rates and methods that are the subject of the actuarial review conducted by these States.

To determine rates for a specific insurance product, the issuer must estimate future claims costs in connection with that product and then the revenue needed to pay anticipated claims and non-claims expenses, such as administrative expenses including profits. The costs that will be incurred and the revenue that will be received are not known at the time the rate is established (indeed, the number of people that will be covered by the product is not known), so the rates must be based on an actuarial estimate of these costs and of the non-claims expenses. It is these estimates, along with the methodology used to determine them, that are the subject of the actuarial review conducted by States that have authority to review premium or rate increases.

Once the overall amount of revenue needed is established, the premium that will be charged to specific insureds is determined. Generally, the premium charged will vary depending on characteristics such as age, geography, and in the individual market in many States, health status. It will also vary based on choices made by the insured, such as the amount of deductibles and co-pays. The criteria that may be used and the differences in premium that may be charged are determined by State law.

This proposed regulation, therefore, provides a process for the review of unreasonable rate increases, based upon the practice in States that conduct effective reviews of the cost of health insurance coverage.

Section 2794 of the PHS Act does not define what makes a rate increase "unreasonable," nor does it specify the process that should be used for determining whether a particular rate increase is unreasonable (requiring that a review be conducted and a justification submitted). Therefore, this proposed regulation provides a definition of an "unreasonable" rate increase, and outlines a process that would be used by HHS when reviewing rate increases to determine which rates are subject to review and among them which are "unreasonable."

We considered two types of processes that arguably could satisfy the requirement in 2794 that unreasonable rates be reviewed. One would establish, by regulation, a standard of unreasonableness, based on some criteria other than an actuarial standard or actual review. For example, any rate increase exceeding the average increase for similar products during the previous year, or any rate increase exceeding a rate of inflation of medical costs by a specific amount, could be deemed to be unreasonable. Under this approach, any rate increase over a pre-determined percentage would be considered "unreasonable" and therefore subject to review. However, while consumers may view any large increase in the cost of their health insurance coverage to be "unreasonable," it is not possible to know whether an increase is "unreasonable" from an actuarial standpoint until the proposed increase, and the underlying assumptions, have been the subject of actuarial analysis. Moreover, while such an approach may be relatively easy to administer, for the reasons stated above it almost certainly would label as "unreasonable" rate increases that are not unreasonable from an actuarial standpoint. This point was made in numerous comments received in response to the Request for Comments published on April 14, 2010 in the **Federal Register** (75 FR 19335). Those comments suggest that HHS should not establish a definition of an unreasonable rate increase by, for example, providing that all rate increases greater than a specified

[1] There are two sections numbered 2794 in the Public Health Service Act. The Section 2794 that is the basis for this rule is entitled "Ensuring That Consumers Get Value For Their Dollars."

percentage would be deemed to be unreasonable.

In addition, this "literal" reading under which rates are deemed "unreasonable" at the outset, in the absence of review, would make any "review" process meaningless, as the outcome of any review (that is, whether the rate was "unreasonable") would have been pre-determined.

This proposed regulation instead proposes an alternative approach that is consistent with the language of section 2794; is more narrowly focused on what we interpret to be the purpose of that section; and would not involve the anomaly of "pre-determining" the reasonableness of a rate before it has been reviewed. Under this approach, if a proposed rate increase equals or exceeds a defined threshold, it would be considered "subject to review." The review process would then determine if the increase is, in fact, unreasonable. This approach interprets the statutory "process" for reviewing unreasonable rate increases as a process under which rates that may ultimately be determined to be unreasonable are reviewed. Under this interpretation, identifying potentially unreasonable rates for review is reasonably an element of a broader process for the review of proposed rate increases.

Rates above the threshold would not be deemed or otherwise determined to be unreasonable in advance of this review. As discussed below, for rate increases filed in a State on or after July 1, 2011, or effective on or after July 1, 2011 in a State that does not require a rate increase to be filed, the threshold for whether rates are subject to review would be whether the average weighted increase in the rate filing, alone or in combination with prior increases in the preceding 12 month period, is 10 percent or more.

In establishing the 10 percent threshold for determining which rates are subject to review, HHS has balanced the wide range of available data on rate and medical trend increases. HHS reviewed available data and literature on insurance rate increases in States and general trends in health care costs. HHS reviewed each State's applicable Web site, and determined that the information related to rate trends posted on these Web sites is limited. Our review of the limited data available suggests that the majority of increases in the individual market exceeded 10 percent each year for the past 3 years.

These yearly increases significantly exceed some national measures of medical cost inflation, such as the medical component of the Consumer Price Index, whose inflation has typically ranged from 3.7 percent to 4.4 percent. The Centers for Medicare and Medicaid Services' National Health Expenditures (NHE) data is another measure of health care cost trends based on overall national health care spending. The five most recent years of available NHE data suggest that overall health care expenditures have increased at an annual rate between 4.4 percent to 6.9 percent. Some commenters suggested using these indices as thresholds for a review of rate increases. Another national index, the Standard & Poor's Healthcare Economic Commercial Index, also measures insurance rate trends. The S & P Index measures trends in provider claims costs, which encompasses both unit cost and utilization changes; the trend in that index from September 2009 to September 2010 was 8.5 percent.

The 10 percent threshold established in this regulation exceeds these major indices and in doing so balances industry concerns that any threshold would be over-inclusive with the competing concern that it would subject to review too few rates that may be unreasonable. As we discuss below, when better and more specific data on trends in insurance rates in individual States can be collected, State-specific thresholds would be established.

This approach does not provide for the review of every proposed rate increase, no matter how small, to determine whether it is unreasonable. We recognize that the choice of any threshold makes it inevitable that unreasonable rate increases below the threshold will not be reviewed, and that a proposed increase of less than 10 percent would be unreasonable if the actuarial assumptions underlying the increase were invalid or unreasonable. In proposing this approach, HHS also has taken into consideration the fact that many States, as discussed below, conduct a rate review process for all rate increases without regard to the magnitude of the increase. We expect the number of States conducting such reviews to increase in light of additional resources provided under the rate review grants and passage of State legislation. Therefore, as a practical matter, in a growing number of States, there is even less likelihood that an unreasonable increase below the threshold would be implemented.

In this regulation, HHS proposes an approach that balances the regulatory burdens that would be imposed on both the agency and the industry if every rate increase, no matter how small, were to be reviewed for unreasonableness against the potential harm to consumers should a small, but unreasonable, increase not be reviewed and the issuer not be required to provide a final justification for the increase. We invite comments on whether 10 percent is a reasonable threshold to apply in determining which rate increases will be subject to review.

In establishing an initial 10 percent threshold for whether a rate increase is subject to review, as discussed below, HHS recognizes that rates, underlying costs, and health care trends vary from State to State. Many factors influence the magnitude and frequency of increases in the States, and a single, national filing threshold does not reflect all of the local variations. As a consequence, HHS would propose, for future calendar years, to establish State-specific thresholds for each future calendar year by September 15th of the prior year. In determining each State-specific threshold, HHS would consider the State-specific data submitted for each rate increase subject to review, and also the State-specific data received by HHS from those States that have received "premium review grants" under section 2794(c) of the PHS Act. To the extent that a State insurance regulator has other data that could serve as the basis for a State-specific threshold, that would be considered as well.

As discussed below, the State-specific threshold would be based on the same analysis used to develop the initial 10 percent threshold, but would be based on data from the specific State, rather than the national data we analyzed in selecting the proposed 10 percent figure.

In response to the Request for Comments, many commenters also suggested that the rate review process should not apply to rate increases in the large group market. Currently, our review of State law indicates that only 18 States have authority to review rates for all or part of the large group market. Applying this regulation to the large group market would result in a process that is not closely aligned with most State processes upon which the regulation is modeled. In addition, many issuers are not accustomed to submitting proposed rate increases for review in this market. Finally, purchasers in the large group market have greater leverage than those in the individual and small group markets, and therefore may be better able to avoid imposition of unreasonable rate increases. For these reasons, under this proposed regulation, rates in the large group market would not be subject to the rate review process we are proposing. HHS solicits specific comments on whether, in the future, if rate increases in the large group market were subject to a review process under

section 2794, if that process should differ from the process provided for in this proposed regulation for the individual and small group markets.

In recognition of the primary role States have in reviewing rates today, HHS would defer to the definitions used under applicable State rate filing laws when determining whether a rate filing relates to health insurance coverage offered in the individual market, small group market, or large group market, where such laws differ from the definitions of these terms in the PHS Act. HHS believes that deferring to the definitions employed in State rate filing laws ensures that the rate review process under this proposed regulation would not disrupt current State rate filing and review practices; however, we are soliciting public comment on alternative approaches. We note that this is solely for rate filing purposes. Federal law distinctions in the Affordable Care Act regarding group size apply for all other purposes unless otherwise specified. As discussed below, where State rate filings laws do not contain definitions of small and large group markets, we propose to employ the definitions in the Public Health Service Act, with the caveat that the number used for a cut-off between small and large groups would remain at 50 employees, as is currently the case in all States, even though States have the option of using 100 employees prior to 2016, and a 100 employee cut-off would be used after that date.

Rate increases for health insurance coverage for "excepted benefits," as described in paragraph (1) of subsection (c) of section 2791 of the PHS Act, or in paragraphs (2), (3) or (4) of such subsection, if the benefits are provided under a separate policy, certificate of contract of insurance, would also be exempted from review under this proposed regulation. Excepted benefits, such as dental and vision, do not appear to be a principal focus of the Affordable Care Act, and the regulatory burden that would be imposed on the industry and HHS would not justify reviewing rate increases for these benefits.

All rate increases that meet or exceed the 10 percent threshold would be reviewed, by the relevant State, or by HHS in the smaller number of cases where States do not yet have an effective process in place. The proposed regulation would use the definition of States set forth in section 2791(d)(14) of the PHS Act, which defines States to include each of the several States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands. Consistent with the statutory requirement in section 2794 that the rate review process be established "in conjunction with the States," the proposed regulation provides that HHS would adopt a State's determination of whether a rate increase is unreasonable if the State has an effective rate review program for rates filed in a particular market. This element of the proposed regulation preserves the primary role States have today in reviewing rates. So long as a State can conduct an effective review of proposed rate increases that meet or exceed the applicable threshold, State determinations will be adopted by HHS.

HHS expects that a significant majority of States would currently meet the standards for having an effective review process in one or both of the individual or small group markets, and we anticipate the remainder would likely establish an effective rate review process as they obtain needed statutory authority or implement new or enhanced review procedures. More than 10 States indicated in their applications for rate review grants they would be seeking additional legislative authority to enhance their existing processes.

HHS would evaluate whether a State has an effective rate review program based on four main factors, all of which currently represent the best practices among the many States which conduct review today. The first factor is whether the State receives from health insurance issuers' data and documentation sufficient to determine whether a rate increase is unreasonable. As noted above, many States have these provisions today. The second factor is whether the State effectively reviews the data and documentation submitted by health insurance issuers in support of a rate increase. The third factor is whether the State review examines the reasonableness of the assumptions used by the issuer in developing its rate proposal and the historic data underlying those assumptions. The proposed regulation also describes the areas of analysis that a State's review would be required to include in order for it to be deemed effective. The fourth factor is whether the State applies a standard set forth in statute or regulation when making the determination of whether a rate increase is unreasonable. This proposed regulation does not establish a standard for unreasonableness that a State must use or apply; nor does it require a numerical standard to be applied under State law to determine whether a rate increase is unreasonable. Rather, a State regulator would apply the applicable standards that exist under State law. Finally, we are soliciting public comment on whether the public's ability to comment on unreasonable rate increases during the review process should be considered as one criterion for an effective rate review program.

As noted above, section 2794 does not provide a definition of "unreasonable" rate increases. The proposed regulation provides that States would apply the standards set forth in State law or regulation when determining whether a rate increase is unreasonable. As mentioned above, many States' laws provide that rates may not be approved, or may not remain in effect, if they are excessive or unreasonable in relation to the benefits provided or fail to satisfy other statutory standards. Specifically, our review of States' laws indicates that 43 of the 50 States currently have some rate review process in either the individual or small group markets, or both. 16 States and the District of Columbia explicitly prohibit insurance rates from being excessive, inadequate, or unfairly discriminatory. In addition, 13 States prohibit rates from being both unreasonable in relation to the benefits provided and excessive, inadequate, or unfairly discriminatory. Finally, an additional 14 States prohibit rates from being unreasonable in relation to the benefits provided. For the remaining 8 States, we did not identify any explicit statutory standards that address the unreasonableness of rates; however, these States may use other legal tools available to regulate unreasonable rates. In addition, based on the rate review grant applications, some Territories either have a rate review process in place today, or expect to implement a process in the future.

When a State with an effective rate review program determines whether a rate increase violates the standards set forth in State law and therefore whether the increase is unreasonable, HHS would adopt that determination and would not conduct an independent review of the State's determination. Given this proposed regulation, and the rate review grants made available to States under Section 2794 of the PHS Act, it is likely that, as States gain rate review authority and improve their rate review programs, the number of States in which HHS would be conducting reviews would diminish over time.

For rate increases filed in markets for which a State does not have an effective rate review process, HHS would conduct a review of the proposed rate increases to determine whether they are unreasonable until such time as the State implements an effective review process in that market. This proposed regulation provides that where HHS conducts rate reviews, the standard for

unreasonable would be whether the rate increase is "excessive," "unjustified," or "unfairly discriminatory." The proposed regulation lists the factors that HHS would consider when determining if a rate increase is excessive, unjustified or unfairly discriminatory, and therefore, unreasonable.

Consistent with the statutory requirement that a "justification" be filed before an unreasonable rate may be implemented, the regulation also proposes to require that for rate increases that are subject to review (because they meet or exceed the 10 percent review threshold), a preliminary justification would have to be submitted to the applicable State in which the increase is proposed to be implemented, as long as a State accepts such submissions, and to HHS. The regulation sets out the proposed contents of the preliminary justification. The preliminary justification would be divided into three parts, each part having a different purpose. The proposed regulation would require health insurance issuers to complete parts one and two of the preliminary justification, regardless of whether a State or HHS is reviewing the rate increase. The information that would be contained in parts one and two of the preliminary justification is intended to provide consumers with a description of the rate increase and the factors contributing to the increase, including both a descriptive and a quantitative analysis.

The information required to be provided in the preliminary justification supplements, and does not conflict with, State laws specifying what issuers must file with the State when they propose to increase rates. Those laws continue to govern what the issuer must file with the State, and would be unaffected by this proposed regulation and the requirement that the preliminary justification must be filed with HHS.

When HHS is reviewing a rate increase, issuers would be required to submit the additional data required under part three of the preliminary justification in order to allow HHS to conduct a comprehensive actuarial review of the increase. The specific data reporting requirements in part three of the preliminary justification are modeled on the actuarial memorandum guidelines included in NAIC Model Regulation 134–1. In the event the level of detail provided by a health insurance issuer does not provide a sufficient basis for HHS to review a rate increase, HHS would request from the health insurance issuer the additional information necessary to complete its review.

Parts one and two of the preliminary justification would promptly be posted to the HHS Web site so that insurance consumers are on notice of proposed increases and have basic information about the factors the issuer asserts are causing the increase. HHS will also post on its Web site before any information contained in part three of the preliminary justification that has not been designated as "confidential" as defined in HHS's Freedom of Information Act regulations, 45 CFR § 5.65. HHS will make a determination as to whether to post information designated as "confidential" under the standards and procedure set forth in those regulations, and will post that information only after making a determination that it is subject to disclosure as provided by those regulations.

If HHS reviews a rate increase and determines it to be unreasonable, HHS would provide its final determination to the health insurance issuer. If the issuer chooses not to implement the unreasonable rate increase, or to implement a lower increase than it had proposed and such lower increase is below the applicable subject to review threshold, the issuer would be required to provide a final notification to this effect to HHS. If the issuer chooses to implement a lower increase but the lower increase is above the applicable subject to review threshold, the lower increase would be subject to review and the issuer would be required to submit a new preliminary justification. If the issuer implements an unreasonable rate increase, it would have to provide to HHS a final justification in response to HHS's determination of unreasonableness. HHS would post its final determination and the issuer's final notification or final justification on its Web site. If the issuer chooses to implement the rate increase, it would be required to post its preliminary justification, HHS's determination and its final justification on its Web site.

One of the elements of an effective rate review program, discussed more fully below, is that the State's review would include an analysis of certain specific factors set forth in this proposed regulation and which are based on the common practices that States employ today. In addition, the State would provide to the issuer and to HHS its determination of whether a rate increase is unreasonable, along with an explanation of how its analysis of the factors set forth in the proposed regulation caused it to arrive at that determination. HHS would adopt determinations made by States with effective rate review programs. When HHS has adopted a State's determination as to whether a rate increase is unreasonable, HHS would post the State's final determination on its Web site, together with the issuer's final justification in the event that the issuer chose to implement a rate increase that was determined to be unreasonable by the State.

B. Definitions (§ 154.102)

The proposed regulation provides the following key definitions that would apply to the rate review process used by HHS, and to its determination regarding whether a rate increase is unreasonable. The definitions are discussed here because they are unique to this regulation or may be of particular interest to enrollees, health insurance issuers, consumers, regulators, and others. Defined terms that conform to definitions commonly used in the health insurance industry, such as "insurance," or that have already been defined in Federal law, are not discussed here.

1. Individual Market and Small Group Market

As discussed above, in order to ensure that the rate review process outlined in the proposed regulation is consistent with the process used by States in performing rate reviews, and in order to avoid any disruption to the current State rate filing and review practices, the definitions of "individual market" and "small group market" would be defined as they are under the applicable State's rate filing laws, if such laws include such definitions. For example, several States define a small group to include 2 to 25 employees for rating purposes, and the small group rating requirements in these States do not apply to groups with 26 or more employees. Further, certain States consider association plans to be large employers for rating purposes. In such circumstances, and only for this purpose, HHS would defer to applicable State law when determining whether a rate increase in that State relates to the small group market. For all other purposes the definitions set forth in the PHS Act govern as applicable.

In addition, for purposes of rate review under this regulation only, if the State rate filing law does not include a definition of small or large group, the definition under the PHS Act would be used, except that a small group would be defined to include 1 to 50 employees. Currently, under the Affordable Care Act definitions, States have the option until 2016 of using 50 or 100 as the cutoff for a small group, with 100 applying after that date, and all States have elected the 50 option. Thus, if

there are no definitions of small and large group in a State's rate filing law, this proposed regulation would define "small group" to include 1 to 50 employees.

2. Unreasonable Rate Increase

The proposed regulation defines a rate increase as "unreasonable" if it is "unjustified," "excessive," or "unfairly discriminatory," as these terms are more fully described in *§ 154.205, but this* proposed definition would apply only to rate increases that are reviewed by HHS, and would not create a Federal standard for States to use when determining whether a rate increase is unreasonable. These terms are described consistently with the standards that are most commonly used by States to identify rate increases that are not in compliance with State law.

Since HHS would be adopting the determinations of States with an effective rate review program, the proposed regulation includes in the definition of "unreasonable rate increase," those rate increases that have been determined by a State to be excessive, unjustified, unfairly discriminatory or otherwise unreasonable under applicable State law. Accordingly, a State with an effective review program would be permitted to use any applicable standards set forth in statute or regulation for determining whether a rate increase that is subject to review is unreasonable. This serves to preserve and recognize existing State laws relating to unreasonable rates. HHS recognizes that factors other than those addressed in the proposed regulation may be viewed as potentially impacting the reasonableness of a rate, including the structure and competitiveness of the market, and we are therefore soliciting public comment to identify these factors and whether they should be considered in determining whether a rate increase is unreasonable.

C. Applicability (§ 154.103)

The requirements of this proposed regulation would generally be applicable to all health insurance issuers offering small group or individual health insurance coverage in a State.

Section 2794 of the PHS Act does not apply to grandfathered health plan coverage (*See* 45 CFR 147.140 (75 FR 34538, June 17, 2010, as amended by 75 FR 70114, November 17, 2010)), so these proposed regulations similarly would not apply to such coverage.

In addition, insurance coverage that meets the "excepted benefits" definition set forth in section 2791(c) of the PHS Act and 45 CFR 144.103 would not be subject to these proposed regulations. While "excepted benefits" are not explicitly exempt from section 2794 of the PHS Act, they are exempt from other provisions of the PHS Act, as added by the Affordable Care Act. "Excepted benefits" do not appear to be the focus of the rate review provisions of the Affordable Care Act. Therefore, the proposed regulation would exempt "excepted benefits," to allow for the consistent administration of the PHS Act with respect to these defined benefits.

While HHS recognizes that the rate review provisions of section 2794 of the PHS Act do not specify to which particular segments of the insurance market the rate review provisions apply, and contain no specific exclusion for the large group market, HHS proposes that these provisions should only apply to the small group and individual market at this time. The significant majority of States focus their efforts on review of rates within the small group and individual markets. Purchasers in the large group market are viewed as more sophisticated purchasers, who may have greater leverage and therefore better ability to avoid the imposition of unreasonable rate increases, also mitigating the need for more active regulation. Many States have limited authority over the large group market, so under the framework set out in this regulation, few States could satisfy the standards for an effective review process in the large group market. Taking these factors into consideration, as noted above, these proposed regulations would not apply to the large group market. HHS may, however, revise these regulations at a future date to cover such plans, and solicits specific comments on whether, in the future, if rate increases in the large group market were subject to a review process under Section 2794, that process should be different than the one provided for in this regulation for the small and individual group markets.

Although section 2794 of the PHS Act directs that implementation of the annual rate review process begin with the 2010 plan year, the rate review process established in the proposed regulation would begin implementation with rate increases filed in a State on or after July 1, 2011, or effective on or after July 1, 2011 in a State that does not require rate increases to be filed, due to several factors. At the time that the Affordable Care Act amendments to the PHS Act first became effective, on March 23, 2010, many health insurance issuers had already implemented rate increases for the 2010 plan or policy year, and many more had taken necessary steps to implement increases in the immediate months that followed. Since that time, in fulfilling the statute's directive that an effective rate review program be developed in conjunction with the States, the National Association of Insurance Commissioners (NAIC) has been working to develop appropriate reporting and disclosure mechanisms, and HHS has provided input into this development process. HHS also deemed it appropriate to solicit public comments prior to the promulgation of this proposed regulation, through the Request for Comments published on April 14, 2010. Finally, this regulation is being issued in proposed form, with opportunity for further comments which specifically address this proposed regulation. Therefore, as noted, the rate review process outlined in this proposed regulation would begin with rate increases filed in a State on or after July 1, 2011 or effective on or after July 1, 2011 in a State that does not require rate increases to be filed.

D. Rate Increases Subject To Review (§ 154.200)

1. Applicable Threshold for Rate Increases Subject To Review

As explained previously, while section 2794 of the PHS Act directs the Secretary to establish a process for the annual review of unreasonable increases in "premiums," HHS has interpreted this as referring to the underlying "rates" that are used to develop the premiums. This is consistent with how these terms are most commonly used by State regulators and the insurance industry. Often, the rate review process performed by States is one that reviews changes to the rating structure for a plan or policy, as opposed to premium increases within the plan or policy that are derived from the underlying rating structure. Therefore a "rate increase" alters the underlying rate structure of a policy form, while a "premium increase" can occur even without any increase (or change) to the underlying rate structure. For example, for policies that are age-rated, as the duration of the policy advances, premium changes that correlate with age bands are not "rate increases," since they do not change the underlying rate structure. For these reasons, the term "rate" is used instead of the statutory term "premium" throughout the text of the proposed regulation.

Since it is not possible under the provisions of this proposed regulation to know before conducting a review of a proposed rate increase whether it is "unreasonable," the process that would

be established must provide for the review of a range of proposed rate increases, some of which ultimately would be determined to be unreasonable, while others would not. This proposed regulation therefore provides that for health insurance coverage offered in the individual or small group market all proposed rate increases above the defined threshold would be "subject to review." In establishing a threshold for rate increases subject to review, the Secretary has balanced the need to set a standard that would effectively capture unreasonable increases, while avoiding unnecessary filing burdens for health insurance issuers with regard to increases that are likely to be reasonable.

The review of a rate increase subject to review, and the determination of whether the rate increase is unreasonable, must take into account the unique experience of a health insurance product and cannot be subject to a simple, fixed value. Therefore, under the proposed rule, a rate increase that is subject to review would not be per se unreasonable. For 2011, the threshold for whether a rate increase is subject to review is a rate increase of 10 percent or more. This applies not only to a single rate increase, but also to multiple rate increases of less than 10 percent that, when added to one or more previous increases within the preceding 12 month period, total 10 percent or more.

In establishing the 10 percent threshold, as noted earlier, HHS reviewed available data and literature on insurance rate increases in States and general trends in health care costs. HHS reviewed each State's applicable Web site, and determined that the information related to rate trends posted on these Web sites is limited. A small number of States make available data on rate increases in different insurance market segments in that State. Our review of this data suggests that the majority of increases in the individual market exceeded 10 percent each year for the past 3 years. Trends are slightly lower in the small group market, but over 40 percent of increases still exceeded 10 percent. In fact, in the States examined, rate increases in the individual market and small group market typically exceeded 15 percent. These yearly increases significantly exceed some national measures of medical cost inflation, such as the medical component of the Consumer Price Index, whose inflation has typically ranged from 3.7 percent to 4.4 percent. The Centers for Medicare and Medicaid Services' National Health Expenditures (NHE) data is another measure of health care cost trends based on overall national health care spending. The five most recent years of available NHE data suggest that overall health care expenditures have increased at an annual rate between 4.4 percent to 6.9 percent. Commenters point out that the factors which account for the NHE or the medical component of the CPI are different than the various components that account for increases in insurance rates. For example, the medical component of CPI does not take into account utilization of health care services, or the risk profiles of specific populations but is instead based on prices for certain services provided to the general population. Health insurance rates are affected, not only by the prices charged by the providers of health care services, but also by changes in the rate at which those services are accessed and the characteristics of the group covered by the insurance. Another national index, the Standard & Poor's Healthcare Economic Commercial Index, also measures insurance rate trends. The S & P Index measures trends in provider claims costs, which encompasses both unit cost and utilization changes; the trend in that index from September 2009 to September 2010 was 8.5 percent.

In establishing a 10 percent threshold for determining which rates are subject to review, HHS has balanced the wide range of available data on rate and medical trend increases. If, for example, the NHE or medical component of the CPI represented an accurate measure of insurance rate trends, then a threshold for review could be established consistent with those indices under the theory that rate increases in line with those trends were reasonable because they tracked medical cost trends generally, and increases that exceed those measures are more likely to be unreasonable. However, since neither of those particular measures captures the many factors that affect insurance rates, using those measures as a threshold for reviewing rates under section 2794 would be over-inclusive. Under that approach, rather than capturing potentially unreasonable or excessive rate increases, almost all rate increases would be subject to review. Such a result would not be consistent with the intent of section 2794. For these reasons, a 10 percent threshold is a reasonable accommodation between the observed, but limited data available regarding trends in rate increases in the States, and the available but not precisely comparable data on general trends in health care costs and spending, and recognizes that other factors may justify a larger rate increase.

As noted earlier, the Secretary would seek to establish a State-specific threshold for each future calendar year no later than September 15th of the preceding calendar year, beginning in 2011, provided applicable State-specific trend data is available. If a State-specific threshold is not established by the Secretary for an applicable calendar year, the 10 percent threshold would continue to apply.

A State-specific threshold, to the extent it can be developed, would be based on the same kind of analysis used in establishing the proposed 10 percent threshold, but would account for State-specific variations in rate increases based on the cost of health care, utilization patterns, and other factors affecting health insurance rates in a State. HHS would use trend data and other information made available to HHS from States receiving premium review grants and through the reporting and notification requirements of this proposed regulation to develop State-specific thresholds, when possible.

In developing the 10 percent threshold, the Secretary considered the level of aggregation that should apply when determining whether a rate increase meets or exceeds the threshold, and the Secretary received numerous comments on this issue. Comments received from issuers, the American Academy of Actuaries, and industry groups proposed the use of a higher level of aggregation of multiple policy forms to improve statistical credibility. Typically, this aggregation occurs within a market segment. Consumer groups, on the other hand, generally favored lower levels of aggregation. Finally, various State regulators sent comments describing how individual State rate review laws affect the level of aggregation used in performing rate reviews.

In considering the broad range of perspectives represented by the comments on aggregation, the proposed regulation requires the consideration of rate increases at the "product" level when determining whether the increase is subject to review. Product would be defined under this proposed regulation as a package of health insurance coverage benefits with a discrete set of rating and pricing methodologies that a health insurance issuer offers in a State. Most States require issuers to submit each "product" as a separate form filing prior to marketing the "product" in the State. While each filed "product" may include variable options (such as different cost-sharing or deductible requirements), this definition,

consistent with State law, does not consider each variable option as a separate "product." Any rate increase for a product that meets or exceeds the applicable threshold is subject to review. However, if an issuer has rate increases that meet or exceed the applicable threshold for multiple products, the issuer may submit a single, combined preliminary justification for those products combined, provided (i) the experience of all combined products has been aggregated to calculate the rate increases, and (ii) the rate increase is the same across all combined products.

2. Determining Whether a Rate Increase Meets or Exceeds the Threshold

A rate increase would meet or exceed the applicable threshold if the weighted average increase for all enrollees subject to the rate increase meets or exceeds the applicable threshold. In this case, the weighted average takes into account the number of enrollees affected by each particular rate increase and represents the given increase proportionately. Specifically, we assume that different subcategories of enrollees will experience varying rate increases. The weighted average is calculated as follows: For each subcategory of enrollees subject to the same rate increase, we multiply the number of enrollees by the respective rate increase. The products are then summed over all subcategories. The sum is then divided by the total number of enrollees to arrive at the weighted average rate increase.

A rate increase meets or exceeds the threshold either by itself, or when considered cumulatively with any previous rate increases implemented with respect to the product during the preceding 12-month period. Therefore, a single rate increase which by itself falls below the applicable threshold must be aggregated with rate increases implemented during the 12 month period preceding its effective date in order to determine whether it is subject to review. If a rate increase meets or exceeds the threshold when combined with a previous increase or increases during the 12-month period preceding the date on which the rate increase would become effective, the rate increase is subject to review, and such review shall include a review of the aggregate rate increases during the applicable 12-month period.

E. Review of Rate Increases Subject To Review by a State or by HHS (§ 154.210)

As noted above, under this proposed regulation, States would continue to have primary responsibility for the review of rate increases. HHS would only review rates when a State has not yet established a process, including adequate legal authority, to do so. While not every State is currently equipped to conduct an effective review of insurance rates, the significant majority of States have a review process for some or all of the individual or small group markets, and many are planning to expand their authority to review rates using the grants provided in the Affordable Care Act detailed below. We fully expect that the vast majority of States will be able to conduct effective reviews in the future, should they choose to.

A Kaiser Family Foundation survey designed to explore what rate review authority States have and how they exercise it, identifies various reasons that explain why there is wide variation in the review of rate increases by States.[2] Some States have no legislative authority to approve or disapprove rates, while others have the authority to approve rates prior to implementation, or disapprove rates before or after implementation. Among States with robust legislative authority, a thorough rate review is contingent on State resources, staffing, and statutory timelines. The effectiveness of a State rate review program depends on State law as well as insurance department resources and practices, and will be determined, for purposes of this regulation, based on the State's ability to meet the criteria set forth in § 154.301.

Section 2794(c) of the PHS Act established a program to award "premium review grants." Section 2794(c) makes available a total of $250 million through 2014 for the provision of grants to States to support their efforts to enhance review of premium increases. These grants are available to States with the goal of improving existing rate review programs, developing rate review programs in States where none exist, and improving the transparency of the rate review process for the public. On August 16, 2010 HHS announced the first cycle of grant awards totaling the amount of $46 million to build upon States' current processes for reviewing, and to the extent permitted by State law, approving health insurance premium increases. Forty-five States and the District of Columbia applied for grants, and each was awarded $1 million in grant funds.

In applying for the first phase of these grants in 2010, some States indicated a need for additional resources to make the State's rate review program more effective. Many States indicated they lacked funding to hire actuaries and to secure other resources essential to a meaningful rate review program. Therefore, the rate review process under this proposed regulation, in conjunction with the rate review grant program, would enhance the quality and quantity of review of rate increases that States are able to conduct, building on their existing efforts and processes.

By requiring the Secretary to develop a rate review process in conjunction with the States, Congress also recognized that many States have significant experience reviewing rate increases and understand the local market forces driving health insurance rate increases. Therefore, HHS is proposing a rate review process that leverages State experience and expertise.

Section 154.210 of the proposed regulation sets forth the factors that would determine whether HHS would review rate increases that are subject to review or whether HHS would adopt the determination made by a State regarding whether a rate increase is an unreasonable rate increase. To the extent that a State has an effective rate review program in a given market, as evaluated by HHS using the criteria set forth more fully below, HHS would adopt that State's determinations regarding rate increases subject to the State's review in a given market. Accordingly, upon receipt of the State's final determination and explanation for its determination, HHS would adopt the determination of a State that has an effective rate review program regarding whether a rate increase is unreasonable under applicable State law. If a State does not have an effective rate review program in place for the individual or small group markets within the State, only then would HHS review rate increases and make its own determinations of whether the rate increases are unreasonable.

F. Effective Rate Review Program (§ 154.301)

1. General Criteria for an Effective Rate Review Program

This regulation sets out specific criteria, set forth in § 154.301(a), for evaluating whether a State has an effective rate review program in the individual and small group markets. Specifically defining these criteria provides transparency to the rate review process as these criteria are readily available to the States, health insurance issuers, and consumers. These criteria

[2] Kaiser Family Foundation, "Rate Review: Spotlight on State Efforts to Make Health Insurance More Affordable," December 2010, available at *http://www.kff.org/healthreform/upload/8122.pdf.*

were developed solely for the purpose of establishing the standards that HHS would use to evaluate, in consultation with the States, whether a State's rate review process is effective, or whether HHS would conduct rate reviews and make a determination as to whether a rate increase is unreasonable. Since a State may be in the process of improving its rate review program, and may be using grant funds and other resources for this purpose, HHS would make its determination based on the State's existing rate review program, including any recent changes made that would satisfy the criteria for an effective rate review program set forth in § 154.301(a).

Under proposed § 154.301(a)(1), we set forth four criteria for an effective rate review program. These criteria are drawn from common practices that States use today for effective reviews. Underlying these proposed criteria is the principle that the purpose of an effective rate review program is to affirmatively determine, based on substantial evidence on the record as a whole, whether a rate increase is an unreasonable rate increase. The proposed regulation specifies that in order for a State's rate review program to be considered effective, the State needs to have the legal authority to obtain data and documentation that is sufficient to conduct an effective examination. The State would also be required to effectively review data and documentation submitted in support of rate increases. An effective rate review program would have to include an examination of both (i) the reasonableness of the assumptions used by the health insurance issuer in developing the rate proposal and the validity of historical data underlying such assumptions; and (ii) the issuer's data related to past projections and actuarial experience. As is the case for those States conducting effective review today, this examination of assumptions and past projections would be required to include analyses of at least the following twelve areas that typically impact rates:

- Medical trend changes by major service categories;
- Utilization changes by major service categories;
- Cost-sharing changes by major service categories;
- Benefit changes;
- Changes in enrollee risk profile;
- Impact of over- or under-estimate of medical trend in previous years on the current rate;
- Reserve needs;
- Administrative costs related to programs that improve health care quality;
- Other administrative costs;
- Applicable taxes, licensing or regulatory fees;
- Medical loss ratio; and
- The health insurance issuer's risk-based capital status relative to national standards.

Finally, the State's determination of whether a rate increase is unreasonable would be made under a standard that is set forth in State statute or regulation. As noted above, 43 States have some standard under State law that would apply to the review of unreasonable rates. This proposed regulation does not establish a standard that States must apply.

2. HHS's Determination Whether a State Has an Effective Rate Review Program

We fully expect that the vast majority of States will be able to conduct effective reviews in the future. HHS expects that the majority of States would currently meet the standards for having an effective review process, and many more would become effective review States as they obtain needed statutory authority or implement new or enhanced rate review processes. So long as a State can conduct an effective review of proposed rate increases that meet or exceed the applicable threshold, States will not be "second-guessed" by HHS. Working with the States, HHS would evaluate whether a State's rate review program meets the requirements of an effective rate review program set forth in § 154.301(a) based on documentation and information received from the State through the grant process, through review of applicable State law, and through any other information otherwise available to HHS. Unless a State were no longer conducting reviews in accordance with the criteria set forth in proposed § 154.301(a), HHS would not conduct reviews for rate filings in that State. If after an initial determination has been made by HHS that a State's rate review program is not effective, HHS would subsequently be able to determine that later improvements made by the State to its rate review program have made it an effective rate review program. HHS would post on its Web site a list of those States having effective rate review programs, and would update this list from time to time, as appropriate.

G. Unreasonable Rate Increases (§ 154.205)

Under the proposed regulation, when HHS reviews a rate increase, HHS would determine that the rate increase is an unreasonable rate increase if the increase is an excessive rate increase, an unjustified rate increase, or an unfairly discriminatory rate increase. The factors that make a rate increase excessive, unjustified or unfairly discriminatory are described in 154.205. HHS would consider all of these factors in determining whether a rate increase is unreasonable. The factors used to determine whether a rate increase is unreasonable would only apply to rate increases that are reviewed by HHS. Each State would apply its own State standards when reviewing a rate increase to determine whether it is unreasonable.

HHS recognizes that factors other than those addressed in the proposed regulation may be viewed as potentially impacting the reasonableness of a rate, including the structure and competitiveness of the market, and we are therefore soliciting public comment to identify these factors and whether they should be considered in determining whether a rate increase is unreasonable.

1. Excessive Rate Increase

An excessive rate increase is a rate increase that is subject to review and that causes the premium charged for the health insurance coverage to be unreasonably high in relation to the benefits provided. HHS recognizes that identifying objective measures that would be considered in determining whether a rate increase is excessive would be helpful to both issuers and the public. The proposed regulation therefore would describe several objective measures that HHS would consider in determining whether a rate increase causes the premiums charged to be unreasonably high in relation to the benefits provided.

First, HHS would consider whether the rate increase results in a projected future loss ratio below the Federal medical loss ratio (MLR) standard determined under section 2718 of the PHS Act for the applicable market to which the rate increase applies. HHS recognizes that under the regulations implementing the MLR standards, 75 FR 74864 (December 1, 2010), generally issuers must meet the relevant MLR standard in each State by aggregating all of their business in a particular market segment. The consequence of this approach is that an issuer may meet the MLR standard in the aggregate even if a particular insurance product does not meet the relevant standard so long as the combination of all products in the market by the issuer meets the Federal standard. Therefore, while the MLR is not a determinative factor, MLR

standards serve as a benchmark against which the reasonableness of rates are measured in the industry and the approach that would be adopted under this proposed rule is consistent with the approach taken in States that have had MLR standards under State law. Under this proposed approach, if an issuer proposed an increase of 10 percent or more (an increase that would be subject to review) for one or more individual market products, and the projected MLR for the product or products was below 80 percent, the increase nonetheless would not necessarily be considered excessive if the issuer could demonstrate that the aggregate MLR for all products in the individual market in that State would be at or above 80 percent.

Notably, the Federal MLR standard under the Public Health Service Act also takes into account certain adjustments such as credibility adjustments to account for newer and smaller plans and other special cases. HHS would consider the issuer's adjusted Federal medical loss ratio in the applicable market to which the rate increase applies when determining whether an increase is excessive.

Second, in determining whether a rate increase is excessive, HHS would consider whether one or more of the assumptions on which the rate increase is based are not supported by substantial evidence. Finally, HHS would consider whether the choice of assumptions or combination of assumptions on which the rate increase is based is unreasonable.

2. Unjustified Rate Increase

Included in this proposed regulation are provisions that would require health insurance issuers to provide a defined set of data and documentation to HHS, to permit HHS to determine whether a rate increase is "unjustified." A proposed rate increase that is subject to review would be "unjustified" if the health insurance issuer provides data or documentation to HHS in connection with the increase that is incomplete, inadequate or otherwise does not provide a basis upon which the reasonableness of an increase may be determined. Therefore, issuers would be required to provide data and documentation that is sufficient for HHS to conduct a meaningful review of a rate increase.

3. Unfairly Discriminatory Rate Increase

Under the proposed regulation, an unfairly discriminatory rate increase is one that results in premium differences for a particular product between insureds within similar risk categories that are not permissible under applicable State law or, if no State law applies, do not reasonably correspond to differences in expected costs. In this context, a risk category is a classification of a group of insureds who share a common set of descriptive characteristics, such as age or geographic location, and are covered under a single product. Health insurance issuers charge different premiums to insureds that fall within different risk categories.

More than 25 States prohibit health insurance rates from being unfairly discriminatory. Therefore, the proposed regulation would define an unreasonable rate increase to include an unfairly discriminatory rate increase. In order to develop the factors that would make a rate increase an unfairly discriminatory rate increase, HHS reviewed factors applied by States to determine whether a rate increase is unfairly discriminatory.

In our review, we concluded that States determine whether a rate increase is unfairly discriminatory based on the specific rating requirements under applicable State law. For example, if a State's rating law prohibits price discrimination within a rating cell (a subcategory of enrollees with particular characteristics in common, such as age, geographical location or tobacco status), a rate increase in that State would be unfairly discriminatory if the increase varied between individuals with the same characteristics within a given rating cell. If a State's rating law requires community rating (the practice of charging a common, unadjusted premium to all members of a diverse pool who may have widely varied health spending for the year) or prohibits the use of a specific rating factor such as geographical location, age or tobacco status, a rate increase in that State would be unfairly discriminatory if the increase was calculated based on a prohibited rating factor or does not account for pooled experience under the State's community rating requirements.

Therefore, under the proposed regulation, an unfairly discriminatory rate increase would be one that results in premium differences not permissible under applicable State law between insureds within similar risk categories or, if no State law applies, do not reasonably correspond to differences in expected costs. This approach would give deference to applicable State rating laws, and give HHS the ability to determine that a rate increase is unfairly discriminatory in the absence of applicable State law.

H. Issuer Disclosure Required Under Part 154

1. Preliminary Justification

The proposed regulation would require health insurance issuers to submit a preliminary justification for all rate increases subject to review, regardless of whether a State or HHS is reviewing the rate increase. The format of the preliminary justification would be provided in guidance. In order to minimize the burden on health insurance issuers to complete the preliminary justification, HHS is developing a web-based program that would allow health insurance issuers to complete and submit the preliminary justification electronically. The information contained in parts one and two of the preliminary justification would be intended to provide consumers with a thorough description of the rate increase, including both a narrative descriptive and a quantitative analysis. Further, parts one and two would provide consumers with the context necessary to interpret a State's or HHS's determination as to whether a rate increase is unreasonable. HHS is sensitive to placing an increased reporting burden on health insurance issuers, but believes that the majority of issuers would have the information required in parts one and two of the preliminary justification readily available, since this is the type of information generally used by issuers to calculate their rates.

In developing the requirements for parts one and two of the proposed preliminary justification, HHS has reviewed and incorporated elements from a comparable form developed by the NAIC over a period of several months. For example, State regulators expressed the view that consumers need more than just quantitative information, such as cost and utilization trend factors, to interpret a rate increase. Regulators recommended that issuers be required to provide a narrative explanation of applicable rate increases that supports and explains the key quantitative information associated with the increase. The narrative also should describe, in a straightforward fashion, the rationale for the rate increase. The preliminary justification therefore would require issuers to provide high level quantitative data associated with a rate increase along with a written narrative explaining the increase.

If HHS is responsible for reviewing a rate increase, HHS would conduct a comprehensive actuarial review of the increase. In this case, issuers would be required to submit additional information in part three of the

preliminary justification. As noted above, the specific proposed data reporting requirements in part three of the preliminary justification are modeled on the actuarial memorandum guidelines included in NAIC Model Regulation 134–1. These guidelines set forth reasonable standards for reporting and justifying rate increases, and this type of data comprises a typical rate filing in those States that require rates to be filed. Therefore, HHS anticipates that these data would be readily available to most issuers. Shortly following the release of this proposed rule, HHS will release via the **Federal Register** a draft version of the preliminary justification for public comment. The draft preliminary justification will provide the formatting and reporting instructions for each of the reporting categories listed in the regulation.

Part one of the preliminary justification, titled "rate increase summary," would require issuers to submit the following data underlying the rate increase:

(1) Historical and projected claims experience;

(2) Trend projections related to utilization, and service or unit cost;

(3) Any claims assumptions related to benefit changes;

(4) Allocation of the overall rate increase to claims and non-claims costs;

(5) Per enrollee per month allocation of current and projected premium;

(6) Current loss ratio and projected loss ratio;

(7) Three year history of rate increases for the product associated with the rate increase; and

(8) Employee and executive compensation data from the health insurance issuer's annual financial statements.

Under part two of the preliminary justification, titled "written description justifying the rate increase," a health insurance issuer would be required to provide a written description of the rate increase, including: (1) An explanation of the rating methodology (that is, the method used to apply various rating factors, such as cost trends or benefit design, to the development of an insurance rate, as well as the formulae employed to apply those factors); (2) an explanation of the most significant factors causing the rate increase, including a brief description of the relevant claims and non-claims expense increases reported in the rate increase summary; and (3) a brief description of the overall experience of the policy, including historical and projected expenses and loss ratios.

Again, a health insurance issuer would be required to complete and submit sections one and two of the preliminary justification for all rate increases subject to review, regardless of whether HHS or a State is reviewing the rate increase. Issuers would be required to complete part three titled, "rate filing documentation," only in the event HHS is reviewing the rate increase. The rate filing documentation supports parts one and two of the preliminary justification, and the proposed regulation lists the following broad reporting data categories that would be required under part three, consistent with NAIC model requirements:

(1) Description of the type of policy, benefits, renewability, general marketing method and issue age limits;

(2) Scope and reason for the rate increase;

(3) Average annual premium per policy, before and after the rate increase;

(4) Past experience, and any other alternative or additional data used;

(5) A description of how the rate increase was determined, including the general description and source of each assumption used;

(6) The cumulative loss ratio and a description of how it was calculated;

(7) The projected future loss ratio and a description of how it was calculated;

(8) The projected lifetime loss ratio that combines cumulative and future experience, and a description of how it was calculated;

(9) The Federal medical loss ratio standard in the applicable market to which the rate increase applies, accounting for any adjustments allowable under Federal law; and

(10) If the result under paragraph (e)(7) is less than the standard under paragraph (e)(9), a justification for this outcome.

When health insurance issuers provide rate filing documentation for each category in part three of the preliminary justification, they would have to be sufficient to permit HHS to conduct a thorough actuarial review of the rate increase. However, HHS would accept a State rate filing in lieu of the information required under part three, provided the rate filing includes the information required under such part. In the event a health insurance issuer does not provide sufficiently detailed information for HHS to review a rate increase and determine whether it is unreasonable, HHS would request from the health insurance issuer the information necessary to complete its review. HHS proposes to provide further details on the format by which the specific data elements would be required to be submitted by this proposed regulation.

2. Submission of Final Justification or Final Notification

When a State with an effective rate review program receives notice of a rate increase subject to review, it would determine whether the increase is an unreasonable rate increase. The State would provide its findings and conclusions to HHS. In the situations when HHS reviews a rate increase, HHS would prepare a final determination and brief explanation of its analysis. If HHS determines that a rate increase is not unreasonable, or adopts a determination by a State that a rate increase is not unreasonable, the health insurance issuer would not be obligated to submit any additional information to HHS. If HHS determines that a rate increase is unreasonable, HHS would provide the final determination and explanation to the health insurance issuer. If HHS adopts a determination by a State that a rate increase is unreasonable, and the health insurance issuer is legally permitted to implement the unreasonable rate increase under applicable State law, HHS would provide the State's final determination and explanation to the issuer.

If the health insurance issuer intends to implement an unreasonable rate increase, the issuer would be required to submit a final justification to HHS. The justification would be a brief response to HHS's or the applicable State's final determination. If the issuer chooses not to implement the unreasonable rate increase, or chooses to implement a lower rate increase, it would be required to notify HHS to that effect. If the issuer implements a lower rate increase that does not meet or exceed the applicable threshold, the lower increase would not be subject to the proposed regulation. However if the lower rate increase does meet or exceed the applicable threshold, the increase would be subject to the proposed regulation and the issuer would be required to submit to HHS a new preliminary justification for the increase. The issuer would submit the final justification or final notification by the later of 10 days after (i) the implementation of such increase or (ii) the health insurance issuer's receipt of HHS's final determination that a rate increase is an unreasonable rate increase.

The purpose of the final justification would be to provide the health insurance issuer with an opportunity to respond to HHS's or the State's determination that its rate increase is unreasonable and to make the issuer's final justification available to health

insurance consumers. Since HHS would rely directly on information provided by the health insurance issuer when making the determination whether a rate increase is unreasonable, the health insurance issuer's final justification would have to be consistent with and based upon the information provided under the preliminary justification, and could not include new or different information that was not provided to HHS. Health insurance issuers would be required to provide their final justifications electronically to HHS through the web-based program developed by HHS.

As noted above, HHS's determination that a rate increase is unreasonable would not have any effect on the issuer's right to implement the rate increase, which is entirely a matter of State law. Similarly, HHS's review of rate increases would not delay the implementation of those increases; the timing of implementation is also a matter of State law.

3. Posting of Information on the HHS Web site

HHS proposes to promptly post on its Web site the information contained in parts one and two of the preliminary justification. Section 2794 requires the Secretary to ensure the public disclosure of information, including the justifications. The statute does not specify when this information must be posted, but HHS believes that Congress intended that the rate review process be transparent, and that this objective is served by giving consumers immediate access to basic information regarding the proposed increase that is under consideration by HHS or States and prior to the implementation of the rates that are subject to review. To avoid a misperception that these postings represent justifications for rate increases that are determined to be unreasonable, HHS will prominently place a disclaimer near the postings that: "The preliminary justification is the initial summary information regarding the rate increase subject to review and does not represent a determination that the rate increase subject to review is an unreasonable rate increase." We solicit public comment on the specific language HHS should use in its disclaimer. HHS considered disclosing this information later in the review process, such as when the review of the rate increase was completed, but determined that posting in this manner would reduce transparency and provide insufficient opportunity for consumer review of information related to these rate increases prior to implementation.

HHS does not consider the information contained in the preliminary justification to be confidential and believes that consumers would benefit from this information because it provides a basic description of the rationale underlying a rate increase. HHS also believes that the information under part three should be made public, but understands that issuers may consider certain of this information to be confidential. HHS would promptly post on its Web site any information provided in part three of the preliminary justification, as long as it has not been designated as "confidential" as defined in HHS's Freedom of Information Act regulations, 45 CFR 5.65. HHS will also make a determination as to whether to post information designated as "confidential" under the standards and procedure set forth in those regulations, and will post that information only after making a determination that it is subject to disclosure as provided by those regulations.

HHS would also post on its Web site the final determinations of both States and HHS that a rate increase is either unreasonable or not, as well as explanations for those determinations. In the event that either a State or HHS determines that a rate increase is an unreasonable rate increase and the health insurance issuer chooses to implement the rate increase, HHS would also post on its Web site the health insurance issuer's final justification.

4. Posting of Information on the Health Insurance Issuer's Web site

PHS Act section 2794 requires health insurance issuers to prominently post on their Web sites their justification for an unreasonable premium increase. Therefore, if HHS determines that a rate increase is unreasonable or adopts a determination by a State that a rate increase is unreasonable, and the health insurance issuer implements the rate increase, the issuer would be required to post on its Web site the information contained in the preliminary justification; HHS's final determination and explanation; and the issuer's final justification. In an attempt to minimize this posting burden, health insurance issuers would be able to download from HHS an electronic file containing the information required to be posted. Further, the health insurance issuer would have no obligation to post on its Web site any information regarding rate increases that are not determined to be unreasonable or that are not implemented. HHS proposes to issue further guidance regarding the format of posting.

5. Timing of Submission of Preliminary Justification, Final Justification, Final Notice, and Issuer Posting

PHS Act section 2794 requires health insurance issuers to provide justifications for unreasonable rate increases prior to the implementation of such increases. As noted above, consistent with this requirement, HHS is proposing necessary timeframes for the completion of the preliminary justification by health insurance issuers. Specifically, if a State requires a health insurance issuer to file a proposed rate increase with the State prior to implementation of the rate, the issuer would be required to submit a completed preliminary justification when it submits the proposed rate increase to the State. This approach would allow HHS to receive the preliminary justification prior to implementation of a rate increase without creating an additional burden on health insurance issuers to include an extensive justification in their initial submission to the State.

If a State does not require a health insurance issuer to file a rate increase with the State, HHS anticipates that such State would not be found to have an effective rate review program. Therefore, HHS anticipates that it would be responsible for reviewing rate increases in those States. PHS Act section 2794 does not require issuers to submit rate filing data prior to implementation of a rate increase, and accordingly neither would this proposed regulation. Therefore, absent any State law to the contrary, issuers would have the option of completing the preliminary justification at the time of implementation or prior to that time. If HHS requires information in addition to the preliminary justification to complete its review, then the issuer would be required to provide this information within five business days following its receipt of the request.

In the event the issuer implements an unreasonable rate increase, the issuer would be required to submit a final justification to HHS and post the required information on its Web site within the later of 10 days after the implementation of the increase or 10 days after the issuer's receipt of the final determination by HHS that the rate is unreasonable. If an issuer determines that it will decline to implement or has withdrawn an increase determined by HHS to be unreasonable, or that it will implement a lower increase, it would be required to notify HHS of this decision within 10 days of its determination.

III. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995, we are required to provide 60 days notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. This proposed rule contains information collection requirements (ICRs) that are subject to review by OMB. A description of these provisions is given in the following paragraphs with an estimate of the annual burden, and summarized in table A. Included in the estimate is the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing each collection of information. In order to fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires that we solicit comment on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of our agency.
- The accuracy of our estimate of the information collection burden.
- The quality, utility, and clarity of the information to be collected.
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

We are soliciting public comment on each of these issues for the following sections of this proposed rule that contain information collection requirements (ICRs):

A. Background

Section 2794 requires the Secretary to develop, in conjunction with the States, a process for the annual review of unreasonable rate increases. The proposed regulation would establish a rate review program to ensure that all rate increases that meet or exceed an established threshold are reviewed by a State or HHS to determine whether the rate increases are unreasonable. Under the proposed regulation, if HHS determines that a State has an effective rate review program in a given market, using the criteria set forth in the proposed rule, HHS would adopt that State's determinations regarding whether rate increases in that market are unreasonable, provided that the State reports its final determinations to HHS, and explains the bases of its determinations. For all other States, HHS would conduct its own review of rates that meet or exceed the applicable threshold to determine whether they are unreasonable.

Section 2794 directs the Secretary to ensure the public disclosure of information on unreasonable rate increases and justification for those increases. The proposed regulation would therefore develop a process to ensure the public disclosure of information on unreasonable rate increases and justifications for those increases. Section 2794 also requires that health insurance issuers submit a justification for an unreasonable rate increase to HHS and the relevant State prior to its implementation. The proposed regulation would therefore establish various reporting requirements for health insurance issuers, including a preliminary justification for a proposed rate increase, a final justification for any rate increase determined by a State or HHS to be unreasonable, and a notification requirement for unreasonable rate increases which the carrier will not implement.

B. ICRs Regarding the Rate Review Preliminary Justification Form (§ 154.215 and § 154.220)

This proposed rule describes the preliminary justification that each health insurance issuer would be required to submit to both HHS and States, if it is seeking to implement a rate increase that meets or exceeds the threshold described in § 154.200. The preliminary justification would include data supporting the potential rate increase as well as a written explanation of the rate increase. For those rates HHS would be reviewing, issuers' submissions would also include supplemental data and information that HHS would need to make a valid actuarial determination regarding whether a rate increase is unreasonable.

Each health insurance issuer seeking to implement a rate increase that meets or exceeds the established threshold would be required to complete a preliminary justification. The preliminary justification consists of three parts. Part one consists of a document (Excel spreadsheet) to be completed by issuers for all proposed rate increases that meet or exceed the threshold. Part two of the preliminary justification is a three- to five-page written narrative explaining the methodology used to derive the rate increase. Issuers would be required to submit to both HHS and the applicable State parts one and two prior to implementation of a rate increase, regardless of whether HHS is reviewing the rate increase or adopting the State's review. Issuers typically calculate these figures in order to develop a premium and submit a rate filing to State regulators. The data elements and methodologies are commonly calculated by issuers and are often required by States that review rates.

Issuers would be required to complete part three of the preliminary justification only when HHS is reviewing a rate increase to determine whether it is unreasonable or not, and submit part three to HHS only (and not to the applicable State). Part three of the preliminary justification defines an additional set of information that issuers must submit only when HHS is reviewing a rate increase. The information provided under part three would allow HHS to make a valid actuarial determination as to whether the rate increase is unreasonable or not. If an issuer completes and submits part three of the preliminary justification, but does not provide sufficient information for HHS to conduct its review, HHS would request the additional information necessary to make its determination. Issuers would have five business days to respond to any request for outstanding information from HHS.

Using 2010 data, HHS estimates the number of rate filings in 2010 that would have been subject to the proposed rule had it been in force to be between 3,635 and 4,015 in the individual and small group markets nationwide. HHS estimates that the total number of rate filings is expected to increase slightly in 2011, due in part to an increased number of issuers required to file based on those factors discussed in the impact analysis section. Therefore, HHS estimates that, in 2011, there would be 5,343 rate filings subject to the proposed rule. As discussed in the impact analysis section, HHS estimates that approximately 773 of these rate filings would require review under the proposed rule because they meet or exceed the established threshold.

At this time, HHS has not completed development of the draft forms for parts one, two, and three of the preliminary justification that issuers would have to submit should their rate increase be subject to review because it would meet or exceed the threshold. While these are new forms, we believe issuers are already collecting the data necessary to complete any form we develop. Because the forms are still under development, we cannot assign a complete burden estimate at this time. Once the forms are available, we will publish a notice in the **Federal Register** to solicit public comments on the forms and provide our burden estimates associated with this requirement.

C. ICRs Regarding State Determinations (§ 154.210 and § 154.225)

Under the proposed rule, if HHS determines that a State has satisfied specific criteria for an effective rate review program under § 154.301, HHS would adopt the State's determinations regarding whether a rate increase that meets or exceeds the established threshold is unreasonable, providing the State reports its final determinations to the Department and explains the bases of its determination as required under § 154.210(b)(2). As discussed in the impact analysis section, since many States are already performing these functions, the cost burden to States would be small and would largely be offset by rate review grants provided by the Department to help States improve their rate review processes. In those cases where a State does not have an effective rate review program, HHS would make its own determinations regarding whether a rate increase that meets or exceeds the established threshold is unreasonable.

HHS would post on its Web site the information contained in each preliminary justification for each rate increase subject to review under § 154.200. For consumer clarity, HHS would also post on its Web site the final disposition of each rate increase reviewed by either HHS or a State. Therefore, either a State or HHS would make a final disposition for all rate increases reviewed under the proposed rule, similar to current rate filing practices under the NAIC System for Electronic Rate and Form Filing (SERFF) or similar State-based filing systems.

As explained in the impact analysis section, HHS estimates that 773 rates would be reviewed under the proposed rule because they meet or exceed the established threshold and that 25 to 35 States, in whole or in part based on market segment, would be reporting to HHS and posting dispositions on approximately two-thirds of these rates (or 515 filings) for at least one market. The RIA also estimates that reporting information from the State to Department will require approximately 20 minutes per filing. Thus the annual burden for this requirement is approximately 172 hours. HHS estimates that the additional burden of posting to the States would be negligible, since States currently post information about the disposition of rates. However, we welcome comments regarding the burden associated with the State posting burden requirements described in § 154.225.

D. ICRs Regarding the Final Justification and Final Notification (§ 154.230)

The proposed rule would require health insurance issuers to submit to HHS and the relevant State a final justification for any unreasonable rate increase that would be implemented and to display this information on their Internet Web sites. If an issuer is legally permitted to implement an unreasonable rate increase and declines to implement the increase, the issuer would provide notice to HHS that it will not implement the increase. As discussed in the impact analysis section, HHS estimates that 417 issuers will submit an estimated 371 to 1,396 rates for review and that it will take between 6 to 16 hours to complete the entire justification process. HHS estimates that 773 rates will meet or exceed the threshold and further assumes carriers will implement 100 percent of rates found unreasonable. We welcome comments regarding the burden associated with the State posting burden requirements described in § 154.230.

E. ICRs Regarding HHS's Determinations of Effective Rate Review Programs (§ 154.301)

As discussed earlier in the preamble, HHS would determine whether a State's rate review program meets the requirements of an effective rate review program set forth in § 154.301(a) based on documentation and information received from the State through the grant process, through review of applicable State law, and through any other information otherwise available to HHS. The information collection for the "Grants to States for Health Insurance Premium Review" is approved under OMB Control number 0938–1092. Since HHS does not believe additional data from States are necessary to make these determinations, we assume the additional burden from this provision is zero.

TABLE A—ESTIMATED ANNUAL BURDEN

45 CFR Section	Type of collection	Respondent	Number of respondents	Total annual responses	Hours per response	Total hours
§ 154.210	Reporting	States	25–35	515	0.33	172
§ 154.215 and § 154.220	Reporting	Issuers	417	773	TBD	TBD
§ 154.225	Disclosure	States	25–35	515	Negligible	0
§ 154.230	Reporting	Issuers	417	773	.5	386
§ 154.230	Disclosure	Issuers	417	773	.5	386

In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the agency has submitted the information collection provisions of this proposed rule to OMB for review.

If you comment on these information collection and recordkeeping requirements, please do either of the following:

1. Submit your comments electronically as specified in the **ADDRESSES** section of this proposed rule; or

2. Submit your comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: OCIIO Desk Officer, OCIIO–9999–P, Fax: (202) 395–7245; or E-mail: *OIRA_submission@omb.eop.gov*.

IV. Response to Comments

Because of the large number of public comments we normally receive on **Federal Register** documents, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the **DATES** section of this preamble, and, when we proceed with a subsequent document, we will respond to the comments in the preamble to that document.

V. Regulatory Impact Analysis

In accordance with the provisions of Executive Order 12866, this regulation was reviewed by the Office of Management and Budget.

A. Summary

As stated earlier in the preamble, this notice of proposed rulemaking (NPRM) implements Section 2794 of the Public Health Service (PHS) Act (as added by Section 1003 of the Affordable Care Act), which requires the Secretary, in conjunction with the States, to establish a process for the annual review of unreasonable increases in health

insurance premiums (referred to in the NPRM as "rates"). This notice of proposed rulemaking outlines the methodology by which HHS would review proposed rate increases. HHS has proposed this regulation to implement statutory provisions designed to help make private health insurance more affordable, and to increase the transparency of the process by which health insurance issuers calculate premiums. HHS has quantified costs where possible and provided a qualitative discussion of the benefits and of the transfers and costs that may stem from this regulation.

B. Executive Order 12866

Executive Order 12866 (58 FR 51735) directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects; distributive impacts; and equity).

Section 3(f) of the Executive Order defines a "significant regulatory action" as an action that is likely to result in a proposed rule (1) having an annual effect on the economy of $100 million or more in any one year, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as "economically significant"); (2) creating a serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. OMB has determined that this proposed rule is a "significant rule" under Executive Order 12866. Accordingly, OMB has reviewed this proposed rule under the Executive Order.

A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any 1 year); and a "significant" regulatory action is subject to review by the Office of Management and Budget (OMB). As discussed below, HHS has concluded that this proposed rule would likely not have economic impacts of $100 million or more in any one year, nor would it adversely or materially affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities. This assessment is based primarily on the administrative costs to issuers of completing the preliminary justification form they are required to submit when proposing rate increases of 10 percent or greater, and on the costs to States and the Federal government of reviewing these justifications. As discussed below, HHS is not able to quantify the effect of this proposed rule on rates charged by issuers, and it is possible that the effect on rates will be large enough to cause the proposed rule to be considered a major rule. HHS invites comments on this issue.

Nevertheless, HHS opted to provide an assessment of the potential costs, benefits, and transfers associated with this proposed regulation.

1. Need for Regulatory Action

Consistent with the provisions in Section 2794 of the PHS Act, this NPRM when finalized would require health insurance issuers offering non-grandfathered coverage in the individual and small group markets to report information concerning rate increases to HHS and the applicable State if the proposed increase is 10 percent or higher. Section 2794(a) of the PHS Act (captioned "initial premium review process") requires the Secretary to "establish a process for the annual review of unreasonable increases in premiums for health insurance coverage." The section further provides that issuers "submit to the Secretary and the relevant State a justification for an unreasonable premium increase prior to the implementation of the increase."

Many States currently review rate filings in all or some portion of the insurance market, therefore, the burden of implementing this proposed rule on States will be small. In the States that do not currently conduct effective rate review, HHS will initially review those rate filings that meet or exceed the 10 percent threshold. HHS anticipates that those States will use the rate review grants described in the preamble to enhance their capacity for review. Moreover, HHS anticipates gradually transitioning rate review responsibilities to these States as they build their capacity and as a result, reducing Federal costs over time.

In addition, this proposed rule requires issuers proposing rate increases 10 percent and above to provide a preliminary justification for the proposed increase. That preliminary justification will use data typically assembled by the issuers in computing their rate request. Because the preliminary justification requires the restating of existing data rather than the generation of new information, HHS expects the burden on issuers in filing the justification will be relatively small.

2. Summary of Impacts

In accordance with OMB Circular A–4, Table 1 below depicts an accounting statement summarizing HHS' assessment of the benefits, costs, and transfers associated with this regulatory action. HHS limited the period covered by the regulatory impact analysis (RIA) to 2011–2013. Estimates are not provided for subsequent years because there will be significant changes in the marketplace in 2014 related to the offering of new individual and small group plans through the health insurance Exchanges, and the wide ranging scope of these changes makes it difficult to project results for 2014 and beyond.

As described in this RIA, HHS estimates that this regulatory action would result in better information for consumers about their health insurance premiums and is likely to lower premiums. The proposed rule also imposes costs on insurers associated with preparing and filing proposed rate increases, and imposes costs on State and Federal governments associated with reviewing proposed rate increases. In accordance with Executive Order 12866, HHS believes that the benefits of this regulatory action justify the costs.

TABLE 1—ACCOUNTING TABLE

Benefits:
Qualitative:
* Increased transparency in health insurance markets, promoting competition.
* To the extent that unreasonable rate increases are prevented as a result of this rule, reduction in the deadweight loss to the economy from the exercise of monopolistic power by issuers.

TABLE 1—ACCOUNTING TABLE—Continued

Costs:	Low estimate	Mid-range estimate	High estimate	Year dollar	Discount rate percent	Period covered
Annualized Monetized ($millions/year)	7	12	19	2010	.....	2011–2013
	6	11	18	2010	.....	2011–2013
One-time costs to create systems to report data, and annual costs related to reporting data to the Secretary, providing rate increase justifications, and costs to the States and Federal government of reviewing the justifications.						
Transfers:						
Qualitative: * To the extent that rate increases are reduced as a result of this rule, money will be transferred from issuers/shareholders to consumers.						

3. Qualitative Discussion of Anticipated Benefits, Costs and Transfers

a. Benefits

Reliable information on prices is a prerequisite for well-functioning competitive markets. Consumers in the individual and small-group health insurance markets, which are highly concentrated, may have difficulty knowing whether an increase in their premium is actuarially justifiable—for example, because it is due to a change in the scope of covered services—or whether it is the result of insurers exercising market power to set rates above the level that is actuarially justifiable.

The proposed rule subjects proposed rate increases of ten percent or more to additional scrutiny in order to safeguard against this exercise of market power by insurers. The proposed rule's reporting requirements should result in better information for consumers about prices, promoting competition and potentially increasing the volume of trade, thereby yielding a net benefit to society.

b. Costs

HHS has identified the primary sources of costs that would be associated with this proposed rule as the costs to issuers associated with reporting, recordkeeping, notifications, and the costs to State and Federal governments of conducting reviews of the justifications filed by issuers.

HHS estimates that issuers would incur approximately $10 million to $15 million in one-time administrative costs, and $0.4 million to $4.5 million in annual ongoing administrative costs related to complying with the requirements of this proposed rule from 2011 through 2013. In addition, States would incur very small additional costs for reporting the results of their reviews to the Federal government, and the Federal government would incur approximately $0.6 million to $4.8 million in annual costs to conduct reviews of justifications filed by issuers in States that do not perform effective reviews. Additional details relating to these costs are discussed later in this regulatory impact analysis.

C. Estimated Number of Affected Entities and Number of Rate Filings Meeting or Exceeding the Threshold and Subject To Review

Section 2794 of the Public Health Service Act specifies that the rate review provisions apply to health insurance issuers offering individual or group health insurance coverage, not including grandfathered health plans. As discussed earlier in the preamble, in this context, the term "issuer" has the same meaning provided in 45 CFR 144.103, which states that an issuer is "an insurance company, insurance service, or insurance organization (including an HMO) that is required to be licensed to engage in the business of insurance in a State and that is subject to State law that regulates insurance (within the meaning of section 514(b)(2) of ERISA)." As discussed in the preamble, the rate review provisions in this proposed rule apply to issuers that offer individual and small group coverage, and these issuers would be required to submit a preliminary justification for rate increases meeting or exceeding the rate review threshold of 10 percent, to file with the Secretary and the applicable State a final justification for those rate increases found unreasonable, and disclose information about the proposed increase, if implemented, on their Web sites. The following sections summarize HHS' estimates of the number of entities and rate filings that would be affected by the requirements being proposed in this rule.

D. Estimated Number of Affected Entities

The rate review provisions will apply to all health insurance issuers offering coverage in the individual and small group markets except for grandfathered plans. The number of issuers is 311 in the individual market and 342 in the small group market, for a total of 417 (unduplicated) issuers, as determined for the interim final rule for implementing the medical loss ratio requirements under the Affordable Care Act (**Federal Register** December 1, 2010).

Table 2 shows the estimated distribution of the 417 issuers offering coverage in the individual and small group markets for the analytic sample used in this RIA.[3] Approximately 75 percent (311) of these issuers offer coverage in the individual market and 82 percent (342) offer coverage in the small group market. Additionally, HHS estimates that there are 34.8 million enrollees in coverage that would be subject to the requirements being proposed in this rule, including approximately 10.6 million enrollees in individual market coverage and 24.2 million enrollees in small group coverage (estimated based on "life years" for 2009 NAIC Health and Life Blank filers, which excludes data for companies that are not required to file annual statements with NAIC).[4]

[3] The analytic sample excludes companies that are regulated by HHS of Managed Health Care in California, as well as small, single-State insurers that are not required by State regulators to submit NAIC annual financial statements. The excluded companies are estimated to account for approximately 9 percent of the comprehensive major medical fully insured market. In addition, among the 579 companies that filed with the NAIC, 137 were excluded because of data anomalies. These 137 excluded companies are estimated to account for approximately 5 percent of the individual market and less than one percent of the group market.

[4] As noted above, issuers that are regulated by HHS of Managed Health Care in California are not required to file annual statements with the NAIC, and are not included in the estimates provided here.

TABLE 2—ESTIMATED NUMBER OF ISSUERS SUBJECT TO THE RATE REVIEW REQUIREMENTS BY MARKET

Description	Issuers (companies) offering coverage [1] [3]	% of total	Enrollees [2]	% of total
	Number		Number (in thousands)	
Total (Unduplicated)	417	100.0	34,792	100.0
Number Offering Coverage In:	.....	.....	.....	.....
Individual Market	311	74.6	10,603	30.5
Small Group Market [4]	342	82.0	24,189	69.5

Notes:
[1] Issuers represents companies (e.g., NAIC company codes).
[2] Enrollment represents "life years" (total member months divided by 12).
[3] Total issuers represents 2009 NAIC Health and Life Blank filers with valid data, which excludes approximately 8 percent of comprehensive major medical premium among NAIC filers. Also excludes data for companies that are regulated by the California Department of Managed Health Care.
[4] Small group is defined based on the current definition (*e.g.,* 2 to 50 employees).

E. Estimated Number of Rate Filings

This section of the regulatory impact assessment provides estimates of the number of filings that would be subject to review under this proposed rule.

1. Estimation Methods and Sources of Uncertainty

HHS estimates the total number of rate filings using data on the number of filings in 2010 made through the NAIC System for Electronic Rate and Form Filing (SERFF). However, not all issuers are required to file through SERFF, and HHS is required to make assumptions about the total number of filings in 2010, as well as the expected change in the number of filings between 2010 and 2011.

HHS conducted research to compile information regarding the regulatory structure in place by State and market. HHS analyzed information provided by States in their applications for rate review grants, analyzed State Department of Insurance Web sites, and surveyed State Insurance Department staff via telephone to obtain information regarding the number of licensed carriers and filings in the individual and small group markets. In its original estimate for the number of filings, HHS used ten representative States with relatively complete data to estimate the average number of filings that could be expected per State and by market. Those average values were used for all States to estimate the total number of filings in the individual and small group markets.

HHS also gathered information from State Insurance Departments to obtain data for 2008 through 2010 on the estimated number of filings processed, by market, and approval/rejection rate, stratified by the magnitude of the increase. Separately HHS received from the NAIC an extract showing the final disposition for all comprehensive major medical filings in SERFF for the first three quarters of calendar year 2010, by market type. This information was used to estimate the total number of filings in 2010 received and processed by the 49 States and the District of Columbia which use SERFF.

Another SERFF extract provided the number of comprehensive major medical filings filed for 2009 by 31 States. All 19 States that did not use the field "market type" were excluded from the extract. Using the data pertaining to the 31 States included in the 2009 data, HHS estimated the proportion of filings submitted by quarter, and used that distribution, along with the 2010 data, to project the number of filings for all States using SERFF for the 4th quarter of 2010. The increase in the number of number of filings from 2009 to 2010, by State and market, was added to the 2010 estimates to trend the number of filings forward to 2011. HHS has determined that there is insufficient data to estimate the number of rate filings beyond 2011.

Although there is some uncertainty concerning the number of filings in 2011, a much larger source of uncertainty is uncertainty about the number of filings that will have proposed rate increases greater than or equal to 10 percent. Data on rate requests made by issuers are available from a handful of States, and HHS has used these data to estimate the proportion of rate filings with requested rate increases of 10 percent or greater. However, given the small number of States for which data are available, there is substantial uncertainty about the number of filings in 2010 with proposed rate increases that are greater than or equal to 10 percent. Further, even if HHS had precise data on the distribution of rate increase requests in 2010, it is unclear to what extent that distribution might change in 2011 as a result of this proposed rule. Given the combination of data imperfections and limitations and behavioral uncertainties, HHS has chosen to provide a range of estimates, based on a range of assumptions.

2. Estimated Number of Rate Filings Meeting or Exceeding the Threshold and Subject To Review

Twenty-five States require issuers to use the NAIC System for Electronic Rate and Form Filing (SERFF) and many issuers also use SERFF for filings in States that have no SERFF requirement. Based on the number of SERFF filings from 31 States for the first three quarters of 2010, HHS estimates a range of rate filings from 3,635 to 4,015 in the individual and small group markets for all States for all of 2010.

The total number of filings in 2011 is expected to be larger than the number of filings in 2010 in part due to an increased number of issuers required to file and additional filings to meet the justification requirements.[5] Based on actuarial estimates using data from 2009 and 2010, HHS estimates that the number of 2011 rate filings will be in the range of from 4,858 to 5,828 (*see* Table 3).

Issuers are not required to submit preliminary justification for their grandfathered enrollees. The percentage of individuals covered under policies that will lose grandfathered status in the individual market is estimated to be 40 to 67 percent, according to Grandfathered Health Plan Regulation (**Federal Register** June 17, 2010). The percentage of small group plans relinquishing their grandfathered status in the small group market is estimated

[5] According the Kaiser Family Foundation, a number of States have already enhanced their rate review and filing process under their current authority and several other States will seek additional authority to review rates from their legislature. *See Rate Review: Spotlight on State Efforts to Make Health Insurance More Affordable,* Kaiser Family Foundation, December 2010.

to be 20 to 42 percent in 2011. HHS uses 40 percent, 54 percent, and 67 percent for the low, mid, and high estimates of the percentage of non-grandfathered rate filings in the individual market and 20 percent, 30 percent and 42 percent in the small group market.

An issuer would be required to submit a preliminary justification report to the Secretary and the applicable State if the rate increase is 10 percent or higher. The estimates in this regulatory impact analysis are based on this provision of the proposed rule.

Data from a small group of States for their individual market show the percentage of rate requests at or above 10 percent ranged from 50 percent to 72 percent during the time period 2008 to 2010.[6] The fraction of enrollees in plans requesting an increase of 10 percent or greater ranged from 34 percent to 77 percent. HHS uses 50 percent, 60 percent, and 70 percent as the low, mid, and high estimates for the percentage of rate requests at or above the rate review threshold of 10 percent in the individual market, and 35 percent, 50 percent, and 75 percent for the percentage of enrollees affected.

Data on rate requests in the small group market are available from three States (Colorado and Oregon, data for 2009 and 2010, and Minnesota, 2007 through 2010).[7] On average, approximately 35 percent of rate requests were for 10 percent or greater, and with, one exception, in each State and year combination, between 20 percent and 40 percent of rate requests were above that threshold. HHS uses 20 percent, 30 percent, and 40 percent for the low, medium, and high-range estimates of the percentage of rate requests at or above the rate review threshold of 10 percent in the small group market. For the percentage of enrollees affected in the small group market, HHS estimates 15 percent, 30 percent, and 50 percent.[8]

The following table (Table 3) shows the low, mid and high range estimates (371, 773, and 1,396) of the number of filings that will be subject to review and require the submission of a justification report because the proposed rate increase is 10 percent or greater.

TABLE 3—ESTIMATED NUMBER OF FILINGS SUBJECT TO REVIEW

	Individual	Small group	Total
Estimated number of filings for 2011:			
Low Range	1107	3751	4858
Mid Range	1247	4097	5343
High Range	1386	4442	5828
Percent of filings subject to review (non-grandfathered):			
Low Range	40%	20%	
Mid Range	54%	30%	
High Range	67%	42%	
Number of filings subject to review:			
Low Range	443	750	1193
Mid Range	673	1229	1902
High Range	929	1866	2794
Estimated percentage of filings meeting or exceeding threshold:			
Low Range	50%	20%	
Mid Range	60%	30%	
High Range	70%	40%	
Estimated number of filings meeting or exceeding threshold:			
Low Range	221	150	371
Mid Range	404	369	773
High Range	650	746	1396

F. Estimated Administrative Costs Related To Rate Review Provisions

As stated earlier in this preamble, this proposed rule would implement the reporting requirements of section 2794, describing the type of information that would be included in the preliminary justification to the Secretary and the applicable State and the disclosure that would be made available to consumers on the issuer's Web site if the rate increase is found to be unreasonable. HHS has quantified the primary sources of start-up costs that issuers in the individual and small group market would incur to bring themselves into compliance with this proposed rule, as well as the ongoing annual costs that they would incur related to these requirements. These costs and the methodology used to estimate them are discussed below.

In order to assess the potential administrative burden relating to the requirements in this proposed rule, HHS consulted with the NAIC and industry experts to gain insight into the tasks and level of effort required. Based on these discussions, HHS estimates that issuers would incur one-time start-up costs associated with developing teams to review the requirements in this proposed rule, and developing processes for capturing the necessary data (*e.g.,* automating systems). HHS estimates that issuers would also incur ongoing annual costs relating to data collection, completing the justification

[6] The sources for the rate increases in the individual market are: Iowa list of proposed rate increases as of October 25, 2010 *http://www.iid.state.ia.us/docs/0_Multi-year%20A&H%20Rate%20Increase_PPACA%20Types.pdf;* Illinois list of proposed rate increases as of September 2010 *http://www.insurance.illinois.gov/Reports/special_reports/IMMHPRFR.pdf;* North Carolina rate filings *http://infoportal.ncdoi.net/filelookup.jsp?divtype=3;* Oregon list of proposed rate increases as of November 30 2010 *http://www.oregoninsurance.org/insurer/rates_forms/health_rate_filings/health-rate-filing-search.html;* Pennsylvania announcement of each proposed rate increases *http://www.pabulletin.com/secure/search.html,* Washington list of proposed rate increases from the State.

[7] The sources for the rate increases in the small group market are: Colorado list of rate increases *http://www.dora.state.co.us/pls/real/Ins_RAF_Report.main;* Minnesota list of final rate increases from the State; and Oregon list of proposed rate increases *http://www.oregoninsurance.org/insurer/rates_forms/health_rate_filings/health-rate-filing-search.html.*

[8] Rate filings in which each of the products covered in the filing are grandfathered plans will not be subject to the provisions of this proposed rule. However, in the small group market, HHS believes that most filings are made for products which are still being actively marketed. To the extent that there are filings in the individual market that include no products which are being actively marketed, the estimates provided here of the number of filings that will be subject to review are overestimates of the true burden that will be imposed by this proposed rule.

reports, conducting a final internal review, submitting the reports to the Secretary and applicable State, record retention, and Web site notifications.

1. One-Time Start-up Costs

Based on discussions with NAIC and industry experts, start-up costs are estimated at $25,000 to $35,000 per issuer, calculated from assumptions of 125 to 175 hours at $200 per hour (senior actuary fee) to review the requirements for this proposed rule and developing processes for data collection.

2. Ongoing Costs Related To Rate Review Reporting

For each rate review reporting year, issuers offering coverage in the individual and small group markets would be required to submit a preliminary justification to the Secretary and applicable State prior to the implementation of a rate increase for each proposed rate increase of 10 percent or greater.

Ongoing annual costs are estimated at 6 to 16 hours per justification report at $200 per hour or $1,200 to $3,200 per report. Most of the hours are for populating the justification reports with an additional hour for record retention and Web site notification.

HHS estimates that the one-time costs relating to the rate review reporting requirements in this proposed rule would range from $10 million to $15 million, and that annual costs would be between $0.4 million and $4.5 million per year (Table 4).

TABLE 4—ESTIMATED COSTS FOR REPORTING, RECORD RETENTION, AND WEBSITE NOTIFICATION (ACTUAL DOLLARS)

Description	Total number of issuers	Total number of reports	Estimated total hours (1)	Estimated average cost per hour (2)	Estimated total cost	Estimated average cost per issuer	Estimated average cost per report
LOW RANGE ASSUMPTIONS:							
One-Time Costs	417	371	52,125	$200	$10,425,000	$25,000	$28,100
Ongoing Costs	417	371	2,226	200	445200	1,068	1,200
Total Year One Costs	417	371	54,351	200	10,870,200	26,068	29,300
MID RANGE ASSUMPTIONS:							
One-Time Costs	417	773	62,550	200	12,510,000	30,000	16,184
Ongoing Costs	417	773	8,503	200	1,700,600	4,078	2,200
Total Year One Costs	417	773	71,053	200	14,210,600	34,078	18,384
HIGH RANGE ASSUMPTIONS:							
One-Time Costs	417	1,396	72,975	200	14,595,000	35,000	10,455
Ongoing Costs	417	1,396	22,336	200	4,467,200	10,713	3,200
Total Year One Costs	417	1,396	95,311	200	19,062,200	45.713	13,655

Notes: Estimated costs are stated in 2010 dollars.
(1) Estimated number of one-time start up hours and annual ongoing hours.
(2) Actuary salary/fee.

3. Estimated Costs to the States and Federal Government Related To Rate Review Provisions

Section 2794 directs the Secretary to, in conjunction with the States establish a process for the annual review of unreasonable increases in premiums for health insurance coverage. In doing so, both the Federal Government and States will incur certain administrative costs. However, HHS estimates that the additional costs to the States will be negligible given that the majority already conduct some level of rate review, and the costs to the Federal Government and States will be extremely small.

4. Estimated Costs to the Federal Government

States currently have primary responsibility for the review of rate increases and will continue to under this proposed regulation. If a State does not have an effective rate review program in place for all or some markets within the State, HHS would review rate increases that meet or exceed the 10 percent threshold and make its own determinations of whether the rate increases were excessive, unjustified, or unfairly discriminatory, or otherwise unreasonable, within those markets. This activity could be conducted with in-house resources and/or with the use of contracted services. Given the fact that, as noted above, some States do not have review authority in either the small group or individual markets, and assuming filings are evenly distributed across markets, HHS estimates a range between 28 percent and 36 percent of the rate filings requiring review in 2011 would fall under HHS's review responsibility. Based on these filing estimates and the necessary actuarial expertise, this rate review process would range in cost from $0.6 million to $4.8 million.

Table 5 describes the assumptions used in the estimates for the administrative costs to the Federal Government associated with its rate review activities.

TABLE 5—ESTIMATED ACTUARIAL RATES

Estimated actuarial rates	Low	Mid	High
Principal Actuaries	$340.00	$350.00	$360.00
Support Actuaries	200.00	234.00	275.00
Actuarial Analyst	120.00	150.00	180.00
Administrative Support	80.00	100.00	120.00

TABLE 5—ESTIMATED ACTUARIAL RATES—Continued

Estimated actuarial rates	Low	Mid	High
Estimated Time to Complete Average Review	Average Time Required		
Principal Actuaries	4.25	5.50	6.75
Support Actuaries	8.50	9.50	11.00
Actuarial Analyst	12.00	14.00	15.00
Administrative Support	9.00	9.50	12.00
Actuarial Staff Hours	24.75	29.00	32.75
Total Staff Hours	33.75	38.5	44.75
	Low	Mid	High
Estimated Cost per Review	$5,305	$7,198	$9,595
Number of Rate Reviews	104	255	503
Total Expected Contracting Cost	551,720	1,835,490	4,826,285

In addition to the costs to the Federal government of conducting rate reviews in States that do not conduct effective reviews, there will be a small, largely one-time cost to the Federal government to determine whether States are conducting effective reviews.

5. Estimated Costs to States

HHS recognizes that States have significant experience reviewing rate increases. As discussed earlier in this preamble, most States have existing effective rate review programs that would meet the requirements of this regulation in substituting for HHS' review of rate filings that meet or exceed the threshold. Rate review grants provided by HHS are expected to increase the effectiveness of State rate review processes, but are not a direct measure of the cost of this regulation.

HHS estimates that the cost burden on States would be small because most States currently conduct rate review. For these States the incremental costs and requirements of this regulation would be minimal. Some States do not already have a rate review process or have a process that applies to only a portion of the individual and small group markets that this regulation addresses. In these States, the implementation costs to develop effective rate review processes at the State level will be offset by the rate review grants provided by HHS. However, from a Federal budget perspective, these Federal costs from grants will be largely balanced by a decrease in the Federal cost of performing reviews directly. For States not currently conducting effective rate review, there are likely a variety of factors affecting the decision to institute an effective rate review process, including the need for resources, as well as potential legislative hurdles. The rate review grants are expected to help States overcome some of these hurdles.

States with effective rate review programs would be required to report on their rate review activities to the Secretary. HHS believes that this reporting requirement will involve minimal cost. HHS estimates that reporting information from the State to Department will require approximately 20 minutes per filing. Based on resource use from the NAIC's 2009 Resource Report which shows the average Department of Insurance actuary earns approximately $45 an hour, HHS estimates an average cost per filing of $15. The estimated cost of reporting the two-thirds of filings meeting or exceeding the 10 percent threshold, which are reviewed by States, ranges from $4,011 to $13,404.

G. Transfers

The proposed rule will likely result in lower premiums, although the magnitude of this effect is difficult to predict. To the extent that premiums are lower as a result of the proposed rule, this represents a transfer from insurers/shareholders to consumers. The experience of States that engage in rate review, summarized in Table 6, suggests that the review process may result in premium increases that are lower than they would otherwise be.[9]

TABLE 6—STATE RATE REVIEW ACTIONS

[State filings from 2005 to 2010]

State	Market	Number of filings	Range of rate requests	Range of actual increases	Number of rate reductions
A	Individual	96	7%–40%	0%–21%	15
	Small Group	21	14%–26%	9%–22%	5
B	Individual	31	4%–30%	1%–25%	14
	Small Group	37	1%–17%	1%–17%	5
C	Combined	34	1%–32%	1%–32%	8

It is difficult, however, to draw strong conclusions from this information about the effects of additional rate review on rates because we are uncertain about insurers' behavioral response. Further, a substantial number of States currently operate effective rate review processes, and it is likely that any potential effect

[9] Data provided by States on recent rate review actions from informal discussions between HHS and State Department of Insurance actuaries

in these States will be less than in States currently without strong rate review.

Although HHS did not estimate the impact of this proposed regulation on the reduction in premium rate increases, HHS estimates that comprehensive major medical premiums are $28 billion in the individual market and $95 billion in the small group market, for a total of $123 billion in 2011 (Medical Loss Ratio Regulation Technical Appendix, December 1, 2010 and National Health Expenditure projection factors). The percentage of individuals covered under policies that will lose grandfathered status in the individual market is estimated to be 40 to 67 percent (Grandfathered Health Plan Regulation, June 17, 2010). The percentage of small group plans relinquishing their grandfathered status in the small group market is estimated to be 20 to 42 percent in 2011 (Grandfathered Health Plan Regulation, June 17, 2010). Thus, HHS estimates that approximately $30 to $59 billion of premiums will be written by issuers in the individual and small group markets to non-grandfathered subscribers. Given the magnitude of the premiums that may be affected, HHS invites comments on how to calculate premium savings so as to determine whether the $100 million threshold is met.

H. Regulatory Alternatives

Under the Executive Order, HHS is required to consider alternatives to issuing regulations and alternative regulatory approaches. HHS considers a variety of regulatory alternatives below.

1. Establish a Lower or Higher Threshold for Rate Increase Review

Section 2794(a) requires the Secretary, in conjunction with the States to conduct an annual review of unreasonable increases in premiums. In establishing a threshold for rate increases that would be subject to review, HHS (1) examined national trends in rate increases and health care costs; and (2) weighed the administrative burden on issuers and States against the level of protection for consumers.

If HHS established a threshold lower than 10 percent, this would impose a larger burden on issuers, States, and HHS, and HHS judged that it would not yield a substantial benefit for consumers. However, as discussed earlier in the preamble, HHS proposes an approach that balances the regulatory burdens on both the agency and the industry where every rate increase, no matter how small, is reviewed for unreasonableness against the potential harm to consumers should a small but unreasonable increase be implemented.

In addition, HHS has also taken into consideration the fact that many States, as discussed below, conduct a rate review process for all rate increases without regard to the magnitude of the increase, and we expect the number of States conducting such reviews to increase. Therefore, as a practical matter, in a growing number of States, the prospect that an unreasonable increase that is also below the 10 percent threshold would be implemented without review is mitigated by the State review processes.

HHS recognizes that there may be rate increases that fall below the 10 percent threshold that are unjustified. However, given the practice of many States to review all increases, HHS considered the cost benefit of the additional Federal resources to potentially catch unjustified/unreasonable rates vs. fairness to consumers and the additional administrative burden for insurers. HHS could spend additional resources and potentially catch only a small number of unreasonable rates below the threshold.

HHS also examined establishing a threshold higher than 10 percent for rate increases that would be subject to review. However, in attempting to strike the balance discussed above, HHS decided on the 10 percentage point threshold. Specifically, with a threshold higher than 10 percent, consumers would face greater exposure to rate increases that were either unjustified or excessive with no assurance that those rates were given a careful review.

2. Establish a State-Specific Threshold

HHS recognizes that underlying costs and health care trends vary from State to State. Many factors influence the magnitude and frequency of increases in the States, and a single, national filing threshold does not reflect all of the local variations. Therefore, in this proposed rule, HHS proposes to use a State-specific threshold as determined by the Secretary for future calendar years.

HHS did not immediately adopt the State-specific threshold for rate increases in calendar year 2011 because of the lack of State-specific data. For future calendar years, the Secretary would consider the State-specific data submitted for each rate increase subject to review, and also the State-specific rate trend data and information received by the Secretary from those States that have received "premium review grants" under section 2794(c) of the PHS Act. Using these data, the Secretary may set a State-specific threshold. In the event the Secretary does not have sufficient data to calculate a State-specific threshold, the threshold will remain at 10 percent.

3. Establish a Threshold Based on the Market Share of the Insurer

An alternative approach would have established a lower threshold for insurers with larger market share, with the justification that such insurers were more likely to be able to exert market power. However, analysis of data from a limited number of States suggested showed no evidence that larger insurers received higher rates of increase. Further, to the extent that market power exists in the individual market because subscribers with health problems are unable to switch to a competing insurer, this power exists equally for small companies as for large ones. As a result, HHS decided to propose a uniform threshold for all insurers, regardless of their size.

4. Apply Rate Review Standards to the Large Group Market

As discussed in the preamble, HHS discussed applying this proposed rule to the large group market as well as the individual and small group markets. However, because of the current rate-setting practices of the large group market and States' limited authority over this segment of the market, HHS concluded that this regulation should only apply to the individual and small group markets.

We welcome comments on the likely costs and benefits of this proposed rule as presented, on alternatives that would improve consumer benefits and minimize industry burden, and on our quantitative estimates of burden.

I. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires agencies that issue a regulation to analyze options for regulatory relief of small businesses if a proposed rule has a significant impact on a substantial number of small entities. The RFA generally defines a "small entity" as (1) a proprietary firm meeting the size standards of the Small Business Administration (SBA), (2) a nonprofit organization that is not dominant in its field, or (3) a small government jurisdiction with a population of less than 50,000 (States and individuals are not included in the definition of "small entity"). HHS uses as its measure of significant economic impact on a substantial number of small entities a change in revenues of more than 3 to 5 percent.

The RFA requires agencies to analyze options for regulatory relief of small businesses, if a proposed rule has a significant impact on a substantial

number of small entities. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small government jurisdictions. Small businesses are those with sizes below thresholds established by the Small Business Administration (SBA). We examined the health insurance industry in depth in the Regulatory Impact Analysis we prepared for the proposed rule on establishment of the Medicare Advantage program (69 FR 46866, August 3, 2004). In that analysis we determined that there were few if any insurance firms underwriting comprehensive health insurance policies (in contrast, for example, to travel insurance policies or dental discount policies) that fell below the size thresholds for "small" business established by the SBA.

Further, the one-time costs of this proposed rule are approximately $25 thousand per covered entity (regardless of size or non-profit status) and approximately $4 thousand annually in ongoing costs. Numbers of this magnitude do not remotely approach the amounts necessary to be considered a "significant economic impact" on firms with revenues of tens of millions of dollars (usually hundreds of millions or billions of dollars annually). Accordingly, we have determined, and certify, that this proposed rule will not have a significant economic impact on a substantial number of small entities and that a regulatory flexibility analysis is not required.

In addition, section 1102(b) of the Social Security Act requires us to prepare a regulatory impact analysis if a proposed rule may have a significant economic impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. This notice of proposed rulemaking would not affect small rural hospitals. Therefore, the Secretary has determined that this proposed rule would not have a significant impact on the operations of a substantial number of small rural hospitals.

J. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that agencies assess anticipated costs and benefits before issuing any proposed rule that includes a Federal mandate that could result in expenditure in any one year by State, local or tribal governments, in the aggregate, or by the private sector, of $100 million in 1995 dollars, updated annually for inflation. In 2010, that threshold level is approximately $135 million.

UMRA does not address the total cost of a proposed rule. Rather, it focuses on certain categories of cost, mainly those "Federal mandate" costs resulting from: (1) Imposing enforceable duties on State, local, or tribal governments, or on the private sector; or (2) increasing the stringency of conditions in, or decreasing the funding of, State, local, or tribal governments under entitlement programs.

This proposed rule includes no mandates on State, local, or tribal governments. Under the proposed rule, issuers would be required to submit rate justification reports for rate increases of 10 percent or greater directly to HHS. A State may voluntarily choose to use its existing rate review process, if deemed an "effective rate review program," to make a determination as to whether a rate increase is unreasonable. If a State chooses to review the rate increase, the State would be required to submit to HHS the final determination and an explanation of its analysis. However, if a State chooses not to do so, HHS would review a rate increase subject to review to determine whether it is unreasonable. Thus, the law and this regulation do not impose an unfunded mandate on States. However, consistent with policy embodied in UMRA, this notice for proposed rulemaking has been designed to be the least burdensome alternative for State, local and tribal governments, and the private sector while achieving the objectives of the Affordable Care Act.

K. Federalism

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. In HHS' view, while the requirements proposed in this notice for proposed rulemaking would not impose substantial direct costs on State and local governments, this notice for proposed rulemaking has federalism implications due to direct effects on the distribution of power and responsibilities among the State and Federal governments relating to determining the reasonableness of rate increases for coverage that State-licensed health insurance issuers offer in the individual and small group markets.

HHS recognizes that there are federalism implications with regard to HHS' evaluation of effective rate review programs and its subsequent review of rate increases. Under Subpart C of this proposed rule, HHS outlines those criteria that States would have to meet in order to be deemed to have an effective rate review program. If HHS determines that a State does not meet those criteria, then HHS would review a rate increase subject to review to determine whether it is unreasonable. If a State does meet the criteria, then HHS would adopt that State's determination of whether a rate increase is unreasonable.

States would continue to apply State law requirements regarding rate and policy filings. State rate review processes that are more stringent than the Federal requirements would likely be deemed effective and satisfy the requirements under this proposed rule. Accordingly, States have significant latitude to impose requirements with respect to health insurance issuers that are more restrictive than the Federal law.

In compliance with the requirement of Executive Order 13132 that agencies examine closely any policies that may have federalism implications or limit the policy making discretion of the States, HHS has engaged in efforts to consult with and work cooperatively with affected States, including participating in conference calls with and attending conferences of the National Association of Insurance Commissioners, and consulting with State insurance officials on an individual basis.

Throughout the process of developing this notice of proposed rulemaking, HHS has attempted to balance the States' interests in regulating health insurance issuers, and Congress' intent to provide uniform protections to consumers in every State. By doing so, it is HHS' view that it has complied with the requirements of Executive Order 13132. Under the requirements set forth in section 8(a) of Executive Order 13132, and by the signatures affixed to this regulation, HHS certifies that the Office of Consumer Information and Insurance Oversight has complied with the requirements of Executive Order 13132 for the attached notice for proposed rulemaking in a meaningful and timely manner.

List of Subjects in 45 CFR Part 154

Administrative practice and procedure, Claims, Health care, Health insurance, Health plans, Penalties, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Department of Health and Human Services proposes to amend 45 CFR subtitle A, subchapter B, by adding a new part 154 to read as follows:

PART 154—HEALTH INSURANCE ISSUER RATE INCREASES: DISCLOSURE AND REVIEW REQUIREMENTS

Subpart A—General Provisions

Sec.

154.101 Basis and scope.
154.102 Definitions.
154.103 Applicability.

Subpart B—Disclosure and Review Provisions

154.200 Rate increases subject to review.
154.205 Unreasonable rate increases.
154.210 Review of rate increases subject to review by HHS or by a State.
154.215 Submission of disclosure to HHS for rate increases subject to review.
154.220 Timing of preliminary justification.
154.225 Determination by HHS or a State of an unreasonable rate increase.
154.230 Submission and posting of final justifications for unreasonable rate increases.

Subpart C—Effective Rate Review Programs

154.301 HHS's determinations of effective rate review programs.

Authority: Section 2794 of the Public Health Service Act (42 U.S.C. 300gg–94).

Subpart A—General Provisions

§ 154.101 Basis and scope.

(a) *Basis.* This part implements section 2794 of the Public Health Service (PHS) Act.

(b) *Scope.* This part establishes the requirements for health insurance issuers offering small group or individual health insurance coverage to report information concerning unreasonable rate increases to the Department of Health and Human Services (HHS). This part further establishes the process by which it will be determined whether the rate increases are unreasonable rate increases as defined in this part.

§ 154.102 Definitions.

As used in this part:

Effective rate review program means a State program that HHS has determined meets the requirements set forth in § 154.301(a) for the relevant market segment in the State.

Federal medical loss ratio standard means the applicable medical loss ratio standard for the State and market segment involved, determined under subpart B of 45 CFR part 158.

Health insurance coverage has the meaning given the term in section 2791(b)(1) of the PHS Act.

Health insurance issuer has the meaning given the term in section 2791(b)(2) of the PHS Act.

HHS means the Department of Health and Human Services.

Individual market has the meaning given the term under the applicable State's rate filing laws, except that where State law does not define the term, it has the meaning given in section 2791(e)(1)(A) of the PHS Act.

Product means a package of health insurance coverage benefits with a discrete set of rating and pricing methodologies that a health insurance issuer offers in a State.

Rate increase means an increase of the rates for a specific product offered in the individual or small group market.

Rate increase subject to review means a rate increase that meets the criteria set forth in § 154.200.

Secretary means the Secretary of the Department of Health and Human Services.

Small group market has the meaning given under the applicable State's rate filing laws, except that where State law does not define the term, it has the meaning given in section 2791(e)(5) of the PHS Act; provided, however, that for the purpose of this definition, "50" employees is substituted for "100" employees in the definition of "small employer" under section 2791(e)(4).

State has the meaning given the term in section 2791(d)(14) of the PHS Act.

Unreasonable rate increase means:

(1) When HHS is conducting the review required by this part, a rate increase that HHS determines is:

(i) An excessive rate increase;

(ii) An unjustified rate increase; or

(iii) An unfairly discriminatory rate increase; as described in § 154.205.

(2) When HHS adopts the determination of a State that has an effective rate review program, a rate increase that the State determines is excessive, unjustified, unfairly discriminatory, or otherwise unreasonable as provided under applicable State law.

§ 154.103 Applicability.

(a) *In general.* The requirements of this part apply to health insurance issuers offering health insurance coverage in the individual market and small group market.

(b) *Exceptions.* The requirements of this part do not apply to grandfathered health plan coverage as defined in 45 CFR § 147.140, or to excepted benefits as described in paragraph (1) of subsection (c) of section 2791 of the Public Health Service Act, or as described in paragraph (2), (3) or (4) of such subsection if the benefits are provided under a separate policy, certificate or contract of insurance.

Subpart B—Disclosure and Review Provisions

§ 154.200 Rate increases subject to review.

(a) Rate increases that meet or exceed the following threshold are subject to review to determine whether they are unreasonable rate increases:

(1) For rate increases filed in a State on or after July 1, 2011, or effective on or after July 1, 2011 in a State that does not require rate increases to be filed, a rate increase that is 10 percent or more, as calculated under paragraph (b) of this section.

(2) For rate increases filed in a State during calendar year 2012 and thereafter, or effective during calendar year 2012 and thereafter in a State that does not require rate increases to be filed, any rate increase, as calculated under paragraph (b) of this section that meets or exceeds:

(i) State-specific thresholds as determined by the Secretary for the applicable calendar year based on the cost of health care and health insurance coverage in a State; or

(ii) 10 percent if an applicable State-specific threshold is not established by the Secretary under paragraph (a)(2)(i) of this section. The thresholds set forth in paragraph (a)(2)(i) will be published in the Federal Register no later than September 15th of the year preceding the calendar year in which the threshold applies, beginning in 2012.

(b) A rate increase meets or exceeds the applicable threshold set forth in paragraph (a) of this section if the weighted average increase for all enrollees subject to the rate increase meets or exceeds the applicable threshold.

(c) If a rate increase that does not otherwise meet or exceed the threshold under paragraph (b) of this section meets or exceeds the threshold if combined with a previous increase or increases during the 12 month period preceding the date on which the rate increase would become effective, then the rate increase must be considered to meet or exceed the threshold and is subject to review under § 154.210, and such review shall include a review of the aggregate rate increases during the applicable 12 month period.

§ 154.205 Unreasonable rate increases.

(a) When HHS reviews a rate increase subject to review under § 154.210(a), HHS will determine that the rate increase is an unreasonable rate increase if the increase is an excessive rate increase, an unjustified rate increase, or an unfairly discriminatory rate increase.

(b) The rate increase is an excessive rate increase if the increase causes the premium charged for the health insurance coverage to be unreasonably high in relation to the benefits provided under the coverage. In determining whether the rate increase causes the premium charged to be unreasonably high in relationship to the benefits provided, HHS will consider:

(1) Whether the rate increase results in a projected medical loss ratio below the Federal medical loss ratio standard in the applicable market to which the rate increase applies, after accounting for any adjustments allowable under Federal law;

(2) Whether one or more of the assumptions on which the rate increase is based is not supported by substantial evidence; and

(3) Whether the choice of assumptions or combination of assumptions on which the rate increase is based is unreasonable.

(c) The rate increase is an unjustified rate increase if the health insurance issuer provides data or documentation to HHS in connection with the increase that is incomplete, inadequate or otherwise does not provide a basis upon which the reasonableness of an increase may be determined.

(d) The rate increase is an unfairly discriminatory rate increase if the increase results in premium differences between insureds within similar risk categories that:

(1) Are not permissible under applicable State law; or

(2) In the absence of an applicable State law, do not reasonably correspond to differences in expected costs.

§ 154.210 Review of rate increases subject to review by HHS or by a State.

(a) Except as provided in paragraph (b) of this section, HHS will review a rate increase subject to review to determine whether it is unreasonable, as required by this part.

(b) HHS will adopt a State's determination of whether a rate increase is an unreasonable rate increase, if the State:

(1) Has an effective rate review program as described in § 154.301; and

(2) The State provides to HHS, on a form and in a manner prescribed by the Secretary, its final determination of whether a rate increase is unreasonable, which must include an explanation of how its analysis of the relevant factors set forth in § 154.301(a)(3) caused it to arrive at that determination, within five business days following the State's final determination.

(c) HHS will post and maintain on its Web site a list of the States that meet the requirements of paragraph (b) of this section.

§ 154.215 Submission of disclosure to HHS for rate increases subject to review.

(a) For each rate increase subject to review, a health insurance issuer must submit a preliminary justification for each product affected by the increase on a form and in the manner prescribed by the Secretary.

(b) The preliminary justification must consist of the following parts:

(1) Rate increase summary;

(2) Written description justifying the rate increase; and

(3) When HHS is reviewing the rate increase under § 154.210(a), rate filing documentation.

(c) A health insurance issuer must complete and submit parts one and two of the preliminary justification described in paragraph (b)(1) and (2) of this section to HHS and, as long as the applicable State accepts such submissions, to the applicable State, for any rate increase subject to review. If a rate increase subject to review is for a product offered in the individual market or small group market and HHS is reviewing the rate increase under § 154.210(a), then the health insurance issuer must also complete and submit part three of the preliminary justification described in paragraph (b)(3) of this section to HHS only.

(d) The health insurance issuer may submit a single, combined preliminary justification for rate increases subject to review affecting multiple products, if the claims experience of all products has been aggregated to calculate the rate increases and the rate increases are the same across all products.

(e) *Content of rate increase summary.* The rate increase summary must include the following:

(1) Historical and projected claims experience;

(2) Trend projections related to utilization, and service or unit cost;

(3) Any claims assumptions related to benefit changes;

(4) Allocation of the overall rate increase to claims and non-claims costs;

(5) Per enrollee per month allocation of current and projected premium;

(6) Current loss ratio and projected loss ratio;

(7) Three year history of rate increases for the product associated with the rate increase; and

(8) Employee and executive compensation data from the health insurance issuer's annual financial statements.

(f) *Content of written description justifying the rate increase.* The written description of the rate increase must include a simple and brief narrative describing the data and assumptions that were used to develop the rate increase and include the following:

(1) Explanation of the rating methodology;

(2) Explanation of the most significant factors causing the rate increase, including a brief description of the relevant claims and non-claims expense increases reported in the rate increase summary; and

(3) Brief description of the overall experience of the policy, including historical and projected expenses, and loss ratios.

(g) *Content of rate filing documentation.* (1) The rate filing documentation supports the information required under paragraphs (d) and (e) of this section. This documentation must be sufficient to permit HHS to conduct a review to determine whether the rate increase is an unreasonable rate increase and must include the following:

(i) Description of the type of policy, benefits, renewability, general marketing method and issue age limits;

(ii) Scope and reason for the rate increase;

(iii) Average annual premium per policy, before and after the rate increase;

(iv) Past experience, and any other alternative or additional data used;

(v) A description of how the rate increase was determined, including the general description and source of each assumption used;

(vi) The cumulative loss ratio and a description of how it was calculated;

(vii) The projected future loss ratio and a description of how it was calculated;

(viii) The projected lifetime loss ratio that combines cumulative and future experience, and a description of how it was calculated;

(ix) Federal medical loss ratio standard in the applicable market to which the rate increase applies, accounting for any adjustments allowable under Federal law; and

(x) If the result under paragraph (g)(1)(vii) of this section is less than the standard under paragraph (g)(1)(ix) of this section, a justification for this outcome.

(2) If the health insurance issuer is also required to submit a rate filing to a State in connection with the rate increase under State law, HHS will accept a copy of the filing provided that the filing includes all of the information described in paragraph (g)(1)(i) through paragraph (g)(1)(x) of this section.

(h) In the event the level of detail provided by the issuer for the information under paragraph (g) of this section does not provide sufficient basis

for HHS to determine whether the rate increase is an unreasonable rate increase, HHS will request the additional information necessary to make its determination. The health insurance issuer must provide the requested information to HHS within five business days following its receipt of the request.

(i) *Posting of the disclosure on the HHS Web site.*

(1) HHS will promptly make available to the public on its Web site the information contained in parts one and two of each preliminary justification.

(2) HHS will make available to the public on its Web site the information contained in part three of each preliminary justification after its receipt thereof.

(i) HHS will post any information contained in part three of the preliminary justification that is not designated as "confidential" as defined in HHS's Freedom of Information Act regulations, 45 CFR 5.65.

(ii) HHS will make a determination as to whether to post information designated as "confidential" under the standards and procedure set forth in 45 CFR 5.65, and will post that information only after making a determination that it is subject to disclosure as provided by 45 CFR 5.65.

(3) HHS will include the following disclaimer on its Web site with information made available to the public under this paragraph (i):

"The preliminary justification is the initial summary information regarding the rate increase subject to review and does not represent a determination that the rate increase subject to review is an unreasonable rate increase."

§ 154.220 Timing of preliminary justification.

A health insurance issuer must submit a preliminary justification for all rate increases subject to review that are filed in a State on or after July 1, 2011, or effective on or after July 1, 2011 in a State that does not require the rate increase subject to review to be filed, as follows:

(a) If a State requires that a proposed rate increase be filed with the State prior to the implementation of the rate, the health insurance issuer must submit to HHS and the applicable State the preliminary justification on the date on which the health insurance issuer submits the proposed rate increase to the State.

(b) For all other States, the health insurance issuer must submit to HHS and the State the preliminary justification prior to the implementation of the rate increase.

§ 154.225 Determination by HHS or a State of an unreasonable rate increase.

(a) When HHS receives a preliminary justification for a rate increase subject to review and HHS reviews the rate increase under § 154.210(a), HHS will determine whether the rate increase is an unreasonable rate increase.

(1) HHS will post on its Web site its final determination and a brief explanation of its analysis within five business days following its final determination.

(2) If HHS determines that the rate increase is an unreasonable rate increase, HHS will also provide its final determination and brief explanation to the health insurance issuer within five business days following its final determination.

(b) If a State conducts a review under § 154.210(b), HHS will adopt the State's determination of whether a rate increase is unreasonable and post on the HHS Web site the State's final determination described in § 154.210(b)(2).

(c) If a State determines that the rate increase is an unreasonable rate increase and the health insurance issuer is legally permitted to implement the unreasonable rate increase under applicable State law, HHS will provide the State's final determination and brief explanation to the health insurance issuer within five business days following HHS's receipt thereof.

§ 154.230 Submission and posting of final justifications for unreasonable rate increases.

(a) If a health insurance issuer receives from HHS a final determination by HHS or a State that a rate increase is an unreasonable rate increase, and the health insurance issuer declines to implement the rate increase or chooses to implement a lower increase, the health insurance issuer must submit to HHS timely notice that it will not implement the rate increase or that it will implement a lower increase on a form and in the manner prescribed by the Secretary.

(b) If a health insurance issuer implements a lower increase as described in paragraph (a) of this section and the lower increase does not meet or exceed the applicable threshold under § 154.200, such lower increase is not subject to this part. If the lower increase meets or exceeds the applicable threshold, the health insurance issuer must submit a new preliminary justification under this part.

(c) If a health insurance issuer implements a rate increase determined by HHS or a State to be unreasonable, the health insurance issuer must, within the later of 10 days after the implementation of such increase or the health insurance issuer's receipt of HHS's final determination that a rate increase is an unreasonable rate increase:

(1) Submit to HHS a final justification in response to HHS's or the State's final determination, as applicable. The information in the final justification must be consistent with the information submitted in the preliminary justification supporting the rate increase; and

(2) Prominently post on its Web site the following information on a form and in the manner prescribed by the Secretary:

(i) The information made available to the public by HHS and described in § 154.215(i);

(ii) HHS's or the State's final determination and brief explanation described in § 154.225(a) and § 154.210(b)(2), as applicable; and

(iii) The health insurance issuer's final justification for implementing an increase that has been determined to be unreasonable by HHS or the State, as applicable.

(3) The health insurance issuer must continue to make this information available to the public on its Web site for at least three years.

(d) HHS will post all final justifications on the HHS Web site. This information will remain available to the public on the HHS Web site for three years.

Subpart C–Effective Rate Review Programs

§ 154.301 HHS's determinations of effective rate review programs.

(a) *Effective rate review program.* The purpose of an effective rate review program as set forth in this section is to determine whether a rate increase is an unreasonable rate increase. In evaluating whether a State has an effective rate review program, HHS will apply the following criteria for the review of rates for the small group market and the individual market, and also, as applicable depending on State law, the review of rates for different types of products within those markets:

(1) The State receives from issuers data and documentation in connection with rate increases that are sufficient to conduct the examination described in paragraph (a)(3) of this section.

(2) The State conducts an effective and timely review of the data and documentation submitted by a health insurance issuer in support of a proposed rate increase.

(3) The State's rate review process includes an examination of:

(i) The reasonableness of the assumptions used by the health insurance issuer to develop the proposed rate increase and the validity of the historical data underlying the assumptions; and

(ii) The health insurance issuer's data related to past projections and actual experience.

(4) The examination must include an analysis of:

(i) The impact of medical trend changes by major service categories;

(ii) The impact of utilization changes by major service categories;

(iii) The impact of cost-sharing changes by major service categories;

(iv) The impact of benefit changes;

(v) The impact of changes in enrollee risk profile;

(vi) The impact of any overestimate or underestimate of medical trend for prior year periods related to the rate increase;

(vii) The impact of changes in reserve needs;

(viii) The impact of changes in administrative costs related to programs that improve health care quality;

(ix) The impact of changes in other administrative costs;

(x) The impact of changes in applicable taxes, licensing or regulatory fees;

(xi) Medical loss ratio; and

(xii) The health insurance issuer's risk-based capital status relative to national standards.

(5) The State's determination of whether a rate increase is unreasonable is made under a standard that is set forth in State statute or regulation.

(b) HHS will determine whether a State has an effective rate review program for each market based on documentation and information received from the State or any other information otherwise available to HHS that its rate review program meets the criteria described in paragraph (a) of this section.

(c) HHS reserves the right to determine that a State no longer has an effective rate review program if HHS determines that the State no longer satisfies the criteria set forth in paragraph (a) of this section.

Dated: December 16, 2010.

Jay Angoff,

Director, Office of Consumer Information and Insurance Oversight.

Approved: December 16, 2010.

Kathleen Sebelius,

Secretary.

[FR Doc. 2010–32143 Filed 12–21–10; 8:45 am]

BILLING CODE 4150–03–P

Federal Register

Thursday,
December 23, 2010

Part VI

Nuclear Regulatory Commission

10 CFR Part 51

Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation; Waste Confidence Decision Update; Final Rules

NUCLEAR REGULATORY COMMISSION

10 CFR Part 51

[NRC–2008–0404]

RIN 3150–AI47

Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC or Commission) is revising its generic determination on the environmental impacts of storage of spent fuel at, or away from, reactor sites after the expiration of reactor operating licenses. The revisions reflect findings that the Commission has reached in an update and supplement to the 1990 Waste Confidence rulemaking proceeding published elsewhere in this issue of the **Federal Register**. The Commission now finds that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 60 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor in a combination of storage in its spent fuel storage basin or at either onsite or offsite independent spent fuel storage installations (ISFSIs). It also finds reasonable assurance that sufficient mined geologic repository capacity will be available for disposal of spent fuel when necessary.

DATES: The rule is effective on January 24, 2011.

ADDRESSES: You can access publicly available documents related to this document using the following methods:

NRC's Public Document Room (PDR): The public may examine and have copied for a fee publicly available documents at the NRC's PDR, Room O–1F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland.

NRC's Agencywide Documents Access and Management System (ADAMS): Publicly available documents created or received at the NRC are available electronically at the NRC's electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html.* From this page, the public can gain entry into ADAMS, which provides text and image files of NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC's PDR reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr.resource@nrc.gov.*

Federal Rulemaking Web site: Public comments and supporting materials related to this final rule can be found at *http://www.regulations.gov* by searching on Docket ID: NRC–2008–0404.

FOR FURTHER INFORMATION CONTACT: Tison Campbell, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, *telephone:* 301–415–8579, *e-mail: tison.campbell@nrc.gov;* Lisa London, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: 301–415–3233, *e-mail: lisa.london@nrc.gov.*

SUPPLEMENTARY INFORMATION:

Background

In 1990, the Commission concluded a generic rulemaking proceeding to reassess its degree of confidence that radioactive wastes produced by nuclear power plants can be safely disposed of, to determine when this disposal or offsite storage will be available, and to determine whether radioactive wastes can be safely stored onsite past the expiration of existing facility licenses until offsite disposal or storage is available. This proceeding reviewed the Commission's 1984 findings on these issues, which were developed through a generic rulemaking proceeding that became known as the "Waste Confidence Proceeding." The 1990 proceeding resulted in the following five reaffirmed or revised Waste Confidence findings:

1. The Commission finds reasonable assurance that safe disposal of high-level radioactive waste (HLW) and spent nuclear fuel (SNF) in a mined geologic repository is technically feasible;

2. The Commission finds reasonable assurance that at least one mined geologic repository will be available within the first quarter of the twenty-first century, and that sufficient repository capacity will be available within 30 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of any reactor to dispose of the commercial HLW and SNF originating in such reactor and generated up to that time;

3. The Commission finds reasonable assurance that HLW and SNF will be managed in a safe manner until sufficient repository capacity is available to assure the safe disposal of all HLW and SNF;

4. The Commission finds reasonable assurance that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 30 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor at its spent fuel storage basin, or at either onsite or offsite ISFSIs; and

5. The Commission finds reasonable assurance that safe independent onsite spent fuel storage or offsite spent fuel storage will be made available if such storage capacity is needed. (55 FR 38474; September 18, 1990).

These five findings formed the basis of the Commission's revised generic determination of no significant environmental impact from temporary storage of SNF after cessation of reactor operation, which was codified at 10 CFR 51.23(a):

> The Commission has made a generic determination that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impact for at least 30 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor at its spent fuel storage basin or at either onsite or offsite independent spent fuel storage installations. Further, the Commission believes there is reasonable assurance that at least one mined geologic repository will be available within the first quarter of the twenty-first century, and sufficient repository capacity will be available within 30 years beyond the licensed life for operation of any reactor to dispose of the commercial [HLW] and [SNF] originating in such reactor and generated up to that time. (55 FR 38474; September 18, 1990)

Thus, the environmental impacts of spent fuel storage for the period following the term of a reactor operating license or amendment or reactor combined license or amendment or initial independent spent fuel storage installation license or amendment do not need to be considered in proceedings on applications for these licenses or amendments. See 10 CFR 51.23(b).

In 1999, the Commission reviewed its Waste Confidence findings and concluded that experience and developments after 1990 had confirmed the findings and made a comprehensive reevaluation of the findings unnecessary. It also stated that it would consider undertaking a reevaluation when the pending repository development and regulatory activities had run their course or if significant and pertinent unexpected events occurred that raise substantial doubt about the continuing validity of the Waste Confidence findings (*See* 64 FR 68005; December 6, 1999).

The Proposed Rule

In 2008, the Commission decided that the generic resolution of appropriate

issues that might be raised in licensing proceedings on anticipated combined operating license (COL) applications for new reactors would enhance the efficiency of the COL proceedings; waste confidence was one of these issues. Prior to NRC's original Waste Confidence proceeding, the Commission stated that, as a matter of policy, it "would not continue to license reactors if it did not have reasonable confidence that the wastes can and will in due course be disposed of safely" (42 FR 34391, 34393; July 5, 1977). It has been 20 years since the last formal review of the Waste Confidence findings, so the Commission is revisiting the findings to address their continuing validity, given the passage of time since the last update to the Waste Confidence Decision, and given the upcoming COL proceedings. The Commission is now updating and revising the 1990 Waste Confidence Decision and Rule.

On October 9, 2008 (73 FR 59551), the Commission published the proposed update and revision of two of the Waste Confidence findings, along with a request for public comment, in the **Federal Register**. In the same issue of the **Federal Register**, the Commission proposed a conforming amendment of its generic determination of no significant environmental impact from the temporary storage of spent fuel after cessation of reactor operations codified at 10 CFR 51.23(a) (73 FR 59547; October 9, 2008). The Commission proposed to modify its generic determination to state that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor at its spent fuel storage basin or at either onsite or offsite ISFSIs until a disposal facility can reasonably be expected to be available.

The Final Rule

After evaluating the public comments on the proposed rule and update to the Waste Confidence Decision, the Commission is now publishing its final rule amending 10 CFR 51.23(a), along with the final update and revision to the Waste Confidence Decision (published separately in this issue of the **Federal Register**). The Commission is revising two of its findings:

Finding 2: The Commission finds reasonable assurance that sufficient mined geologic repository capacity will be available to dispose of the commercial high-level radioactive waste and spent fuel generated in any reactor when necessary.

Finding 4: The Commission finds reasonable assurance that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 60 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor in a combination of storage in its spent fuel storage basin and either onsite or offsite independent spent fuel storage installations.

The Commission, in response to public comments, and to achieve greater consistency with Finding 4, is also modifying the rule to include a time frame for the safe storage of SNF:

The Commission has made a generic determination that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 60 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor in a combination of storage in its spent fuel storage basin and at either onsite or offsite independent spent fuel storage installations. Further, the Commission believes there is reasonable assurance that sufficient mined geologic repository capacity will be available to dispose of the commercial high-level radioactive waste and spent fuel generated in any reactor when necessary.

Public Comments

The NRC received 158 comment letters, including a late-supplemental comment from the Attorney General of New York, as well as two form letters sent by 1,990 and 941 commenters, respectively. Many of the comment letters contained multiple comments on the proposed rule, the proposed revisions to the Waste Confidence findings, or both. All comments received on both notices have been considered together and are addressed in the final update to the Waste Confidence Decision. The main issues raised by the comments are briefly discussed below.

Many commenters argued that NRC has not complied with the National Environmental Policy Act (NEPA) because they believe that the revisions to the findings and amended rule constitute "generic licensing decisions" and need to be supported by a Generic Environmental Impact Statement (GEIS) that addresses all aspects of the nuclear fuel cycle. But as the Commission discusses in its comment responses, neither the Waste Confidence Rule nor the Decision allow for the issuance of a license; applicants for an NRC license must comply with the relevant NRC regulations before they can receive a license. And the Waste Confidence Decision and Rule satisfy a portion of the NRC's NEPA obligations—those associated with the environmental impacts after the end of license life. In this rulemaking, the Waste Confidence Decision is the Environmental Assessment—the NRC's NEPA analysis—that provides the basis for the generic determination of no significant environmental impacts reflected in the rule (10 CFR 51.23).

The Commission is amending its generic determination of no significant environmental impact from the temporary storage of spent fuel after cessation of reactor operation contained in 10 CFR 51.23(a) to conform it to the Commission's revised Finding 4 of the Waste Confidence Decision. Finding 4 is revised to provide reasonable assurance that spent fuel can be stored safely and without significant environmental impacts for at least 60 years beyond the licensed life for operation of a reactor, rather than for at least 30 years as in the present Finding 4. The Commission is also revising the final rule to remove the time frame from the second sentence of 10 CFR 51.23(a); instead the Commission has incorporated the language adopted in Finding 2: That sufficient repository capacity will be available to dispose of spent nuclear fuel and high-level waste when necessary.

The revised generic determination is not a generic licensing decision. It does not authorize the operation of a nuclear power plant (NPP), the renewal of a NPP license, or the production or storage of spent fuel by a NPP. Licensing proceedings for any of these actions are supported by both specific and generic environmental impact statements (EISs) or environmental assessments (EAs) that consider the potential environmental impacts of storage of spent fuel during the term of the license. Because of the generic determination in § 51.23(a) the potential environmental impact of storage of spent fuel for a 60-year period (rather than a 30-year period) after the end of licensed operations or whether ultimate disposal will be available, is not considered in individual NPP licensing reviews. The EA supporting this 30-year extension of the generic determination and the finding of reasonable assurance of a safe, timely disposal facility is the Waste Confidence Decision Update, which supports the Commission's Finding of No Significant Impact (FONSI) and concurrent decision to not conduct an EIS.

A number of commenters asserted that NRC, in preparing an EA and FONSI, has not complied with the

procedural requirements for a FONSI, which include the preparation of an EA and the identification of all the documents that the FONSI is based on. As stated above, the update and revision of the Waste Confidence Decision is the EA supporting the amendment of the generic determination in 10 CFR 51.23(a). All of the documents relied upon in preparing the Update and Final Rule are referenced. Two of the referenced documents are not publicly available; these are reports concerning the safety and security of spent fuel pool storage issued by Sandia National Laboratories (SNL) and the National Academy of Sciences (NAS), which are either Classified, Safeguards Information (SGI), or Official Use Only—Security Related Information. Although these documents cannot be released to the public, redacted or publicly available summaries are available. A redacted version of the SNL study can be found in ADAMS (ADAMS Accession Number ML062290362) and the unclassified summary of the NAS report can be purchased or downloaded for free by accessing the NAS Web site at: *http://www.nap.edu/catalog.php?record_id=11263.* No other non-public documents are referenced in the Waste Confidence Update.

A number of commenters argued that NRC's revisions of its Waste Confidence findings and temporary storage rule do not comply with the holding of the U.S. Court of Appeals for the Ninth Circuit in *San Luis Obispo Mothers for Peace* v. *NRC,* 449 F. 3d 1016 (2006), *cert. denied,* 127 S. Ct. 1124 (2007), that NEPA requires an examination of the environmental impacts that would result from an act of terrorism against an ISFSI. These commenters believe that an attack is reasonably foreseeable and therefore subject to a NEPA review. Despite the outcome of *Mothers for Peace,* the Commission has adhered to its traditional position (outside of the Ninth Circuit) that the environmental effects of a terrorist attack do not need to be considered in its NEPA analyses. *See Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI–07–08, 65 NRC 124 (2007). And in 2009, the U.S. Court of Appeals for the Third Circuit upheld the Commission's position that terrorist attacks are too far removed from the natural or expected consequences of agency action to require an environmental impact analysis. *New Jersey Dept. of Environmental Protection* v. *U.S. Nuclear Regulatory Com'n,* 561 F.3d 132 (2009). Even so, the EA for this update and rulemaking includes a discussion of terrorism that NRC believes satisfies the Ninth Circuit's holding in *Mothers for Peace.*

Some commenters believe that this revision of the Waste Confidence findings violates the Atomic Energy Act of 1954 (AEA) because the AEA precludes NRC from licensing any new NPP or renewing the license of any existing NPP if it would be "inimical * * * to the health and safety of the public." 42 U.S.C. 2133(d). As explained above, NRC's revised Waste Confidence findings and revised generic determination are not licensing decisions, but merely generically resolve certain discrete issues in licensing proceedings. They are not determinations made as part of the licensing proceedings for NPPs or ISFSIs or the renewal of those licenses. They do not authorize the storage of SNF in spent fuel pools or ISFSIs. The revised findings and generic determination include conclusions of the Commission's environmental analyses, under NEPA, of the foreseeable environmental impacts stemming from the storage of spent fuel after the end of reactor operation.

Other comments questioned NRC's basis for reaffirming Finding 1 and Finding 3 and for the revisions made in Findings 2 and 4. Those comments are fully addressed in the final update as well as other, more minor, comments. The Commission, below, restates its reasons for revising Findings 2 and 4.

Specific Question for Public Comment

The Waste Confidence Decision Update considers the many comments received on the specific question for public comment in the Commission's proposals—whether Finding 2 should contain a target date, as proposed, or take a more general approach that a repository will be available when needed (the alternative approach). The State of Nevada, Clark and Eureka Counties in Nevada, and the Nuclear Energy Institute favor the alternative approach. They generally believe that a time frame involves too much speculation about future events and that licensed storage of SNF will be safe no matter what the time needed. Several states; State organizations; Nye County, Nevada; environmental groups; and other commenters want the Commission to retain a time frame. In general, they believe that, in the absence of a time frame, the Commission's confidence in the eventual disposal of spent fuel would rest on pure speculation; that it would ignore intergenerational ethical concerns of this generation reaping the benefits of nuclear energy while passing off the problem of waste disposal to future generations; and that a time frame is necessary to provide an incentive for the Federal Government to meet its responsibilities for the disposal of spent fuel and HLW.

The Commission has confidence that spent fuel can be safely stored without significant environmental impact for long periods of time for all the reasons described in its discussion of Findings 3, 4, and 5 in the update to the Waste Confidence Decision. Further, as discussed in Finding 2, the Commission has confidence that sufficient mined geologic disposal capacity will be available when necessary. However, there are issues beyond the Commission's control, including the political and societal challenges of siting a HLW repository, that make it premature to predict a date when a repository will become available. The Commission has therefore decided not to adopt a specific time frame in Finding 2 or its final rule. Instead, the Commission is expressing its reasonable assurance that a repository will be available "when necessary."

The Commission believes that this standard accurately reflects its position, as discussed in the analysis supporting Finding 2, that a repository can be constructed within 25–35 years of a Federal decision to do so. Further, the Commission continues to have confidence, as expressed in Findings 3 and 5, that safe and sufficient onsite or offsite storage capacity is available and will be available until a repository becomes available for disposal. In addition, revised Finding 4 supports at least 60 years of safe and environmentally sound onsite or offsite storage beyond the end of the licensed life for operation of any nuclear power reactor. It necessarily follows from these findings that the Commission has reasonable assurance that sufficient repository capacity will be available before there are safety or environmental issues associated with the SNF and HLW that would require the material to be removed from storage and placed in a disposal facility.

In short, the Commission can express its reasonable assurance that disposal capacity will become available when necessary and that there will be sufficient safe and environmentally sound storage available for all of the SNF until this disposal capacity becomes available.

Safe Storage of Spent Fuel

This update reflects the Commission's increased confidence in the safety and security of SNF storage, both in spent fuel pools and in ISFSIs. In 1990, the Commission determined that experience with spent fuel pools continued to

confirm that pool storage is a benign environment that does not lead to significant degradation of spent fuel integrity; that the pools in which the assemblies are stored will remain safe for extended periods; and that degradation mechanisms are well understood and allow time for appropriate remedial action. Similarly, by 1990, the Commission had gained experience with dry storage systems that confirmed the Commission's 1984 conclusions that material degradation processes in dry storage are well understood and that dry storage systems are simple, passive, and easily maintained. In fact, one of the bases for the Commission's confidence in the safety of dry storage was its August 19, 1988 (53 FR 31651) amendment to 10 CFR part 72 that addressed spent fuel storage in a monitored retrievable storage installation (MRS) for a license term of 40 years, with the possibility of renewal. In the EA for the MRS rule, the Commission found confidence in the safety and environmental insignificance of dry storage for 70 years following a period of 70 years of storage in a storage pool, for a total of 140 years of storage. *See NUREG–1092: Environmental Assessment for 10 CFR Part 72,* "*Licensing Requirements for the Independent Storage of Spent Fuel and High-Level Radioactive Waste,*" August 1984. Nothing has occurred in the intervening years to call into question the Commission's confidence in the long-term safety of both wet and dry storage of SNF. Subsequently, the NRC has approved a 20-year license renewal for a wet ISFSI and 40-year license renewals for three dry ISFSIs.

Since 1990, the Commission's primary focus has been on potential accidents. And since September 11, 2001, this focus has expanded to include security events that might lead to a radioactive release from stored SNF. Multiple studies of the safety and security of spent fuel storage, including the potential for the draining of a spent fuel pool leading to a zirconium fire and for an airplane crashing into an ISFSI, have been undertaken by NRC and by other entities, such as the NAS. These studies and the Commission's regulatory actions have reinforced NRC's view that spent fuel storage systems are safe, secure, and without significant environmental impacts. *See, e.g.,* Letter to Senator Pete V. Domenici from Nils J. Diaz, March 14, 2005, enclosing *NRC Report to Congress on the [NAS] Study on the Safety and Security of Commercial [SNF] Storage,* March 2005; (73 FR 46204; August 8, 2008); *In the Matter of Private Fuel Storage, L.L.C.,* CLI–05–19; 62 NRC 403 (2005).

In sum, the characteristics of spent fuel storage facilities, the studies of the safety and security of spent fuel storage (conducted both before and after the 1990 update to the Decision and Rule), NRC's extensive experience in regulating spent fuel storage and ISFSIs and in certifying dry cask storage systems, NRC's actions in approving 40-year license renewals for three ISFSIs (meaning that the safety of dry storage after licensed operation at these ISFSIs has been approved for at least a 60-year period), and an additional 20 years of experience with safely storing spent fuel support the Commission's confidence in the long-term safety and security of spent fuel storage.

The Availability of a Repository

On June 3, 2008, the Department of Energy (DOE) submitted the Yucca Mountain (YM) application to NRC and on September 8, 2008, NRC staff notified DOE that it found the application acceptable for docketing (73 FR 53284; September 15, 2008). Although the licensing proceeding for the YM repository is still pending, the current Administration and DOE leadership have made it clear that they oppose the construction of the YM repository. The President's 2010 budget proposal stated that the "Administration proposes to eliminate the Yucca Mountain repository program." *Terminations, Reductions, and Savings: Budget of the U.S. Government, Fiscal Year 2010, Page 68 available at http://www.gpoaccess.gov/usbudget/fy10/pdf/trs.pdf* (last visited on November 9, 2010).

On March 3, 2010, DOE filed a Notice of Withdrawal with the Atomic Safety and Licensing Board (Board) that is presiding over the YM licensing proceeding (ADAMS Accession Number ML100621397). On June 29, 2010, the Board denied DOE's motion; and on June 30, 2010, the Secretary of the Commission invited the parties to file briefs regarding whether the Commission should review, reverse, or uphold the Board's decision (ADAMS Accession Numbers ML101800299 and ML101810432). The Commission has not yet issued its decision.

Recent events, coupled with its ongoing analysis of the target date approach used in Finding 2, have caused the Commission to reconsider its position regarding the use of a target date in Finding 2. As discussed above, the Commission continues to have confidence that a repository can be constructed in 25–35 years, but it is uncertain whether the social and political consensus necessary for a successful repository program will be reached in the near future. Therefore, the Commission has adopted the approach proposed in the Additional Question for Public Comment, and has removed the target date from Finding 2 (73 FR 59561; October 9, 2008).

This modification to Finding 2 does not mean that the Commission is endorsing indefinite storage of HLW and SNF; Finding 4 has not been changed, and only considers "at least 60 years" of storage beyond the licensed life for operation. If the expiration of this time nears without the availability of a repository, the Commission will revisit the Waste Confidence Decision and Rule. The Commission's current Waste Confidence Decision and Rule reflect the NRC's best information and judgment. But the longer-term rulemaking and study of storage for more than 120 years that the Commission directed the staff to start in its Staff Requirements Memorandum (SRM) (SRM–SECY–09–0090, M100915; September 15, 2010) will result in the Commission having more information in a timely fashion should additional adjustments to the Waste Confidence Decision and Rule prove necessary.

The Commission remains confident that disposal of SNF and HLW in a geologic repository is technically feasible and that DOE should be able to locate a suitable site for repository development in no more time than was needed for the YM repository program (about 20 years). Both domestic and international developments have made it clear that confidence in the technical feasibility of a repository alone is not sufficient to bring about the broader societal and political acceptance of a repository. Achieving this broader support for construction of a repository at a particular site requires a broad public outreach program. In some countries community acceptance has taken 25–35 years.

For example, if a new repository program starts in 2025, it could be reasonable to expect that a repository would become available by 2050–2060. But the Commission cannot express reasonable assurance in 2025 as the start date for a new program because it is not possible to predict when a political and social consensus will be reached. The Commission believes that there is no specific date by which a repository must be available for safety or environmental reasons; the Commission did not define a period when a repository will be needed for safety or environmental reasons in 1990 and it is not doing so now—it is only explaining its view of when a repository could reasonably be

expected to be available after a Federal decision to construct a repository.

Availability of Repository Capacity for Disposal of Spent Fuel From All Reactors

The Commission's generic determination of no significant environmental impact from the temporary storage of spent fuel after cessation of reactor operation has included a prediction that sufficient repository capacity for a reactor's fuel will be available within 30 years beyond the licensed life for operation of that reactor. This prediction was not based on safety or environmental considerations; it was based on finding that 30 years beyond the licensed life for operation of even the earliest reactors would not occur until after 2025. Thus, the Commission's confidence that a repository would be available by 2025 still meant that no reactor would need to store its SNF for more than 30 years beyond its licensed life for operation. If it is assumed that a repository will not be available until well after 2025, then this prediction can no longer be maintained (the analysis supporting Finding 2 indicates that if the political and societal roadblocks were resolved today, a repository would not be available until at least 2035–2045). According to NRC's "High-Value Datasets," there are 14 reactor operating licenses that will expire between 2012 and 2020 and an additional 36 licenses that will expire between 2021 and 2030. NRC High-Value Datasets, *http://www.nrc.gov/public-involve/open.html#datasets* (last visited November 9, 2010).

For licenses that are not renewed, some spent fuel will need to be stored for more than 30 years beyond the licensed life for operation. There are 23 reactors that were formerly licensed to operate by the NRC or the Atomic Energy Commission (the NRC's predecessor agency) and have been permanently shut down. *Id.* For most of these plants, 30 years beyond the licensed life for operation will fall in the 2030s and 2040s. Thus, for virtually all of these plants, spent fuel will have to be stored beyond 30 years from the expiration of the license if a repository is not available until well after 2025. Further, the Commission has concerns about the use of the target date approach used in proposed Finding 2 and the proposed rule and has decided not to adopt this approach. A target date requires the Commission to have reasonable assurance of when a repository will become available; but, because the Commission cannot predict when this societal and political acceptance will occur, it is unable to express reasonable assurance in a specific target date for the availability of a repository. The Commission does, however, believe that a repository can be constructed within 25–35 years of a Federal decision to construct a repository.

Given the ongoing activities of the Blue-Ribbon Commission on America's Nuclear Future, events in other countries, the viability of safe long-term storage for at least 60 years (and perhaps longer) after reactor licenses expire, and the Federal Government's statutory obligation to develop a HLW repository, the Commission has confidence that a repository will be made available well before any safety or environmental concerns arise from the extended storage of spent nuclear fuel and high-level waste. In other words, a repository will be available when necessary. For these reasons, the Commission is amending its generic determination that sufficient repository capacity will be available "within 30 years of the expiration of the licensed life for operation of all reactors" to reflect its reasonable assurance that sufficient repository capacity will be available when necessary.

As stated above, this is not a safety finding, and the amendment is made solely to be consistent with an assumption that a repository will not be available until 25–35 years after the resolution of the political and societal issues associated with a repository. As explained in the update to the Waste Confidence Decision, the Commission's confidence that a repository will be available when necessary rests on a number of factors, including (for example) the options being considered by the Blue-Ribbon Commission, the time it likely will take to site, license, and build a repository, the Federal Government's commitment, by law (the Nuclear Waste Policy Act) to dispose of spent fuel, and developments in other countries.

Summary of Amendments by Section

The Commission is adopting the proposed revision, with some changes. The rule is being revised to more closely track the language in final Findings 2 and 4; the basis for the rule is identical to the basis for the findings, no matter how the rule itself is phrased. But to avoid confusion and respond to the issues raised in the comments, the Commission has reconsidered the phrasing of the proposed rule, and the generic determination in the final rule now is made identical to Finding 4.

Section 51.23(a) is also revised to reinsert a version of the second sentence in the present rule that was excluded from the proposed rule. This statement was added to make clear that Finding 4 does not contemplate indefinite storage and to underscore that the 60-year storage period is related to the Commission's expectation that sufficient repository capacity will be available when necessary. Accordingly, the added sentence provides that there is "reasonable assurance that sufficient mined geologic repository capacity will be available to dispose of the commercial high-level radioactive waste and spent fuel generated in any reactor when necessary."

Section 51.23(a) is also revised to provide the Commission's generic determination that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 60 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor in a combination of storage in its spent fuel storage basin or at either onsite or offsite ISFSIs. The time period of "at least 30 years" beyond the licensed life for operation is deleted. This amendment also deletes the predictions that at least one mined geologic repository will be available within the first quarter of the twenty-first century and that sufficient repository capacity will be available within 30 years beyond the licensed life for operation of any reactor to dispose of the commercial HLW and SNF originating in such reactor and generated up to that time. The amendment adds the expectation that sufficient mined geologic repository capacity will be available to dispose of the commercial HLW and spent fuel originating in any reactor when necessary.

Voluntary Consensus Standards

The National Technology Transfer and Advancement Act of 1995 (Pub. L. 104–113) requires that Federal agencies use technical standards that are developed or adopted by voluntary consensus standards bodies unless the use of such a standard is inconsistent with applicable law or otherwise impractical. In this final rule, NRC is modifying its generic determination on the consideration of environmental impacts of temporary storage of spent fuel after cessation of reactor operations to provide that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 60 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of that

reactor in a combination of storage in its spent fuel storage basin and at either onsite or offsite ISFSIs. This action does not constitute the establishment of a standard that establishes generally applicable requirements.

Finding of No Significant Environmental Impact: Availability

This final rule amends the generic determination in 10 CFR 51.23 to state that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 60 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor in a combination of storage in its spent fuel storage basin and at either onsite or offsite ISFSIs. The environmental assessment on which the revised generic determination is based is the revision and update to the Waste Confidence findings published elsewhere in this **Federal Register**. Based on this analysis, the Commission finds that this final rulemaking has no significant environmental impacts. The final revisions and update to the Waste Confidence findings are available as specified in the **ADDRESSES** section of this document.

Paperwork Reduction Act Statement

This final rule does not contain a new or amended information collection requirement subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). Existing requirements were approved by the Office of Management and Budget (OMB) approval number 3150–0021.

Public Protection Notification

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

Regulatory Analysis

A regulatory analysis has not been prepared for this regulation because this regulation does not establish any requirements that would place a burden on licensees.

Regulatory Flexibility Certification

Under the Regulatory Flexibility Act of 1980, 5 U.S.C. 605(b), the Commission certifies that this rule does not have a significant economic impact on a substantial number of small entities. This final rule describes a revised basis for continuing in effect the current provisions of 10 CFR 51.23(b), which provides that no discussion of any environmental impact of spent fuel storage in reactor facility storage pools or ISFSIs for the period following the term of the reactor operating license or amendment or initial ISFSI license or amendment for which application is made is required in any environmental report, environmental impact statement, environmental assessment, or other analysis prepared in connection with certain actions. This rule affects only the licensing and operation of nuclear power plants or ISFSIs. Entities seeking or holding Commission licenses for these facilities 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 at 10 CFR 2.810.

Backfit Analysis

The NRC has determined that the backfit rule (§§ 50.109, 70.76, 72.62, or 76.76) does not apply to this final rule because this amendment does not involve any provisions that would impose backfits as defined in the backfit rule. Therefore, a backfit analysis is not required.

Congressional Review Act

In accordance with the Congressional Review Act of 1996, the NRC has determined that this action is not a major rule and has verified this determination with the Office of Information and Regulatory Affairs of OMB.

List of Subjects in 10 CFR Part 51

Administrative practice and procedure, Environmental impact statement, Nuclear materials, Nuclear power plants and reactors, 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 amendment to 10 CFR part 51.

PART 51—ENVIRONMENTAL PROTECTION REGULATIONS FOR DOMESTIC LICENSING AND RELATED REGULATORY FUNCTIONS

■ 1. The authority citation for part 51 continues to read as follows:

Authority: Sec. 161, 68 Stat. 948, as amended, sec. 1701, 106 Stat. 2951, 2952, 2953 (42 U.S.C. 2201, 2297(f)); secs. 201, as amended, 202, 88 Stat. 1242, as amended, 1244 (42 U.S.C. 5841, 5842); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note). Subpart A also issued under National Environmental Policy Act of 1969, secs. 102, 104, 105, 83 Stat. 853–854, as amended (42 U.S.C. 4332, 4334, 4335), and Pub. L. 95–604, Title II, 92 Stat. 3033–3041; and sec. 193, Pub. L. 101–575, 104 Stat. 2835 (42 U.S.C. 2243). Sections 51.20, 51.30, 51.60, 41.80, and 51.97 also issued under secs. 135, 141, Pub. L. 97–425, 96 Stat. 2232, 2241, and sec. 148, Pub. L. 100–203, 101 Stat. 1330–223 (42 U.S.C. 10155, 10161, 10168). Section 51.22 also issued under sec. 274, 73 Stat. 688, as amended by 92 Stat. 3036–3038 (42 U.S.C. 2021) and under Nuclear Waste Policy Act of 1982, sec. 121, 96 Stat. 2228 (42 U.S.C. 10141). Sections 51.43, 51.67, and 51.109 also under Nuclear Waste Policy Act of 1982, sec. 114(f), 96 Stat. 2216, as amended (42 U.S.C. 10134 (f)).

■ 2. In § 51.23, paragraph (a) is revised to read as follows:

§ 51.23 Temporary storage of spent fuel after cessation of reactor operation—generic determination of no significant environmental impact.

(a) The Commission has made a generic determination that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 60 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor in a combination of storage in its spent fuel storage basin and at either onsite or offsite independent spent fuel storage installations. Further, the Commission believes there is reasonable assurance that sufficient mined geologic repository capacity will be available to dispose of the commercial high-level radioactive waste and spent fuel generated in any reactor when necessary.

* * * * *

Dated at Rockville, Maryland, this 9th day of December, 2010.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,

Secretary of the Commission.

[FR Doc. 2010–31624 Filed 12–22–10; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

10 CFR Part 51

[NRC–2008–0482]

Waste Confidence Decision Update

AGENCY: Nuclear Regulatory Commission.

ACTION: Update and final revision of Waste Confidence Decision.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC or Commission) is updating its Waste Confidence Decision of 1984 and, in a parallel rulemaking

proceeding, revising its generic determinations in the NRC's regulations.

ADDRESSES: You can access publicly available documents related to this document using the following methods:

NRC's Public Document Room (PDR): The public may examine and have copied for a fee publicly available documents at the NRC's PDR, Room O1 F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland.

NRC's Agencywide Documents Access and Management System (ADAMS): Publicly available documents created or received at the NRC are available electronically at the NRC's electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html.* From this page, the public can gain entry into ADAMS, which provides text and image files of NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC's PDR reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr.resource@nrc.gov.*

Federal Rulemaking Web site: Public comments and supporting materials related to this final rule can be found at *http://www.regulations.gov* by searching on Docket ID: NRC–2008–0482.

FOR FURTHER INFORMATION CONTACT: Tison Campbell, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, *telephone:* 301–415–8579, *e-mail: tison.campbell@nrc.gov;* Lisa London, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: 301–415–3233, *e-mail: lisa.london@nrc.gov.*

SUPPLEMENTARY INFORMATION:

Background

On September 18, 1990 (55 FR 38474), the NRC issued a decision reaffirming and revising, in part, the five Waste Confidence Findings reached in its 1984 Waste Confidence Decision. The 1984 Decision and the 1990 update to the Decision were products of rulemaking proceedings designed to assess the degree of assurance that radioactive wastes generated by nuclear power plants can be safely disposed of, to determine when disposal or offsite storage would be available, and to determine whether radioactive wastes can be safely stored onsite past the expiration of existing facility licenses until offsite disposal or storage is available. In 2008, the Commission decided to undertake a review of its Waste Confidence Decision and Rule as part of an effort to enhance the efficiency of combined license proceedings for applications for nuclear power plant (NPP) licensees anticipated in the near future by ensuring that the findings are up to date.

The Commission has considered developments since 1990 and has reviewed its five prior findings and supporting environmental analysis. As a result of this review, the Commission is revising the second and fourth findings in the Waste Confidence Decision as follows:

> Finding 2: The Commission finds reasonable assurance that sufficient mined geologic repository capacity will be available to dispose of the commercial high-level radioactive waste and spent fuel generated in any reactor when necessary.
>
> Finding 4: The Commission finds reasonable assurance that, if necessary, spent fuel generated in any reactor can be stored safely without significant environmental impacts for at least 60 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor in a combination of storage in its spent fuel storage basin and either onsite or offsite independent spent fuel storage installations.

The Commission reaffirms the three remaining findings. Each finding and the reasons for revising or reaffirming the finding are discussed below. In keeping with revised Findings 2 and 4, the Commission is concurrently publishing in this issue of the **Federal Register** conforming amendments to 10 CFR 51.23(a), which provides a generic determination of the environmental impacts of storage of spent fuel at, or away from, reactor sites after the expiration of reactor operating licenses, and expresses reasonable assurance that sufficient geologic disposal capacity will be available when necessary.

In October 1979, the NRC initiated a rulemaking proceeding, known as the Waste Confidence proceeding, to assess its degree of assurance that radioactive wastes produced by NPPs "can be safely disposed of, to determine when such disposal or offsite storage will be available, and to determine whether radioactive wastes can be safely stored onsite past the expiration of existing facility licenses until offsite disposal or storage is available" (44 FR 61372, 61373; October 25, 1979). The Commission's action responded to a remand from the U.S. Court of Appeals for the District of Columbia Circuit in *State of Minnesota* v. *NRC,* 602 F.2d 412 (DC Cir.1979). That case questioned whether an offsite storage or disposal solution would be available for the spent nuclear fuel (SNF) produced at the Vermont Yankee and Prairie Island NPPs at the expiration of the licenses for those facilities in 2007–2009 or, if not, whether the SNF could be stored at those reactor sites until an offsite solution was available.

The Waste Confidence proceeding also stemmed from the Commission's statement, in denying a petition for rulemaking filed by the Natural Resources Defense Council (NRDC), that it intended to periodically reassess its finding of reasonable assurance that methods of safe permanent disposal of high-level radioactive waste (HLW) would be available when they were needed. Further, the Commission stated that, as a matter of policy, it "would not continue to license reactors if it did not have reasonable confidence that the wastes can and will in due course be disposed of safely" (42 FR 34391, 34393; July 5, 1977), *pet. for rev. dismissed sub nom., NRDC* v. *NRC,* 582 F.2d 166 (2d Cir. 1978)).[1]

The Waste Confidence proceeding resulted in the following five Waste Confidence Findings, which the Commission issued on August 31, 1984:

> (1) The Commission finds reasonable assurance that safe disposal of HLW and SNF in a mined geologic repository is technically feasible;
>
> (2) The Commission finds reasonable assurance that one or more mined geologic repositories for commercial HLW and SNF will be available by the years 2007–2009 and that sufficient repository capacity will be available within 30 years beyond the expiration of any reactor operating license to dispose of existing commercial HLW and SNF originating in such reactor and generated up to that time;
>
> (3) The Commission finds reasonable assurance that HLW and SNF will be managed in a safe manner until sufficient repository capacity is available to assure the safe disposal of all HLW and SNF;
>
> (4) The Commission finds reasonable assurance that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 30 years beyond the expiration of that reactor's operating license at that reactor's spent fuel storage basin, or at either onsite or offsite independent spent fuel storage installations (ISFSIs);
>
> (5) The Commission finds reasonable assurance that safe independent onsite or offsite spent fuel storage will be made available if such storage capacity is needed (49 FR 34658).

Based on these findings, the Commission promulgated 10 CFR 51.23(a) to provide a generic determination that for at least 30 years

[1] The NRDC petition asserted that the Atomic Energy Act of 1954 (AEA). Public Law 83–703, 68 Stat. 919 (1954), required NRC to make a finding, before issuing an operating license for a reactor, that permanent disposal of HLW generated by that reactor can be accomplished safely. The Commission found that the AEA did not require this safety finding to be made in the context of reactor licensing, but rather in the context of the licensing of a geologic disposal facility.

beyond the expiration of reactor operating licenses, no significant environmental impacts will result from the storage of spent fuel in reactor facility storage pools or ISFSIs located at reactor or away-from-reactor sites and that the Commission had reasonable assurance that a permanent disposal facility would be available by 2007–2009.

The Commission conducted a review of its findings in 1989–1990, which resulted in the revision of Findings 2 and 4 to reflect revised expectations for the date of availability of the first repository, and to clarify that the expiration of a reactor's operating license referred to the full 40-year initial license for operation, as well as any additional term of a revised or renewed license:

> (2) The Commission finds reasonable assurance that at least one mined geologic repository will be available within the first quarter of the twenty-first century, and sufficient repository capacity will be available within 30 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of any reactor to dispose of the commercial HLW and SNF originating in such reactor and generated up to that time;
>
> (4) The Commission finds reasonable assurance that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 30 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor at its spent fuel storage basin, or at either onsite or offsite ISFSIs.
>
> (55 FR 38474; September 18, 1990)

The Commission similarly amended the generic determination in 10 CFR 51.23(a):

> The Commission has made a generic determination that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 30 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor at its spent fuel storage basin or at either onsite or offsite [ISFSIs]. Further, the Commission believes there is reasonable assurance that at least one mined geologic repository will be available within the first quarter of the twenty-first century, and sufficient repository capacity will be available within 30 years beyond the licensed life for operation of any reactor to dispose of the commercial [HLW and SNF] originating in such reactor and generated up to that time. (55 FR 38472; September 18, 1990)

This generic determination is applied in licensing proceedings conducted under 10 CFR parts 50, 52, 54, and 72. *See* 10 CFR 51.23(b) (2010).

In 1999, the Commission reviewed its Waste Confidence Findings and concluded that experience and developments since 1990 had confirmed the findings and made a comprehensive reevaluation of the findings unnecessary. It also stated that it would consider undertaking a reevaluation when the pending repository development and regulatory activities had run their course or if significant and pertinent unexpected events occurred that raise substantial doubt about the continuing validity of the Waste Confidence Findings (64 FR 68005; December 6, 1999). The Commission has not found that the criteria put forth in 1999 for reevaluating its findings have been met. But because the Commission is now preparing to conduct a significant number of proceedings on combined license (COL) applications for new reactors, and the issue of waste confidence has been raised in some of those proceedings and may be raised in others, it is prudent to take a fresh look at the NRC's Waste Confidence Findings now, before completing the agency's review of new reactor license applications.

On February 14, 2002, the Secretary of Energy recommended the Yucca Mountain (YM) site for the development of a repository to the President thereby setting in motion the approval process set forth in sections 114 and 115 of the Nuclear Waste Policy Act, as amended (NWPA). *See* 42 U.S.C. 10134(a)(1); 10134(a)(2); 10135(b), 10136(b)(2) (2006). On February 15, 2002, the President recommended the site to Congress. On April 8, 2002, the State of Nevada submitted a notice of disapproval of the site recommendation. Congress responded on July 9, 2002, by passing a joint resolution approving the development of a repository at YM, which the President signed on July 23, 2002. See Public Law 107–200, 116 Stat. 735 (2002) (codified at 42 U.S.C. 10135 note (Supp. IV 2004)).

On June 3, 2008, the Department of Energy (DOE) submitted the "Yucca Mountain Repository License Application," seeking NRC's authorization to begin construction of a permanent HLW repository at YM. U.S. Department of Energy, License Application for a High-Level Waste Geologic Repository at Yucca Mountain (2008), available at *http://www.nrc.gov/waste/hlw-disposal/yucca-lic-app.html.* On September 8, 2008, the NRC staff found that the application contained sufficient information for the staff to begin its detailed technical review, and docketed the application (73 FR 53284; September 15, 2008). On October 17, 2008, the Commission issued a "Notice of Hearing and Opportunity to Petition for Leave to Intervene" (73 FR 63029; October 22, 2008). Requests for hearing were received from 12 parties and 2 interested governmental entities; these requests included 318 contentions to the application.[2] The Construction Authorization Boards granted 10 of these petitions to intervene and admitted all but 17 of the 318 contentions (ADAMS Accession Number ML091310479).

On January 29, 2010, President Obama directed the Secretary of Energy to create a "Blue Ribbon Commission on America's Nuclear Future" to evaluate options for the back-end of the nuclear fuel cycle. See Presidential Memorandum—Blue Ribbon Commission on America's Nuclear Future (January 29, 2009), available at *http://www.whitehouse.gov/the-press-office/presidential-memorandum-blue-ribbon-commission-americas-nuclear-future.*

In the YM proceeding, DOE filed a "Motion to Stay the Proceeding," on February 1, 2010, which stated that the President, in the proposed budget for fiscal year 2011, "directed that the Department of Energy 'discontinue its application to the U.S. Nuclear Regulatory Commission for a license to construct a high-level waste geologic repository at Yucca Mountain in 2010 * * *'" (ADAMS Accession Number ML100321641 at 1). The Motion also stated that the proposed budget indicated that all DOE funding for YM would be eliminated in 2011. *Id.* Therefore, DOE stated its intent to withdraw the license application by March 3, 2010, and requested a stay of the proceeding to avoid unnecessary expenditure of resources by the Board and parties. *See Id.* at 2. Construction Authorization Board 4 granted a stay of the proceeding on February 16, 2010 (ADAMS Accession Number ML100470423).

On February 19, 2010, Aiken County, South Carolina filed an action in the U.S. Court of Appeals for the District of Columbia Circuit, challenging DOE's decision to seek withdrawal of the license application. Similar lawsuits filed by three individuals living near Hanford, Washington (the Ferguson Petitioners), the State of South Carolina, and the State of Washington were consolidated into one proceeding now before the District of Columbia Circuit. *See In re Aiken* County, No. 10–1050 (and consolidated cases) (DC Cir.).

[2] ADAMS Accession Numbers ML083540096, ML083540230, ML083550015, ML083570102, ML083570371, ML083570416, ML083570731, ML083570732, ML083570741, ML083570761, ML083570773, ML083570775, ML083570779, ML083570788, ML083570789, ML083590091, ML090050465, ML083540836.

On March 3, 2010, DOE filed with the NRC a Motion to withdraw its license application with prejudice (ADAMS Accession Number ML100621397). On June 29, 2010, Construction Authorization Board 4 issued a Memorandum and Order (Granting Intervention to Petitioners and Denying Withdrawal Motion), LBP–10–11, ____ NRC ____, denying DOE's motion to withdraw as outside its authority under the NWPA (ADAMS Accession Number ML101800299). The Secretary of the Commission invited briefs from all the parties in the YM proceeding on whether to review and whether to uphold or reverse the Board's decision. The Commission has not yet acted on these questions.

Although the proposed updates to the Waste Confidence Decision and Rule did not consider some of these recent developments, the Commission has assumed, for the purposes of these updates, that YM would not be built. Even so, the new YM developments are pertinent. The Commission believes that the updates to the Waste Confidence Decision and Rule reflect the uncertainty regarding the timing of the availability of a geologic repository for SNF and HLW. The Commission, as a separate action, has directed the staff to develop a plan for a longer-term rulemaking and Environmental Impact Statement (EIS) to assess the environmental impacts and safety of long-term SNF and HLW storage beyond 120 years (SRM–SECY–09–0090; ADAMS Accession Number ML102580229). This analysis will go well beyond the current analysis that supports at least 60 years of post-licensed life storage with eventual disposal in a deep geologic repository. The Commission believes that a more expansive analysis is appropriate because it will provide additional information (beyond the reasonable assurance the Commission is recognizing in the current rulemaking) on whether spent fuel can be safely stored for a longer time, if necessary. This analysis could reduce the frequency with which the Commission must, as a practical matter, consider waste storage capabilities. The staff's new review will require an analysis and, to some extent, a forecast of the safety and environmental impacts of storage for extended periods of time beyond that currently recognized in 10 CFR 51.23 and the Waste Confidence Decision. While storage of spent fuel for 60 years beyond licensed life has been shown through experience or analyses to be safe and not to have a significant environmental impact, the proposed technical analysis will go well beyond the time frame of existing requirements.

Even though the Commission has not determined whether this particular analysis will result in a different conclusion concerning the environmental impacts of extended spent fuel storage, the Commission believes that this unprecedented long-term review should be accompanied by an EIS. Preparing an EIS will ensure that the agency considers these longer-term storage issues from an appropriate perspective. The Commission has therefore decided to exercise its discretionary authority under 10 CFR 51.20(a)(2) and is directing the staff to prepare a draft EIS to accompany the proposed rule developed as a result of this longer-term analysis. The updates to the Waste Confidence Decision in this document and the final rule published in this issue of the **Federal Register** rely on the best information currently available to the Commission and therefore are separate from this long-term initiative. The updates to the Waste Confidence Decision and Rule are not dependent upon the staff completing any action outside the scope of these revisions to the Waste Confidence Decision and Rule.

Based upon the technical and environmental analysis contained in this document, and discussed at length below, the Commission has prepared this update of the Waste Confidence Decision and now makes the following revisions to Findings 2 and 4:

(2) The Commission finds reasonable assurance that sufficient mined geologic repository capacity will be available to dispose of the commercial high-level radioactive waste and spent nuclear fuel generated by any reactor when necessary.

(4) The Commission finds reasonable assurance that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 60 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor in a combination of storage in its spent fuel storage basin and either onsite or offsite ISFSIs.

The update to the Waste Confidence Decision restates and supplements the bases for the earlier findings and addresses the public comments received on the proposed revisions to the findings.

The Commission is also concurrently publishing in this issue of the **Federal Register** a final rule revising 10 CFR 51.23(a) to conform to the revisions of Findings 2 and 4.

Responses to Public Comments

The NRC received comments from environmental and other public interest organizations; the nuclear industry; States, local governments, an Indian Tribe, and inter-governmental organizations; and individuals. Comments from the 158 letters, including a late supplemental letter from the Attorney General of New York, have been categorized and grouped under 8 issues for purposes of this discussion. The issues include comments made in two form letters received from 1,990 and 941 commenters, respectively.

Issue 1: Compliance of the Waste Confidence Decision With the National Environmental Policy Act (NEPA)

Comment 1: A large number of commenters stated that the NRC has not complied with NEPA in issuing its proposed revisions to the Waste Confidence Decision and to its generic determination in 10 CFR 51.23(a) because they believe that the revisions need to be supported by a Generic Environmental Impact Statement (GEIS). The National Resources Defense Council (NRDC) argues that these two agency actions "are, in effect, generic licensing decisions that allow for the production of additional spent reactor fuel and other radioactive wastes associated with the uranium fuel cycle—essentially in perpetuity." Thus, these "generic licensing decisions," in NRDC's view, must "be accompanied by a [GEIS] that fully assesses the environmental impacts of the entire uranium fuel cycle, including health and environmental impacts and costs, and that examines a reasonable array of alternatives, including the alternative of not producing any additional radioactive waste."

Texans for a Sound Energy Policy (TSEP) stated that "the NRC has relied on the Waste Confidence Decision to license and re-license many nuclear power plants, and therefore it constitutes a major federal action significantly affecting the environment," requiring preparation of an EIS.

The Attorney General of New York argued that the NRC should "require and perform a site-specific evaluation of environmental impacts of spent fuel storage at each reactor location, taking into account environmental factors including surrounding population density, water resources, seismicity, subsurface geology, and topography along with the design, construction, and operating experience of the spent fuel pool in question and the layout of the fuel assemblies in that pool." The Attorney General believes that these "new factual conclusions also provide compelling evidence to support * * * [consideration] in relicensing

proceedings, such as the ongoing proceeding for the Indian Point power reactors, of any properly presented environmental and safety contention focused on the adequacy of mitigation measures taken or to be taken at that site to address the safety and environmental impacts flowing from the 20 additional years of spent fuel storage at the reactor site, the increased volume of spent fuel created during those 20 years, and the indefinite storage at that reactor site of all the waste generated by that reactor." Finally a form letter, used by many commenters, asserts "it is appropriate that any major Federal action on radioactive waste (such as changing the Waste Confidence Decision) be considered in a generic (programmatic) NEPA proceeding" that includes all aspects of the nuclear fuel chain.

NRC Response: In considering the NRC's compliance with NEPA in revising its Waste Confidence Decision and Rule, it is important to keep in mind the limited scope of these revisions. The NRC is amending its generic determination of no significant environmental impact from the temporary storage of spent fuel after cessation of reactor operation contained in 10 CFR 51.23(a) to conform it to the Commission's revised Findings 2 and 4 of the Waste Confidence Decision.

In revised Finding 4, the Commission finds reasonable assurance that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 60 years (rather than 30 years, as in the present finding) beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor in a combination of storage in its spent fuel storage basin and either onsite or offsite ISFSIs. The revised generic determination in 10 CFR 51.23(a) is dependent upon the environmental analysis supporting revised Finding 4.

The revision also incorporates the Commission's supporting analysis for revised Finding 2, which looks at the time necessary to develop a repository (about 25–35 years) and concludes that reasonable assurance exists that sufficient mined geologic repository capacity will be available when necessary to dispose of the commercial HLW and SNF originating in such reactor and generated up to that time. As the Commission indicated in its Staff Requirements Memorandum (SRM) approving publication of this Decision and the final rule, the changes to Finding 2 do not mean that the Commission has endorsed indefinite storage of SNF and HLW.[3] *See* SRM–SECY–09–0090; ADAMS Accession Number ML102580229.

The revised generic determination is not a generic licensing decision—it generically deals with one aspect of licensing decisions that have yet to be made. It does not authorize the operation of a NPP, the renewal of a license of a NPP, or the production of spent fuel by a NPP. NPPs and renewals of operating licenses are licensed in individual licensing proceedings. The NRC must prepare a site-specific EIS in connection with any type of application to construct and operate a NPP. See 10 CFR 51.20(b). For operating license renewals, the NRC may rely on NRC's *GEIS for License Renewal of Nuclear Plants, NUREG–1437,* May 1996, for issues that are common to all plants and must also prepare a Supplemental EIS that evaluates site-specific issues not discussed in the GEIS or "new and significant information" regarding issues that are discussed in the GEIS.[4] *See* 10 CFR part 51, subpart A, appendix B.

Both types of licensing proceedings are supported by both generic and specific EISs. The generic determination in § 51.23(a) does play a role in the environmental analyses of the licensing and license renewal of individual NPPs; it excuses applicants for those licenses and the NRC from conducting an additional site-specific environmental analysis only *within the scope of the generic determination in 10 CFR 51.23(a).* Thus, 10 CFR 51.23(b) provides:

> Accordingly, * * * within the scope of the generic determination in paragraph (a) of this section, no discussion of any environmental impact of spent fuel storage in reactor facility storage pools or [ISFSIs] *for the period following the term* of the reactor operating license or amendment, reactor combined license or amendment, or initial ISFSI license or amendment for which application is made, is required in any environmental report, [EIS], [EA], or other analysis prepared in connection with the issuance or amendment of an operating license for a [NPP] under parts 50 and 54 of this chapter, or issuance or amendment of a combined license for a [NPP] under parts 52 and 54 of this chapter, or the issuance of an initial license for storage of spent fuel at an ISFSI, or any amendment thereto (emphasis added).

In short, the environmental analysis, which is done as part of the licensing or license renewals of individual NPPs, as well as the initial licensing of an ISFSI, does consider the potential environmental impacts of storage of spent fuel during the term of the license. What is not considered in those proceedings—due to the generic determination in 10 CFR 51.23(a)—is the potential environmental impact of storage of spent fuel for a 60-year period after the end of licensed operations or the potential environmental impacts of ultimate disposal. Environmental analysis for this period is covered by the environmental analysis the NRC has done in this update to the Waste Confidence Decision, particularly under Findings 3, 4, and 5. This analysis enables the Commission to generically resolve this issue because it demonstrates that spent fuel can be safely stored and managed under a 10 CFR part 50 or 10 CFR part 72 license after the cessation of reactor operations for at least a 60-year period. Further, if it becomes clear that a repository will not be available by the expiration of the 60-year post licensed life period, the Commission will revisit the Waste Confidence Decision and Rule early enough to ensure that it continues to have reasonable assurance of the safe storage without significant environmental impacts of the SNF and HLW.

In addition, the NRC's Waste Confidence Decision and Rule do not pre-approve any particular waste storage or disposal site technology—although the Decision does evaluate the technical feasibility of deep geologic disposal—nor do they require that a specific cask design be used for storage. Individual licensees and applicants, or in the case of a HLW repository, DOE, will have to apply for and meet all of the NRC's safety and environmental requirements before the NRC will issue a license for storage or disposal.

The NRC must prepare an EIS when the proposed action is a major Federal action significantly affecting the quality of the human environment or when the proposed action involves a matter that the Commission, in the exercise of its discretion, has determined should be covered by an EIS. 10 CFR 51.20(a). The NRC's rulemaking action here is to incorporate a revised generic determination into 10 CFR 51.23(a), which expands from at least 30 years to at least 60 years after licensed life the period during which the Commission has confidence that spent fuel can be

[3] This reflects the Commission's confidence that a repository will be made available before the storage of the SNF and HLW becomes unsafe or would result in significant environmental impacts. Finding 2 also reflects the Commission's belief that it cannot have confidence in a target date because it cannot predict when the societal and political obstacles to a successful repository program will be overcome. Once those obstacles are overcome, the Commission has confidence that a repository can be sited, licensed, and constructed within 25–35 years.

[4] The Commission issued a proposed rule updating the 1996 GEIS on July 31, 2009 (74 FR 38117) for a 75-day public comment period; the staff is currently preparing responses to the public comments.

safely stored without significant environmental impacts and to state its confidence that a permanent repository will be available when necessary. As the Commission explained in 1984 and 1990, this final rulemaking action formally incorporating the revised generic determination in the Commission's regulations does not have separate independent environmental impacts (49 FR 34693; August 31, 1984, 55 FR 38473; September 18, 1990). The environmental analysis that the revised generic determination is based on is found in this update to the Waste Confidence Decision, which serves as the Environmental Assessment (EA) for the rule.

The updates to the Waste Confidence Decision and Rule, as explained above, do not authorize any licensing or other Federal action. The rule does have the effect of removing from a reactor operating license proceeding, license renewal proceeding, or initial ISFSI licensing proceeding the issue of whether safe storage of SNF can be accomplished without any significant environmental impact for an additional 30 years beyond the 30 years provided by the current generic determination. The update to the Waste Confidence Decision explains and documents the Commission's continued reasonable assurance that this extended storage period will have no significant environmental impacts. Given this conclusion, a finding of no significant environmental impact (FONSI) may be made and preparation of an EIS is not required.

Comment 2: A number of commenters asserted that the NRC, in making its FONSI, has not complied with its procedural requirements for a FONSI: 10 CFR 51.32, or with the requirements of the Council on Environmental Quality: 40 CFR 1508.13. In particular, some commenters claim that the NRC has not published an EA, as required by 10 CFR 51.32, and has not identified all the documents that the FONSI is based on. TSEP asserts that the NRC's alleged failure to comply with its procedural requirements for a FONSI also results in a violation of the Administrative Procedure Act because it means the public has not had an opportunity to comment on the basis for the FONSI.

NRC Response: As explained in response to Comment 1, the only Federal action involved in this rulemaking is the amendment of 10 CFR 51.23(a). This amendment adopts the expansion, by 30 years, of the Commission's Finding 4 in its 1990 Waste Confidence Decision that spent fuel generated in any reactor can be stored safely and without significant environmental impacts after the licensed life for operation of the reactor; the amendment also captures the revisions to Finding 2 in the Waste Confidence Decision that deep geologic disposal capacity will be available when necessary. This is the action described in the NRC's proposed FONSI (*See* 73 FR 59550; October 9, 2008).

The formal incorporation of revised Findings 2 and 4 into 10 CFR 51.23(a) has no separate independent environmental impact from the revisions of Findings 2 and 4. The update and revision of the Waste Confidence Decision is the EA supporting the action and the basis for the FONSI and, as evidenced by the breadth of comments received, the findings of the Waste Confidence Decision have been made available for public review and comment. The update was undertaken, as a matter of discretion, to ensure the currency of the Waste Confidence Findings, which have not been changed in nearly 20 years.

The NRC's procedural requirements for an EA call for a brief discussion of the need for the proposed action, alternatives to that action, and the environmental impacts of the proposed action and alternatives as well as a list of agencies and persons consulted and identification of the sources used. *See* 10 CFR 51.30(a). The Commission's proposal explained that the need for an update of the 1990 Waste Confidence Decision was prompted by a desire to make anticipated licensing proceedings for new reactors more efficient by resolving any concerns that the generic determination was out of date and could not be relied upon in these licensing proceedings (*See* 73 FR 59553, 59558; October 9, 2008). The Commission's proposed rule also explicitly raised the question, in the context of revising Finding 2, whether it should remove a target date from Finding 2 and make a general finding of reasonable assurance that SNF generated in any reactor can be stored safely and without significant environmental impacts until a disposal facility can reasonably be expected to be available (*See* 73 FR 59561–59562; October 9, 2008).

The Commission explained what the basis of this alternative finding would be:

> In other words, in response to the court's concerns that precipitated the original Waste Confidence proceeding, the Commission could now say that there is no need to be concerned about the possibility that spent fuel may need to be stored at onsite or offsite storage facilities at the expiration of the license (including a renewed license) until such time as a repository is available because we have reasonable assurance that spent fuel can be so stored for long periods of time, safely and without significant environmental impact. Such a finding would be made on the basis of the Commission's accumulated experience of the safety of long-term spent fuel storage with no significant environmental impact (*see* Finding 4) and its accumulated experience of the safe management of spent fuel storage during and after the expiration of the reactor operating license (*see* Finding 3). *Id.*

The Commission explicitly sought public comment on whether any additional information would be needed to make this change. The update to the Waste Confidence Decision shows that there would be no difference between the environmental impacts of the proposed action of extending the time period for safe storage of SNF by 30 years and the no-action alternative of leaving it as it is. The Commission also stated in its proposed update and rule that the environmental impacts of the alternative of indefinite storage may be the same, but found no need to make this prediction due to its expectation that a repository will be available within 50–60 years of the end of any reactor's license for the disposal of its spent fuel.

The Commission has, however, now reconsidered its position regarding the use of the 50–60 year target date: The Commission has confidence that spent fuel can be safely stored without significant environmental impact for long periods of time as described in its discussion of Findings 3, 4, and 5. But there are issues beyond the Commission's control, including the political and societal challenges of siting a HLW repository, that make it premature to predict a precise date or time frame when a repository will become available.[5] The Commission has therefore decided not to adopt a specific time frame in Finding 2 or its final rule. Instead, the Commission is expressing its reasonable assurance that a repository will be available "when necessary."

The Commission believes that this standard accurately reflects its position, as discussed in the analysis supporting Finding 2, that a repository can be constructed within 25–35 years of a Federal decision (*e.g.,* congressional action or executive order) to start a new repository program. The Commission continues to have confidence, as expressed in Findings 3 and 5, that safe and sufficient onsite or offsite storage capacity is and will be available until the waste is sent to a repository for disposal. In addition, revised Finding 4 supports safe onsite or offsite storage without significant environmental

[5] These political and societal issues are discussed in the analysis of Finding 2 in this document.

impacts for at least 60 years beyond the end of the licensed life for operation of any nuclear power reactor. Given that long period of time, the current "Blue-Ribbon Commission" studying options for handling SNF, the Commission's direction to the NRC staff to consider whether it is feasible to expand the 60-year period for safe storage, and a continued Federal obligation to site and build a repository under the Nuclear Waste Policy Act, the Commission has reasonable assurance that disposal capacity will become available when necessary and that there will be sufficient safe and environmentally sound storage for all of the spent nuclear fuel until disposal capacity becomes available.

Further, the Commission has decided not to endorse the concept of indefinite storage that was discussed with the alternative Finding 2 in the proposed rule (73 FR 59561–59562; October 9, 2008). The Commission has determined that it is not necessary to endorse indefinite storage if there is no target date for a repository because the Commission has confidence that either a repository will be available before the expiration of the 60 years post-licensed life discussed in Finding 4 or that the Waste Confidence Decision and Rule will be updated and revised if the expiration of the 60-year period approaches without an ultimate disposal solution for the HLW and SNF.

With respect to the claim that the NRC must make the documents on which its FONSI relies available to the public, the commenters are correct that the NRC must disclose all portions of the documents that informed its NEPA analysis and that are not exempt from public disclosure under the Freedom of Information Act (FOIA). The Commission acknowledged this fact when, in *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI–08–01, 67 NRC 1 (2008), it directed the NRC staff to prepare a complete list of the documents on which it relied in preparing its EA.

In the case of the update to the Waste Confidence Decision, the NRC has complied with this standard—all of the documents relied upon in preparing the update to the Waste Confidence Decision and Rule are referenced. Two of the referenced documents are not publicly available: reports concerning the safety and security of spent fuel pool storage issued by Sandia National Laboratories and the National Academy of Sciences (NAS), which are Classified, Safeguards Information, or Official Use Only—Security Related Information. Although these documents cannot be released to the public, redacted or publicly available summaries are available: A redacted version of the Sandia study can be found in ADAMS at (ADAMS Accession Number ML062290362) and the unclassified summary of the NAS report can be purchased or downloaded for free by accessing the NAS Web site at: *http://www.nap.edu/catalog.php?record_id=11263.* No other non-public documents are referenced in the Waste Confidence Decision.

In sum, the NRC's FONSI identifies the proposed action and relies upon an EA that explains at considerable length the reasons why this action will not have a significant effect on the quality of the human environment and describes the documents relied upon and how these documents may be accessed by the public.

Comment 3: A number of commenters asserted that the NRC has failed to comply with NEPA because the NRC has not prepared a GEIS to review and update Table S–3 of 10 CFR 51.51(b). Table S–3 lists environmental data to be used by applicants and the NRC staff as the basis for evaluating the environmental effects of the portions of the fuel cycle that occur before new fuel is delivered to the plant and after spent fuel is removed from the plant site for light-water reactors. Table S–3 was incorporated into the NRC's regulations in 1979 and includes an assumption, based on NRC staff's analysis of disposal in a bedded-salt geologic repository, that after a repository is sealed there would be no further release of radioactive materials to the environment (the "zero release assumption"). The 1979 rulemaking also included an expectation that "a suitable bedded-salt repository site or its equivalent will be found" (44 FR 45362 and 45368; August 2, 1979).

The commenters stated that the NRC's proposed revisions to the Waste Confidence Decision acknowledge that salt formations are now only being considered as hosts for reprocessed nuclear materials because heat-generating waste, like SNF, exacerbates a process by which salt can rapidly deform (See 73 FR 59555; October 9, 2008). For this and other reasons, the commenters believe that Table S–3 has been undermined and is out of date and needs to be reviewed in a GEIS. NRDC also believes that the Table S–3 Rule's "finding of no significant health impacts fundamentally supports the Waste Confidence Decision because its estimate of zero radioactive releases from a repository is based on the Commission's then-current Waste Confidence finding, that 'a suitable bedded-salt repository site or its equivalent will be found.'" The commenters also note that the Commission, in 1990, indicated that it would find it necessary to review the Table S–3 Rule if it found, in a future review of the Waste Confidence Decision, that its confidence in the technical feasibility of disposal in a mined geologic repository had been lost (55 FR 38491; September 18, 1990). The commenters believe that the Commission lacks a basis for continued confidence in the technical feasibility of safe geologic disposal and that the relationship of the Table S–3 rule to the Waste Confidence Decision is such that a GEIS to review the Table S–3 Rule is a necessary prerequisite to a revision of the Waste Confidence Findings.

NRC Response: The Waste Confidence Decision does not rely on findings made in the context of the Table S–3 Rule. Even in 1984, the Commission's confidence that a suitable geologic site for a repository would be found was not premised on the expectation that a bedded-salt site would be located, but rather on the fact that DOE's site exploration efforts were "providing information on site characteristics at a sufficiently large number and variety of sites and geologic media to support the expectation that one or more technically acceptable sites will be identified." (49 FR 34668; August 31, 1984). Similarly, the issue of concern to the NRC in considering waste confidence has not been whether a zero-release assumption will be met, but rather when Environmental Protection Agency (EPA) would issue standards ensuring that any releases of radioactive materials to the environment would not be inimical to public health and safety (*See* 55 FR 38500; September 18, 1990).

In 1990, the Commission discussed the relationship of the Table S–3 rulemaking with the Waste Confidence proceeding (*See* 55 FR 38490–38491; September 18, 1990). The Commission noted that the Table S–3 proceeding was the outgrowth of efforts to generically address the NEPA requirement for an evaluation of the environmental impacts of operation of a light water reactor (LWR), that Table S–3 assigned numerical values for environmental costs resulting from uranium fuel cycle activities to support one year of LWR operation, and that the Waste Confidence proceeding was not intended to make quantitative judgments about the environmental costs of waste disposal. The Commission stated that unless, "in a future review of the Waste Confidence decision, [it] finds that it no longer has

confidence in the technical feasibility of disposal in a mined geologic repository, the Commission will not consider it necessary to review the S–3 rule when it reexamines its Waste Confidence Findings in the future" (55 FR 38491; September 18, 1990). The Commission continues to have confidence in the technical feasibility of disposal in a mined geologic repository (*see* NRC Response to Comment 8 and the discussion of Finding 1 later in this document) so there is no need to review the S–3 rule to support its Waste Confidence Findings.[6] This does not preclude the NRC from taking future regulatory action to amend Table S–3 if doing so appears to be necessary or desirable. In 2008, the Commission stated that "[t]he NRC will continue to evaluate, as part of its annual review of potential rulemaking activity, the need to amend Table S–3." *New England Coalition on Nuclear Pollution; Denial of Petition for Rulemaking* (73 FR 14946, 14949; March 20, 2008).

Comment 4: The Attorney General of California believes that the Waste Confidence Decision violates core principles of NEPA and the NRC's regulations because it does not allow for supplementation of an EIS for an ISFSI even when there is significant change in the circumstances under which a project is carried out or when there is significant new information regarding the environmental impacts of the project. *See* 10 CFR 51.92(a). He asserts that "NRC has not shown a clearly articulated justification, based on substantial evidence in the record, for the proposed extension of this presumption that *no* change in circumstance, and *no* new information, can *ever* trigger the NEPA duty to supplement the environmental analysis of the long-term onsite storage of nuclear waste." The Attorney General also believes that the proposed update to the Waste Confidence Decision allows NPPs "to be substantially re-purposed and transformed into long-term storage facilities * * * without environmental review" and that therefore supplementation of the initial EIS for the NPP may be warranted. Similarly, the Attorney General of New York, in a supplemental comment, argues that the Commission's proposed revision to Finding 2 (originally discussed in the Commissioners' September 2009 votes) endorses a policy of indefinite storage and that the Commission "has not made a generic determination regarding environmental and safety issues presented by indefinite storage of spent fuel at the site of nuclear reactors following shutdown."

NRC Response: Under 10 CFR 51.23(b), the NRC does not need to prepare a site-specific EA or EIS during individual NPP licensing that discusses the environmental impacts of spent fuel storage for the period following the term of the reactor license or initial ISFSI license because of the generic determination the Commission has made in 10 CFR 51.23(a) that spent fuel can be stored safely and without significant environmental impacts for at least 60 years beyond the licensed life of the reactor. The generic determination is based on the environmental analysis conducted in the Waste Confidence Decision. However, the commenter is not correct that this means that an EA or EIS for a reactor or an ISFSI may never need to be supplemented even if there is a significant change in circumstances or significant new information that demonstrates that the application of the generic determination would not serve the purposes for which it was adopted. Under 10 CFR 51.20(a)(2), the Commission, in its discretion, may determine that a proposed action involves a matter that should be covered by an EIS. Further, 10 CFR 2.335(b) provides that a party to an adjudicatory proceeding may petition for the waiver of the application of the rule or for an exception for that particular proceeding. The sole grounds for a petition for waiver or exception is that special circumstances with respect to the subject matter of the particular proceeding exist so that the application of the rule would not serve the purposes for which it was adopted.

More fundamentally, as the Commission clarified in its SRM authorizing publication of this decision and final rule in the **Federal Register**, the changes to the Waste Confidence Decision and Rule are not intended to support indefinite storage. If the time frame for safe and environmentally sound storage included in Finding 4 approaches without the availability of sufficient repository capacity, the Commission will revisit the Waste Confidence Decision and Rule.

Comment 5: Riverkeeper asserts that the NRC made its finding of no significant impact in its initial 1984 decision "without performing an environmental review pursuant to NEPA, explicitly stating that an [EIS] was not necessary," and then has continued to make this finding without appropriate environmental review.

NRC Response: Riverkeeper is correct that the NRC concluded in 1984 that Finding 4—that SNF could be safely stored without significant environmental impacts for at least 30 years beyond the expiration of the reactor's operating license—did not require the support of an EIS (*See* 49 FR 34666; August 31, 1984). This does not mean that this finding was made without performing the required environmental review under NEPA. The Commission explained that the Waste Confidence Decision itself considered the environmental aspects of spent fuel storage and did comply with NEPA. *Id.* No EIS was conducted because the fourth finding concluded that the environmental impacts from extended storage of SNF are so insignificant as not to require consideration in an EIS. The NRC has explained in its response to Comment 1 why an EIS is unnecessary to support the expansion of its generic determination.

Issue 2: Compliance of the Waste Confidence Decision With the Atomic Energy Act (AEA)

Comment 6: Several commenters asserted that the updates to the Waste Confidence Decision and Rule do not comply with the AEA. They stated that that the AEA precludes NRC from licensing any new NPP or renewing the license of any existing NPP if it would be "inimical * * * to the health and safety of the public." 42 U.S.C. 2133(d) (2006). They note that the Commission continues to state that it would not continue to license reactors if it did not have reasonable confidence that the wastes can and will in due course be disposed of safely. These commenters assert that Finding 1 effectively constitutes a licensing determination that spent fuel disposal risks are not inimical to public health and safety, and that Findings 3, 4, and 5 effectively constitute a licensing determination that spent fuel storage risks are not inimical to public health and safety. Because the commenters believe that the NRC has presented no well-documented safety findings supporting its findings, they contend that the NRC's revisions of its findings are in violation of the AEA.

NRC Response: As explained in the response to Comment 1, the NRC's update to the Waste Confidence Decision and Rule are not licensing decisions. They are not determinations made as part of the licensing proceedings for NPPs or ISFSIs or the renewal of those licenses. They do not authorize the storage of SNF in spent fuel pools or ISFSIs. The revised findings and generic determination are conclusions of the Commission's

[6] As discussed below, Finding 1 deals with the general technical feasibility of a repository and is not dependent upon a specific site. Further, the Commission makes it clear in its discussion of Finding 2 that the Findings assume that YM will not be used as a geologic repository.

environmental analyses, under NEPA, of the foreseeable environmental impacts stemming from the storage of SNF after the end of reactor operation.

As long ago as 1978, the U.S. Court of Appeals for the Second Circuit considered the question "whether NRC, prior to granting nuclear power reactor operating licenses, is required by the public health and safety requirement of the AEA to make a determination * * * that high-level radioactive wastes can be permanently disposed of safely." *Natural Resources Defense Council* v. *NRC,* 582 F. 2d 166, 170 (1978) (emphasis in original). The court found that the NRC was not required to make a finding under the AEA that SNF could be disposed of safely at the time a reactor license was issued, but that it was appropriate for the Commission to make this finding in considering a license application for a geologic repository. Similarly, the U.S. Court of Appeals for the District of Columbia Circuit did not vacate amendments to NPP operating licenses permitting the reracking of spent fuel storage pools because it was concerned about the availability of storage or disposal facilities at the end of licensed operation. *State of Minnesota* v. *NRC,* 602 F. 2d 412 (DC Cir. 1979). Rather, that court was concerned that the Commission's confidence in these matters had not been subjected to public scrutiny, so it directed the Commission to conduct a rulemaking proceeding to assess its degree of confidence on these issues, leading to the original Waste Confidence proceeding.

The Commission will make the safety finding with respect to SNF disposal envisioned by the commenters in the context of a licensing proceeding for a geologic repository. The Commission does make the safety findings with respect to storage of SNF envisioned by the commenters in the context of licensing proceedings for NPPs and ISFSIs for the terms of those licenses.

Issue 3: What is the meaning of "*reasonable assurance*" *in the waste confidence Findings?*

Comment 7: One commenter expressed the view that the NRC should continue to take a position of suspending the licensing of reactors if it does not have confidence beyond a reasonable doubt that wastes can and will be disposed of safely. Another commenter criticized the NRC for "fail[ing] to define the standard for reasonable assurance—what level of assurance that they found in making their determination—90%, 51%, 5%."

NRC Response: The "reasonable assurance" standard is not equivalent to the "beyond a reasonable doubt" standard used in the criminal law. *North Anna Environmental Coalition* v. *NRC,* 533 F.2d 655, 667 (DC Cir. 1976) (*North Anna*).[7] It is more akin to a "clear preponderance of the evidence" standard, and what constitutes "reasonable assurance" depends on the particular circumstances of the issue being examined. In a 2009 decision affirming the license renewal of the Oyster Creek NPP, the Commission explained: "Reasonable assurance is not quantified as equivalent to a 95% (or any other percent) confidence level, but is based on sound technical judgment of the particulars of a case and on compliance with our regulations * * * ." *In re Amergen Energy Co.* (License Renewal for Oyster Creek Nuclear Generating Station), *CLI–09–07, 69 NRC 235* (*April 1, 2009*).

Thus, the Commission's reasonable assurance that, if necessary, spent fuel generated in any reactor can be stored safely without significant environmental impacts for at least 60 years beyond the licensed life for operation of that reactor is based on a clear preponderance of the technical and scientific evidence described in the discussion of Finding 4. The Commission's reasonable assurance in Finding 2, that sufficient repository capacity will be available when necessary, is somewhat different; it does not include a specific date for when a repository will be available and is supported by an analysis that considers how long it may take to successfully complete the process to select a site, license, and build a repository. This analysis is not purely scientific, and thus the evidence has more qualitative content than evidence considered for strictly scientific or technical issues.

Issue 4: Whether the Commission Has an Adequate Basis for Reaffirming Finding 1

Comment 8: TSEP believes that the Commission lacks a sound basis for reaffirming Finding 1: that there is reasonable assurance that safe disposal of HLW and SNF in a mined geologic repository is technically feasible. In support of its view, TSEP provides the comments of the Institute for Energy and Environmental Research (IEER) by Dr. Arjun Makhijani. IEER stated that "the Waste Confidence Decision presents a safety finding, under the Atomic Energy Act, that the NRC has reasonable assurance that disposal of spent fuel will not pose an undue risk to public health and safety. It does so via the finding that disposal is technically feasible and can be done in conformity with the assumption of zero releases in Table S–3 * * *." IEER believes that the NRC has failed to address available information, which shows that the NRC currently does not have an adequate technical basis for a reasonable level of confidence that spent fuel can be isolated in a geologic repository.

IEER defines "safe disposal" as involving "(i) the safety of building the repository, putting the waste in it, and backfilling and sealing it, and (ii) the performance relative to health and environmental protection standards for a long period after the repository is sealed * * *. [I]t is essential to show a reasonable basis for confidence that the public and the environment far into the future will be adequately protected from the effects of disposal at a specific site and a specific engineered system built there." Further, IEER believes that "reasonable assurance" requires "a statistically valid argument based on real-world data that would show (i) that all the elements for a repository exist and (ii) that they would work together as designed, as estimated by validated models. The evidence must be sufficient to provide a reasonable basis to conclude that the durability of the isolation arrangements would be sufficient to meet health and environmental standards for long periods of time * * * with a high probability." IEER believes that the NRC does not have the requisite reasonable assurance because the NRC "has not taken into account a mountain of data and analysis" derived from the YM repository program and from the French program at the Bure site, which illustrate the problems these programs have encountered and thus show, in IEER's view, "that it is far from assured that safe disposal of spent fuel in a geologic repository is technically feasible." IEER also cites to the historical difficulty the EPA has had in formulating radiation protection standards and notes that "[w]ithout a final standard that is clear of court challenges, performance assessment

[7] In *North Anna,* the court considered whether the Commission's "reasonable assurance" standard required an applicant for a NPP license to prove beyond a reasonable doubt that an earthquake fault under the proposed site was not capable. The court found that neither the AEA nor the pertinent regulations required the Commission to find, under its reasonable assurance standard, that the site was totally risk-free. *See also Power Reactor Development Co.* v. *International Union of Electrical, Radio and Machine Workers,* 367 U.S. 396, 414 (1961), where the Supreme Court rejected a claim that the Commission's finding of reasonable assurance needed to be based on "compelling reasons" when a construction permit for a reactor sited near a large population center was being considered.

must necessarily rest on guesses about what it might be; this is not a basis on which 'reasonable assurance' of the technical feasibility of 'safe disposal' can be given, for the simple reason that there is no accepted definition of safe in relation to Yucca Mountain as yet."

NRC Response: IEER confuses the safety finding that the NRC must make under the AEA when considering an application for a license to construct and operate a repository at an actual site with the Waste Confidence Findings made under NEPA, including the finding that there is reasonable assurance that safe disposal of HLW and SNF is technically feasible. See response to Comment 6. The NRC currently has before it DOE's application for a construction authorization at the YM site and, if the proceeding moves forward, will consider information submitted with admitted contentions that may call into question DOE's ability to safely dispose of HLW and SNF at that site. However, it is very important that the Commission preserve its adjudicatory impartiality and not consider *ex parte* communications of the type proffered by IEER outside of the YM licensing proceeding, and it has been careful not to do so in the context of reviewing its Waste Confidence Decision. *See* 10 CFR 2.347.

Webster's Third New International Dictionary (1993) defines "feasible" as "capable of being done, executed, or effected: possible of realization." The Commission began its discussion of Finding 1 in its original 1984 decision by stating that "[t]he Commission finds that safe disposal of [HLW and SNF] is technically *possible* and that it is achievable using *existing* technology" (49 FR 34667; August 31, 1984) (emphasis added). The Commission then went on to say: "Although a repository has not yet been constructed and its safety and environmental acceptability demonstrated, no fundamental breakthrough in science or technology is needed to implement a successful waste disposal program." *Id.* This focus on whether a fundamental breakthrough in science or technology is needed has guided the Commission's consideration of the feasibility of the disposal of HLW and SNF.

The Commission identified three key technical problems that would need to be solved: the selection of a suitable geologic setting, the development of waste packages that can contain the waste until the fission product hazard is greatly reduced, and engineered barriers that can effectively retard migration of radionuclides out of the repository. *Id.* In 1984, the Commission reviewed evidence indicating that there are geologic media in the United States in many locations potentially suitable for a waste repository; that the chemical and physical properties of HLW and SNF can be sufficiently understood to permit the design of a suitable waste package; and that DOE's development work on backfill materials and sealants provided a reasonable basis to expect that backfill materials and long-term seals can be developed. In 1990, the Commission noted that the NRC staff had not identified any fundamental technical flaw or disqualifying factor for any of the nine sites DOE had identified as potentially acceptable for a repository, even though the HLW program was then focused exclusively on the YM site (55 FR 38486; September 18, 1990). Similarly, the Commission found no reason to abandon its confidence in the technical feasibility of developing a suitable waste package and engineered barriers, even though DOE's scientific programs were focused on Yucca Mountain (*See* 55 FR 38488–38490; September 18, 1990). Both the EPA and the NRC have standards in place that would have to be met by either the proposed repository at YM or a repository at any other site. *See* 40 CFR parts 190 and 197 and 10 CFR parts 60 and 63.

IEER does not assert that the need for a scientific or technical breakthrough stands in the way of establishing any possible repository; IEER believes that the evidence it has offered shows that a repository at YM will not be capable of meeting the EPA's standards and the NRC's performance objectives. This could turn out to be the case, but this does not mean that safe disposal of HLW and SNF in some repository is not possible.

Issue 5: Whether the Commission Has an Adequate Basis To Revise Finding 2

Comment 9: Many commenters responded to the Commission's request for comments on whether the Commission should revise Finding 2 to predict that repository capacity will be available within 50–60 years beyond the licensed life for operation of all reactors or whether the Commission should adopt a more general finding of reasonable assurance that SNF generated in any reactor can be stored safely and without significant environmental impacts until a disposal facility can reasonably be expected to be available.

Specific Question for Public Comment: In its proposed rule and its proposed revisions to the Waste Confidence Decision, the Commission explicitly requested public comment on an alternative approach to Finding 2 (73 FR 59550 and 73 FR 59561; March 20, 2008). The Commission recognized that its proposed revision of Finding 2, to include a time frame for availability of repository capacity within 50–60 years beyond the licensed life for operation of all reactors, is based on its assessment not only of its understanding of the technical issues involved, but also predictions of the time needed to bring about the necessary societal and political acceptance for a repository site.

Recognizing the inherent difficulties in making this prediction, the Commission outlined an alternative approach wherein it would adopt a more general finding of reasonable assurance that SNF generated in any reactor can be stored safely and without significant environmental impacts until a disposal facility can reasonably be expected to be available. This finding would be made on the basis of the Commission's accumulated experience of the safety of long-term spent fuel storage with no significant environmental impact (*see* Finding 4) and its accumulated experience of the safe management and storage of spent fuel during and after the expiration of the reactor operating license (*see* Finding 3). The Commission also asked whether additional information is needed for this approach or whether accompanying changes should be made to its other findings on the long-term storage of spent fuel if this approach is adopted.

The State of Nevada (NV), Clark and Eureka Counties in NV, and the Nuclear Energy Institute (NEI) provided comments supporting the alternative approach to Finding 2. NV supports the approach because it believes that specifying a time frame involves too much speculation about public acceptance, future technology, a possible redirection of the waste disposal program, adequate funding, and the outcome of the NRC licensing proceedings. NV believes that "whatever the NRC's period of safe storage might be, it is long enough for the Commission to generally conclude that, even if Yucca Mountain fails, one or more other repository sites (or some other form of disposition) would be available before dry storage of reactor spent fuel * * * could pose any significant safety or environmental problem." Further, NV suggested that if the Commission followed this approach, it could dispense with Finding 2 altogether since Finding 3 provides reasonable assurance that HLW and SNF will be managed in a safe manner until sufficient repository capacity is available. Clark and Eureka Counties believe that focusing waste

confidence on management of SNF allows for consideration of a more systemic approach to waste management that considers an array of options and takes into account evolving energy policy at the national and international level, technology enhancements, and scientific research that could lead to new approaches and alternatives. NEI stated that "identifying the exact number of years involved is not necessary because, for whatever length of time is needed, the NRC's regulations will continue to provide a high standard of safety in the storage of spent nuclear fuel, and industry is compelled to comply with these regulations."

Many comments from States, State organizations, one NV county, environmental groups and individuals opposed the alternative approach and want the Commission to retain a time frame. These commenters believe that a time frame is necessary to provide an incentive to the Federal Government to meet its responsibilities for the disposal of HLW. One commenter favored only a slight extension of the repository availability date to 2035 in the belief that a further extension or removal of a time frame would remove virtually all societal incentives for the United States to develop a geologic repository. Some commenters feared that removal of a time frame, which would remove any pressure on the Federal Government to resolve the SNF disposal issue, would lead to added costs to taxpayers due to the accumulating damages incurred by DOE because of its failure to honor its contracts for accepting SNF. Nye County, NV believes that removal of the time frame implies that there is no urgency in implementing the NWPA. Nye County believes that waste confidence would better be achieved if Finding 2 included a reaffirmation of the need for a repository for ultimate waste confidence and for its role in the nation's commitment to support the environmental cleanup of weapons program sites because a repository will be needed even if other options for spent fuel management, such as recycling, are adopted.

Some commenters believe that removal of a time frame does not acknowledge the intergenerational ethical concerns of this generation reaping the benefits of nuclear energy, and passing off the nuclear waste products to future generations without providing them with any ultimate disposal solution. Nye County believes that intergenerational equity is still the primary international basis for the policy of geologic disposal. The Western Interstate Energy Board, in urging retention of a time frame, states that the NRC should be concerned about the possibility of indefinite storage of SNF because it undermines support for a plan for disposal of nuclear waste, noting that approval of a new generation of NPPs should be contingent on a credible plan by which the Federal Government meets its responsibilities.

The Attorneys General of New York, Vermont, and Massachusetts believe that "NRC has admitted that its original thirty-year time estimation was based on no scientific or technical facts, but instead on the period of time in which it expected a repository to be available. * * * The NRC's reasoning—that because no problems significant in NRC's eyes have [yet] occurred * * *, no problems will occur no matter how long spent fuel remains on reactor sites—is antithetical to science, the laws of time, and common sense. For example, over an indefinite period of storage, the probability of a severe earthquake increases." They believe that the NRC's alternative approach is arbitrary because there is no basis for unconditional confidence in the indefinite onsite or offsite storage of waste. Further, the Attorney General of New York argues (in supplemental comments) that the Commission's September 2009 votes on the draft final rule, which would remove a target date from Finding 2 (and which the Commission decided to do in September 2010), support the idea that fuel will have to be stored indefinitely.[8] Similarly, another commenter asserted that it is questionable whether the storage of SNF at current sites for 150 years or more "is safe and feasible merely on the basis of the much more limited experience involving SNF storage to date, particularly at ISFSIs, and at fewer locations with lower quantities of SNF, compared to what would exist over such a long time span."

In addition, the Attorneys General believe that in proposing to revise the generic determination in 10 CFR 51.23(a) without reference to any time frame, the NRC has prematurely and inappropriately adopted the alternative approach without waiting for public comments. Similarly, the Prairie Island Indian Community believes that, in the absence of a time frame, "the Waste Confidence Rule would be premised on the pure speculation that a disposal facility will be available at some unknown point in the future." NRDC believes that the NRC's alternative approach "is contrary to the NRC's long-standing policy of [having] at least some minimal time limitation on the actions of its licensees with respect to active institutional controls at nuclear facilities," *e.g.,* 10 CFR 61.59(b), which prohibits reliance on institutional controls for more than 100 years by the land owner or custodial agency of a low-level waste disposal site.

NRC Response: In 1990, the Commission explained that it had not identified a date by which health and safety reasons require that a repository must be available (55 FR 38504; September 18, 1990). The Commission noted that in 1984 it had found under Finding 3 that SNF would be safely managed until sufficient repository capacity is available, but that safe management would not need to continue for more than 30 years beyond the expiration of any reactor's operating license because sufficient repository capacity was expected to become available within those 30 years. The Commission also reached the conclusion under Finding 4 that SNF could be safely stored for at least 30 years beyond the expiration of the operating license. *Id.*

In 1990, the Commission considered a license renewal term of 30 years in its analysis supporting Findings 2 and 4[9] and explained its reasons for believing that "there is ample technical basis for confidence that spent fuel can be stored safely and without significant environmental impact at these reactors for at least 100 years" (55 FR 38506; September 18, 1990). Thus, it is not correct to say that "NRC has admitted that its original thirty-year time estimation was based on no scientific or technical facts." Rather, the NRC's estimate was based on both when it expected a repository to be available and all the scientific and technical facts it discussed under Findings 3 and 4 that support a conclusion that SNF can be safely managed and stored for at least that period of time. In fact, the Commission considered a comment urging it to find that SNF can be stored safely in dry storage casks for 100 years (55 FR 38482; September 18, 1990). The Commission did not "dispute a conclusion that dry spent fuel storage is safe and environmentally acceptable for a period of 100 years," but rejected this suggestion because it found that safe storage without significant environmental impact could take place for "at least" 30 years beyond the licensed life for operation of the reactor, and because it supported "timely

[8] The Commission's September 2009 votes, along with the September 2010 votes, are available at *http://www.nrc.gov/reading-rm/doc-collections/commission/cvr/2009/2009–0090vtr.pdf.*

[9] The license renewal period for operating reactors in 10 CFR part 54 is 20 years.

disposal of [SNF and HLW] in a geologic repository, and by this Decision does not intend to support storage of spent fuel for an indefinitely long period." *Id.*

The fact that the Commission, in 1990 and now, has confidence that SNF can be safely stored for long periods of time does not mean, however, that the Commission has examined scientific and technological evidence supporting *indefinite* storage. The commenters supporting alternative Finding 2 did not provide evidence supporting indefinite storage, nor has the Commission adopted findings that support indefinite storage. The State of Nevada, in its 2005 petition for rulemaking, requested, *inter alia,* that the NRC define "availability" by presuming that some acceptable disposal site would be available at some undefined time in the future. In denying the petition, the Commission said "[w]e find this approach inconsistent with that taken in the 1984 [WCD] because it provides neither the basis for assessing the degree of assurance that radioactive waste can be disposed of safely nor the basis for determining when such disposal will be available" (70 FR 48333; August 17, 2005).

As explained in response to Comment 1, the Commission's action in this update of the 1990 Waste Confidence Decision is to expand its generic determination in 10 CFR 51.23(a) by 30 years, an action that results in no significant environmental impacts and therefore does not require an EIS. The Commission's approach in Findings 2 and 4 acknowledges the need for permanent disposal, and for the generations that benefit from nuclear energy to bear the responsibility for providing an ultimate disposal for the resulting waste. The Commission's removal of a target date from Finding 2 does not mean that the Commission has approved indefinite storage; Finding 4 still contains a time frame for the length of post-licensed life storage. But a time frame in Finding 4 does not mean that the Commission has to include a target date in Finding 2; instead, the Commission has adopted a revised Finding 2 that expresses the Commission's reasonable assurance that repository capacity will be available when necessary. This Finding does not contemplate indefinite storage of SNF and HLW; Finding 4 has not been changed, and only considers "at least 60 years" of storage beyond the licensed life for operation, including a license renewal period, and the analysis supporting Finding 2 considers the time needed to construct a repository.

The Commission has removed the target date from Finding 2 because recent events have demonstrated that the Commission is unable to predict with confidence when a successful program to construct a repository will start. Instead, the Commission has reasonable assurance that sufficient repository capacity will be available when necessary, which means that repository capacity will be available before there are safety or environmental issues associated with the SNF and HLW that would require the material to be removed from storage and placed in a disposal facility. As made clear in the analysis that supports Finding 2, the Commission continues to have confidence that a repository can be constructed within 25–35 years of a Federal decision to do so, which is much shorter than the time frame considered in revised Finding 4. Further, if it becomes clear that a repository or some other disposal solution will not be available by the end of 60 years after licensed life for operation, the Commission will revisit and reassess its Waste Confidence Decision and Rule if a revision has not already occurred for other reasons.

As the Attorneys General, as well as other commenters, noted, the proposed rule was phrased differently from the proposed revision of Finding 2; the proposed rule made a generic determination of safe storage of SNF "until a disposal facility can reasonably be expected to be available" whereas proposed Finding 2 predicted repository availability "within 50–60 years beyond the licensed life for operation," and proposed Finding 4 made a finding of reasonable assurance of safe storage of SNF "for at least 60 years beyond the licensed life for operation."

The Commission did not intend to cause confusion by adopting different language in the Findings and the rule. The basis for the rule is identical to the basis for the findings, no matter how the rule itself is phrased; the Commission has therefore decided to adopt similar language for Findings 2 and 4 and the rule. As discussed above, the Commission has reconsidered Finding 2 and, in recognition of recent developments, has concluded that it would be inappropriate to include a target date in the Finding. The Commission has therefore made a conforming change to the rule to incorporate the revised language from Finding 2.

Further, as discussed in the proposed rule, the Commission has updated the rule language to include the time frame for safe and environmentally sound storage from Finding 4. The final rule now limits the generic determination regarding safe and environmentally sound storage to "at least 60 years beyond the licensed life for operation (which may include the term of a revised or renewed license)." Section 51.23(a) is also revised to reinsert a version of the second sentence in the present rule that was excluded from the proposed rule. This statement was added to make it clear that Finding 4 does not contemplate indefinite storage and to underscore the fact that the Commission has confidence that mined geologic repository capacity will be available when necessary.

Comment 10: TSEP claims that the survey of various international HLW disposal programs that the NRC provided to review the issue of social and political acceptability of a repository shows that there can be no confidence that the necessary social and political conditions exist in the United States to provide any assurance that a repository can be developed in any foreseeable time frame. TSEP also believes that the NRC's survey is inaccurate and essentially incomplete because it omits the country that is often held up as being exemplary for nuclear power—France.

NRC Response: The NRC rejects the commenter's assertion that the NRC's examination of international experience shows that there can be no confidence that a repository will be developed in the United States in any foreseeable time frame. The NRC's discussion of the HLW programs of other countries was included to show that those countries have programmed into their plans various methodologies for securing social and political acceptance of a repository. This has been a trial-and-error process that has led to both failures and successes. The processes, especially in Finland and Sweden, show that this focus on deliberate attempts to gain public support can lead to success given a sufficiently inclusive process and enough time.

The commenter believes that the NRC's survey is partly inaccurate because the NRC incorrectly implies that the United Kingdom (UK) ended a program for developing a repository for HLW and SNF in 1997 when, in fact, the program was for disposal of intermediate-level waste (ILW). The NRC agrees with the commenter that one sentence describing the UK program is misleading. This is because of a typographical error where "HLW" was inserted instead of "ILW". This error is corrected in this update.

With respect to the omission of France, the NRC did not seek to provide an exhaustive survey or complete history of all foreign repository programs. The NRC examined a number of international examples for the

purpose of reasonably estimating the minimum time needed to "develop * * * societal and political acceptance in concert with essential technical, safety and security assurances." The NRC noted that France was among ten nations that have established target dates (France expects that its repository will commence operation in 2025.), and among seven nations, of those ten, that plan disposal of reprocessed SNF and HLW (73 FR 59558; October 9, 2008). A brief examination of the progress of France's waste disposal program suggests a time frame that is consistent with a range of 25–35 years for achieving societal and political acceptability of a repository. Initial efforts in France in the 1980s failed to identify potential repository sites using solely technical criteria. Failure of these attempts led to the passage of nuclear waste legislation that prescribed a period of 15 years of research. Reports on generic disposal options in clay and granite media were prepared and reviewed by the safety authorities in 2005. In 2006, conclusions from the public debate on disposal options, held in 2005, were published. Later that year, the French Parliament passed new legislation designating a single site for deep geologic disposal of intermediate and HLW. This facility, to be located in the Bure region of northeastern France, is scheduled to open in 2025, some 34 years after passage of the original Nuclear Waste Law of 1991.

Comment 11: Several commenters believe that the history of the U.S. repository program demonstrates that there should be no assurance that the political and social acceptance needed to support development of a repository in the time frame envisioned in Finding 2 will be realized.

NRC Response: The Commission acknowledges the difficulties that the U.S. HLW program has encountered over the years from the failed attempt to locate a repository in a salt mine in Lyons, Kansas, through the strong and continuous opposition to the proposed repository at YM. Nevertheless, the commenters overlook a number of key developments that support the Commission's confidence that a repository will be available when necessary.

First, the comments assume that any repository program must start over from the beginning. But any new repository program would build upon the lessons learned from the YM and other repository programs. Other countries are working toward development of a repository, and some have settled upon a process that is designed to deal with many of the societal and political issues that have delayed the U.S. program. *See* Finding 2 below.

Second, the Secretary of Energy established the Blue Ribbon Commission on America's Nuclear Future. Department of Energy, Blue Ribbon Commission on America's Nuclear Future, Advisory Committee Charter (2010), available at *http://brc.gov/pdfFiles/BRC_Charter.pdf.* The Blue Ribbon Commission "will provide advice, evaluate alternatives, and make recommendations for a new plan to address" a number of issues associated with the back-end of the nuclear fuel cycle. *Id.* Specifically, the Blue Ribbon Commission will evaluate the existing fuel cycle technologies and research and development cycles; look at options for the safe storage of SNF while final disposal pathways are prepared; look at options for the permanent disposal of SNF and HLW; evaluate options to make legal and commercial arrangements for the management of SNF and HLW; prepare flexible, adaptive, and responsive options for decision-making processes related to the disposal and management of SNF and HLW; look at options to ensure that any decisions are open and transparent, with broad participation; evaluate the possible need for additional legislation or amendments to existing laws; and any additional issues that the Secretary of Energy deems appropriate. *Id.*

The NWPA still mandates by law a national repository program, and decades of scientific studies support the use of a repository for disposal of HLW and SNF. Federal responsibility for siting and building a repository remains controlling national policy. Finding 2 is a prediction that a repository will be available when the societal and political obstacles to a repository are overcome and sufficient resources are dedicated to the siting, licensing, and construction of a repository. It necessarily follows from the Waste Confidence Decision that the Commission has reasonable assurance that sufficient repository capacity will be available before there are safety or environmental issues associated with the SNF and HLW that would require the material to be removed from storage and placed in a disposal facility. If this were not the case, the Commission would be unable to express its reasonable assurance in the continued safe, secure, and environmentally sound storage of SNF and HLW.

Finally, the Commission reiterates Finding 1, which states that the Commission finds reasonable assurance that safe disposal of HLW and SNF in a mined geologic repository is technically feasible. This finding has remained unchanged since 1984. The more difficult problem challenging a repository program is achieving political and social acceptance, but the Commission has confidence that this problem can be solved. By applying the lessons learned in the YM program and in the different methodologies for achieving acceptance used in international HLW programs, the Commission remains confident that these issues impeding the construction of a repository can be resolved.

Comment 12: One commenter worried that "a decision in favor of this proposed rule change could prejudice a licensing decision in favor of the Yucca Mountain project simply because it would announce confidence in a waste site and that is the only one there." The commenter also fears that this rulemaking could bias a decision to lift or eliminate the statutory capacity limit on YM, which would be necessary for the repository to accept SNF from new reactors. Further, the commenter believes that if the YM project fails, there will be no basis for confidence that a waste site will be available in the future.

NRC Response: The Commission's reaffirmation of Finding 1—that disposal of HLW and SNF is technically feasible—and its revision of Finding 2, which states confidence that repository capacity will be available when necessary, are not tied to any particular site. In fact, the Commission's proposal assumed that YM would not go forward and become available as a repository. Moreover, the Waste Confidence Decision and Rule have no legal effect in the YM licensing proceeding. *See Nevada* v. *NRC,* No. 05–1350, 199 Fed. Appx. 1 (DC Cir. 2006). Therefore, the NRC does not believe that adopting these findings will prejudice a licensing decision on Yucca Mountain. In a 2008 report DOE predicted that by 2010 SNF would exceed the 70,000 metric tons of heavy metal (MTHM) statutory limit for YM, and that if all existing reactors continue to operate for a total of 60 years through license renewals, SNF will exceed 130,000 MTHM. *See The Report to the President and the Congress by the Secretary of Energy on the Need for a Second Repository,* DOE/RW–0595, December, 2008. Thus, even if YM were to obtain NRC approval and be built, the amount of SNF from current reactors alone would require a change in the statutory limit or a second repository. Finally, as stated above, the proposed revision of Finding 2 assumed that YM would not go forward. The NRC's basis for continued confidence that a repository will be available when necessary is explained in its response to

Comment 11 and its discussion of Finding 2.

Comment 13: The State of Nevada favored the Commission's alternative approach to Finding 2, but also suggested that 10 CFR 51.23(a) be reworded as follows:

> The Commission has made a generic determination that there is reasonable assurance all licensed reactor spent fuel will be removed from storage sites to some acceptable disposal site well before storage causes any significant safety or environmental impacts. This generic finding does not apply to a reactor or storage site if the Commission has found, in the 10 CFR Part 50, Part 52, Part 54 or Part 72 specific licensing proceeding, that storage of spent fuel during the term requested in the license application will cause significant safety or environmental impacts.

Nevada explains that the last sentence is added to be consistent with 10 CFR 51.23(c), which provides that 10 CFR 51.23(a) does not alter any requirement to consider environmental impacts during the requested license terms in specific reactor or spent fuel storage license cases. Nevada states that "NRC should not prejudge this review of potential safety or environmental impacts from storage during the requested license term in any pending or future licensing proceeding." Nevada also states that in the event the Commission adopts Finding 2 as proposed, "it needs to clear up the ambiguity inherent in the reference to the 50–60 year time period. Presumably the Commission means it expects a repository within 60 years."

NRC Response: For the reasons explained in response to Comment 9, the Commission has decided to adopt a revised Finding 2 that states its confidence in the availability of a repository "when necessary." 10 CFR 51.23(c) points out that the generic determination in 10 CFR 51.23(a) only applies to the period following the term of the reactor operating license, reactor combined license or amendment, or initial ISFSI license or amendment in proceedings held under 10 CFR Parts 50, 52, 54 and 72. Nevada is concerned that in a case where the environmental impacts during the term of the license were judged to be significant, there would be reason to doubt the applicability of a generic determination that the impacts occurring after the requested license term would not be significant and so has proposed inclusion of a second sentence in 10 CFR 51.23(a). The Commission already has a rule, 10 CFR 2.335, that allows a party to an adjudicatory proceeding to seek a waiver or exception to a rule where its application would not serve the purposes for which the rule was adopted. Thus, the Commission declines to adopt this additional sentence.

Issue 6: Whether the Commission Has an Adequate Basis To Reaffirm Finding 3

Comment 14: One commenter stated that the NRC appears to ignore the reality that available legal and corporate strategies exist that can provide for the transfer of NPPs and ISFSIs, and the SNF itself, to unfunded separate limited liability companies that can easily abandon SNF at existing sites once the economic value of the generating plants is exhausted.

NRC Response: The transfer of a license for a NPP is governed by 10 CFR 50.80. An applicant for transfer of its license must provide the same information on financial and technical qualifications for the proposed transferee as is required for the initial license. Therefore, the entity intended to receive the license must demonstrate its ability to meet the financial obligations of the license. Both general and specifically licensed ISFSIs are required to demonstrate financial qualifications before they are issued a license. The requirements for general licensees are in 10 CFR part 50, while the financial qualifications for specifically licensed ISFSIs are in 10 CFR part 72.

A general license is issued to store spent fuel at an ISFSI "[a]t power reactor sites to persons authorized to possess or operate nuclear power reactors under 10 CFR part 50 or 10 CFR part 52." 10 CFR 72.210. Under 10 CFR 50.54(bb), NPP licensees must have a program to manage and provide funding for the management of spent fuel following permanent cessation of operations until title to and possession of the fuel is transferred to the Secretary of Energy. As required in 10 CFR 72.30(c), all general licensees must provide financial assurance for sufficient funds to decommission the ISFSI. In addition, general licensees who have decommissioned their site, with the exception of the ISFSI and support facilities, must demonstrate that they have sufficient funds to decommission the ISFSI after the spent fuel is permanently transported offsite.

Applicants for a specific license to store spent fuel under 10 CFR part 72 are required to demonstrate their financial qualifications. *See* 10 CFR 72.22(e). To meet the financial requirements, the applicant must show that it either possesses the necessary funds or has reasonable assurance of obtaining the necessary funds to cover ISFSI construction, operating, and decommissioning costs. In addition, a specific licensee that wants to transfer its license must submit an application that demonstrates that the proposed transferee meets the same financial qualifications as the initial license. *See* 10 CFR 72.50. Most specific licensees are financially backed by a utility with either an operating or shutdown NPP and are required under 10 CFR 50.54(bb) to have sufficient resources for spent fuel management after cessation of operations. Other specific licensees, not located at a NPP site, that are currently storing spent fuel are backed either by a large corporation, such as General Electric (the GE Morris ISFSI), or by the DOE, in the case of the Three Mile Island Unit 2, and Ft. Saint Vrain ISFSIs.

Issue 7: Whether the Commission Has an Adequate Basis for Finding That SNF Generated in Any Reactor Can Be Stored Safely and Securely and Without Significant Environmental Impact for at Least 60 Years (Finding 4)

Comment 15: Several commenters posited that the NRC does not have an adequate technical basis for finding reasonable assurance that SNF can be stored safely and without significant environmental impact because they believe that high-density spent fuel storage pools (SFPs) are vulnerable to catastrophic fires that may be caused by accidents or intentional attacks. These commenters do not believe that the NRC has properly assessed this risk. TSEP submitted a report, "Environmental Impacts of Storing Spent Nuclear Fuel and High-Level Waste from Commercial Nuclear Reactors: A Critique of NRC's Waste Confidence Decision and Environmental Impact Determination," prepared by Dr. Gordon R. Thompson, the Executive Director of the Institute for Resource and Security Studies (Thompson Report), which describes the potential risks associated with a fire in a SFP following a loss of water from the pool. The Thompson Report takes the view that the NRC documents published on the risk of SFP fires are inadequate and objects to the fact that some of the more recent documents rely on "secret studies," which cannot be verified by the public. The Attorney General of California requests that the NRC reconsider the information on the risks of SFP fires that California and Massachusetts submitted with their rulemaking petitions, which the NRC denied. *See The Attorney General of Commonwealth of Massachusetts, The Attorney General of California; Denial of Petitions for Rulemaking* (73 FR 46204; August 8, 2008) (MA and CA Petitions).

Dr. Thompson also questioned the analyses and assumptions that support the staff's conclusions regarding terrorist attacks on ISFSIs. Dr. Thompson defined four types of potential attack scenarios and noted that the staff's previous analyses, specifically the Diablo Canyon EA, focus only on Type III scenarios and ignore the far less dramatic, but far more effective, Type IV releases. Thompson Report at 47–48. Type I releases are those caused by the vaporization of the ISFSI by a nuclear explosion and are not considered by Dr. Thompson in his analysis. Thompson Report at Table 7–8. Type II releases deal with an attack by aerial bombing, artillery, rockets, etc., resulting in rupture of the ISFSI and large dispersal of the contents of the cask. *Id.* Type III events are similar to Type II, but involve small dispersal of the contents of the cask, and are caused by vehicle bombs, impact by commercial aircraft, or perforation by a shaped charge. *Id.* Finally, Type IV events are caused by missiles with tandem warheads, close-up use of shaped charges and incendiary devices, or removal of the overpack lid. *Id.* This type of attack results in scattering and plume formation similar to that of a Type III event, but the release of material far exceeds that of a Type III event. *Id.* Dr. Thompson claims that the staff's analysis does not consider the environmental impacts of a Type IV attack on an ISFSI. *Id.* at 48.

NRC Response: The NRC's 1990 Waste Confidence Decision described the studies of the catastrophic loss of reactor SFP water possibly resulting in a fuel fire in a dry pool that the NRC staff had undertaken prior to that time (55 FR 38511; September 18, 1990). The proposed update further details the considerable work that the NRC has done in evaluating the safety of SFP storage, including the scenario of a SFP fire, and notes that following the terrorist attacks of September 11, 2001, the NRC undertook a complete reexamination of SFP safety and security issues (73 FR 59564–59565; October 9, 2008).[10] The proposed update discusses, in particular, the Commission's careful consideration of this issue in responding to the MA and CA Petitions. The petitions asserted that spent fuel stored in high-density SFPs is more vulnerable to a zirconium fire than the NRC had concluded in the GEIS for renewal of NPP licenses. The petitioner raised the possibility of a successful terrorist attack as increasing the probability of a SFP zirconium fire. The petitions claimed that they were proffering "new and significant information" on this issue, including a study by Dr. Thompson, *see Risks and Risk-Reducing Options Associated with Pool Storage of Spent Nuclear Fuel at the Pilgrim and Vermont Yankee Nuclear Power Plants,* May 25, 2006 (Thompson 2006 Report), and a report by the National Academies Committee on the Safety and Security of Commercial Spent Nuclear Fuel Storage, *see Safety and Security of Commercial Spent Nuclear Fuel Storage* (National Academies Press: 2006) (NAS Report).

The Commission considered all of this information and concluded that "[g]iven the physical robustness of SFPs, the physical security measures, and SFP mitigation measures, and based upon NRC site evaluations of every SFP in the United States * * * the risk of an SFP zirconium fire, whether caused by an accident or a terrorist attack, is very low" (73 FR 46208; October 9, 2008). Later, the United States Court of Appeals for the Second Circuit rejected a challenge to the Commission's denial of the CA and MA petitions. *New York* v. *NRC,* 589 F.3d 551 (2d Cir. 2009). The court said that the "relevant studies cited by the NRC in this case constitute a sufficient 'basis in fact' for its conclusion that the overall risk is low." *Id.* at 555.

The commenters are dissatisfied with the NRC's analysis of this issue, but the only new information they have provided is Dr. Thompson's 2009 Report. The NRC has reviewed the 2009 Report and has found no information not previously considered by the NRC.

The Attorney General of California contends that the NRC should have considered the information supplied by the petitioners with the MA and CA Petition. The NRC did consider this information and explained that the information was neither new nor significant and would not lead to an environmental impact finding different from that set forth in the GEIS for license renewal. Dr. Thompson's contention that the NRC did not consider credible threats to ISFSIs that would cause significant environmental impacts has already been addressed by the Commission in *Pacific Gas and Electric Co.* (Diablo Canyon Independent Spent Fuel Storage Installation), 67 NRC 1, CLI–08–01 (2008). In that case, the San Luis Obispo Mothers for Peace submitted an affidavit and report by Dr. Thompson, which argued that the NRC staff should have considered, but failed to consider, "scenarios with much larger releases of radiation [that] are also plausible and should have been considered. * * * [for] example [a scenario] * * * where the penetrating device is accompanied by an incendiary component that ignites the zirconium cladding of the spent fuel inside the storage cask, causing a much larger release of radioactive material than posited in scenarios where the cases sustain minimal damage." *Id.* at 19. The Commission considered this argument and found that "[a]djudicating alternate terrorist scenarios is impracticable. The range of conceivable (albeit highly unlikely) terrorist scenarios is essentially limitless, confined only by the limits of human ingenuity." *Id.* at 20. Further, the Commission found that the staff's approach to its terrorism analysis, "grounded in the NRC Staff's access to classified threat assessment information, is reasonable on its face." *Id.* In his comment, Dr. Thompson attempts to revisit the Diablo Canyon proceeding by claiming that "the Staff limited its examination to Type III releases." Thompson Report at 48. Not only has this issue already been addressed by the Commission, but some of the specifics of Dr. Thompson's "Type IV" releases are discussed and dismissed by the Commission. Thompson Report Table 7–8; *Diablo Canyon* at 19–20.

Comment 16: A number of commenters urged the Commission to consider the increasing frequency of spent fuel pool leaks as evidence calling into question the NRC's confidence in the safety of SNF storage in the normal operation of spent fuel pools. Comments submitted by the Attorneys General of the States of New York and Vermont, a supplemental comment from the Attorney General of New York, and the Commonwealth of Massachusetts described leaks of tritium at reactor sites around the country. They believe that increased onsite storage increases the opportunity for human error resulting in unauthorized releases. They are concerned about the lack of monitoring requirements or guidelines for these spent fuel leaks.

NRC Response: The NRC's proposed update of the Waste Confidence Decision acknowledged incidents of groundwater contamination originating from spent fuel pool leaks. The Liquid Radioactive Releases Lessons Learned Task Force, created in response to these incidents, reported that near-term health impacts resulting from the leaking spent fuel pools that the NRC had examined were negligible but also that measures should be taken to avoid leaks in the

[10] NRC's reexamination of safety and security issues included consideration of reports issued by Sandia National Laboratories and the National Academy of Sciences, which are classified, SGI, or official-use-only security-related information, and thus cannot be released to the public; public versions of these reports are available. *See* response to comment 2 above.

future. The Task Force provided 26 specific recommendations for improvements to The NRC's regulatory programs regarding unplanned radioactive liquid releases. *See* Report Nos. 05000003/2007010 and 05000247/2007010, May 13, 2008 (ADAMS Accession Number ML081340425), as well as "Liquid Release Task Force Recommendations Implementation Status as of February 26, 2008," (ADAMS Accession Number ML073230982).

The NRC has also revised several guidance documents as well as an Inspection Procedure to address issues associated with leaking spent fuel pools. The NRC will continue to follow this issue and the NRC's regulatory oversight will continue to ensure safety and appropriate environmental protection. Thus, the Commission remains confident that storage of SNF in pools will not have any significant environmental impacts.

Comment 17: A number of commenters expressed the view that the NRC's updates to the Waste Confidence Decision and Rule do not comply with the holding of the Ninth Circuit Court of Appeals in *San Luis Obispo Mothers for Peace* v. *NRC,* 449 F. 3d 1016 (9th Cir. 2006), *cert. denied,* 127 S. Ct. 1124 (2007), that environmental analysis under NEPA requires an examination of the environmental impacts that would result from an act of terrorism against an ISFSI because an attack is reasonably foreseeable and not remote and speculative as the NRC had argued before the court.

NRC Response: Finding 4 considers the potential risks of accidents and acts of sabotage at spent fuel storage facilities. In 1984 and 1990, the NRC provided some discussion of the reasons why it believed that the possibility of a major accident or sabotage with offsite radiological impacts at a spent fuel storage facility was extremely remote. In the proposed update to the Waste Confidence Decision, the Commission gave considerable attention to the issue of terrorism and spent fuel management (*See* 73 FR 59567–59568; October 9, 2008). The Commission concluded that "[t]oday spent fuel is better protected than ever. The results of security assessments, existing security regulations, and the additional protective and mitigative measures imposed since September 11, 2001, provide high assurance that the spent fuel in both spent fuel pools and in dry storage casks will be adequately protected." *Id.*

Some commenters believe that the NRC's environmental analysis of the security of spent fuel storage facilities is deficient because it does not include consideration of the environmental impacts of a successful terrorist attack. The commenters recognize that the Commission continues to disagree with the Ninth Circuit and believes that, outside of the Ninth Circuit, the environmental effects of a terrorist attack do not need to be considered in its NEPA analyses. *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI–07–08, 65 NRC 124 (2007). Recently, the Third Circuit U.S. Court of Appeals upheld the NRC's view that terrorist attacks are too far removed from the natural or expected consequences of agency action to require an environmental impact analysis. *New Jersey Department of Environmental Protection* v. *U.S. Nuclear Regulatory Commission,* 561 F.3d 132 (3d Cir. 2009). The Third Circuit stated:

> In holding that there is no "reasonably close causal relationship" between a relicensing proceeding and the environmental effects of an aircraft attack on the licensed facility, we depart from the reasoning of the Ninth Circuit * * *. The *Mothers for Peace* court held that, given "the policy goals of NEPA and the rule of reasonableness that governs its application, the possibility of terrorist attack is not so 'remote and highly speculative' as to be beyond NEPA's requirements." * * *. We note, initially, that *Mothers for Peace* is distinguishable on the ground that it involved the proposed construction of a new facility—a change to the physical environment arguably with a closer causal relationship to a potential terrorist attack than the mere relicensing of an existing facility. …. More centrally, however, we disagree with the rejection of the 'reasonably close causal relationship' test set forth by the Supreme Court and hold that this standard remains the law in this Circuit. We also note that no other circuit has required a NEPA analysis of the environmental impact of a hypothetical terrorist attack. Id. at 142 (citations and footnote omitted).

But even though, outside of the Ninth Circuit, the NRC continues to adhere to its traditional view that the environmental impacts of a terrorist attack do not need to be considered outside of the Ninth Circuit, the environmental assessment for this update and rule amendment includes a discussion of terrorism in the discussion of the revision to Finding 4 that the NRC believes satisfies the Ninth Circuit's holding in *Mothers for Peace* v. *NRC,* as the decision explicitly left to agency discretion the precise manner in which the NRC undertakes a NEPA-terrorism review. *See Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI–08–01, 67 NRC 1 (2008), *petition for judicial review pending,* No. 09–1268 (9th Cir.).

Comment 18: TSEP and the Attorney General of New York (in a supplemental comment) point out that the NRC has treated the risk of a catastrophic fuel fire caused by an attack or an accident that leads to partial or complete drainage of a high-density SFP as a site-specific issue, imposing orders requiring NPPs to enhance security and improve their capabilities to respond to terrorist attack. Some of these orders required licensees to develop specific guidance and strategies to maintain or restore spent fuel pool cooling capabilities (*See* 73 FR 59567; October 9, 2008). TSEP and the Attorney General believe that this demonstrates that the NRC considers the risk of a pool fire to be specific to each nuclear plant and that site-specific measures to reduce these risks to an acceptable level must be taken at each plant. TSEP and the Attorney General believe that this is inconsistent with the NRC's reliance on its generic determination in 10 CFR 51.23(a) to deny hearing requests regarding the safety and environmental impacts of spent fuel storage, on contentions that are within the scope of the generic determination, in individual licensing cases. Because the NRC has (allegedly) acknowledged that its findings regarding the safety and security of spent fuel storage are site-specific and not generic in nature, TSEP and the Attorney General believe that the NRC should withdraw its generic finding.

NRC Response: After the terrorist attacks of September 11, 2001, the Commission issued orders to NPP and ISFSI licensees requiring enhanced protective measures under its Atomic Energy Act authority to "establish by rule, regulation, or order, such standards and instructions to govern the possession and use of [nuclear materials] as the Commission may deem necessary or desirable to promote the common defense and security or to protect health or to minimize danger to life or property. * * *" 42 U.S.C. 2201 (2006). These orders were site-specific and required each licensee to buttress its security arrangements to achieve the revised standards set by the Commission. Additionally, the orders were used as an expedient method to impose new security requirements on licensees. Subsequently, some of these new requirements and other additional requirements were codified in rulemaking (*See* 72 FR 56287; October 3, 2007, 73 FR 19443; April 10, 2008, 73 FR 51378; September 3, 2008, 73 FR 63546; October 24, 2008; 74 FR 13926; March 27, 2009, 74 FR 17115; April 14,

2009). The NRC's determination that SNF can be stored safely and without significant environmental impacts beyond the licensed life for operation of the reactor for at least 60 years is a generic determination that satisfies both the NRC's NEPA responsibilities and evaluates the safety of the ongoing storage of SNF and HLW. The determination considers reasonably foreseeable risks that could threaten the safety of SNF storage and the environmental impacts of these risks. There is no inconsistency between the NRC's orders enhancing security at each plant and its generic determination that SNF can be safely stored because the requirements imposed by the orders and rulemakings help to ensure the safety and security of the SNF. As the Third Circuit said in its decision upholding the NRC's determination that NEPA did not require that the NRC consider the environmental effects of an aircraft attack on a licensed facility, the fact that the NRC does not have a particular obligation under NEPA does not mean that the NRC "has no obligation to consider how to strengthen nuclear facilities to prevent and minimize the effects of a terrorist attack; indeed, the AEA gives broad discretion over the safety and security of nuclear facilities." *New Jersey Department of Environmental Protection* v. *U.S. Nuclear Regulatory Commission,* 561 F.3d 132, 142 fn 9 (3d Cir. 2009). As discussed in the Response to Comment 17, the NRC's analysis satisfies the Ninth Circuit's holding in *San Luis Obispo Mothers for Peace.*

Comment 19: A commenter stated that the NRC's implication that above-ground storage may be safely conducted for 60 years beyond the operating license of a reactor does not seem to account for probably rapidly changing climactic conditions in the next few decades. This is very critical since most reactor sites are located near large bodies of water.

NRC Response: The earliest impact to spent fuel storage casks from climate change is not from submergence of structures by rising ocean levels, but rather from an increased risk of potential flooding from storm surge and high winds caused by extreme weather events. Current NRC regulations for design characteristics specifically address severe weather events. Before certification or licensing of a dry storage cask or ISFSI, the NRC requires that the vendor or licensee include design parameters on the ability of the storage and spent fuel storage facilities to withstand severe weather conditions such as hurricanes, tornadoes, and floods.

The NRC's regulations, 10 CFR 72.236 (for casks) and 72.122 (for facilities), require that applications for a Certificate of Compliance (COC) for a dry storage cask and a license to store spent fuel in an ISFSI evaluate the effects of a design basis flood on the facility. The evaluation of a design basis flood includes both static pressure from standing water and the force from a uniform flood-current. In addition, all storage casks approved for use with the general license provisions in 10 CFR part 72 have been evaluated for static pressure and uniform flood-current in the same manner as those for a specific licensee. The NRC has published regulatory guidance that describes acceptable approaches to assessing these impacts; further, the staff is addressing climate change in updates to its guidance. Based on the NRC's activities related to climate change, and the relatively slow rate of this change, the NRC is confident that any regulatory action that may be necessary will be taken in a timely manner to ensure the safety of all nuclear facilities regulated by the NRC.

Based on the models discussed in the NAS study (Potential Impact of Climate Change on U.S. Transportation: Special Report 290), none of the U.S. NPPs (operational or decommissioned) will be under water or threatened by water levels by 2050. The climate change models used in the NAS study are based on work by the Intergovernmental Panel on Climate Change. Climate changes over the next century are expected to result in a sea-level rise of approximately 0.8 meters; *see* J.A. Church *et al., Climate Change 2001: Impacts, Adaptation, and Vulnerability,* Intergovernmental Panel on Climate Change, 642 (2001). Recently, the Intergovernmental Panel on Climate Change published a report confirming an accelerated sea-level rise in North America and concluding there will be further accelerated sea-level rise; the report found that the global mean sea-level is projected to rise by 0.35 ± 0.12 meters from the 1980 to 1999 period to the 2090 to 2099 period (*http://www.ipcc.ch/ipccreports/ar4-wg2.htm*). This conclusion is supported by the findings of the U.S. Global Change Research Program report published in 2009 (*http://downloads.globalchange.gov/usimpacts/pdfs/climate-impacts-report.pdf*). Based on these reports, sea-level rise is controlled by complex processes, and estimated to rise less than 1 meter by 2100. In addition to sea-level rise, NRC facilities may be affected by increased storm surges, erosion, shoreline retreat, and inland flooding. Impacts to coastal areas may be further exacerbated by the land subsiding, as is currently observed in some central Gulf Coast areas. NRC facilities, including ISFSIs, are designed to be robust. The facilities are evaluated to ensure that performance of their safety systems, structures, and components is maintained during flooding events, and are monitored when in use. The lowest grade above sea-level of concern for an NRC licensed facility is currently about 4.3 m (14 feet). In the event of climate change induced sea-level rise the NRC regulations require licensees to implement corrective actions to identify and correct or mitigate conditions adverse to safety.

Comment 20: A commenter stated that two events—the July 16, 2007, earthquake in Niigata Province, Japan, and an April 2008 earthquake in Michigan—and an August 2008 study, which discusses a newly-discovered fault line that could significantly increase estimates of the probability of an earthquake in New York City, undermine confidence in the safety of spent fuel storage. Further, the commenter believes that given the differing seismology of various plants around the country, a generic determination that SNF can be stored safely without significant environmental impacts for long periods of time is inappropriate.

NRC Response:

Japan Earthquake of July 2007:

Staff reviewed a report on the 2007 Japan Earthquake by the International Atomic Energy Agency (IAEA) in December 2008. *See* 2d Follow-up IAEA Mission in Relation to the Findings and Lessons Learned from the 16 July 2007 Earthquake at Kashiwazaki-Kariwa NPP, *The Niigataken Chuetsu-oki Earthquake,* Tokyo and Kashiwazaki-Kariwa NPP, Japan, 1–5 December 2008. The report was the third in a series issued by an IAEA-led team of international experts that completed the mission in December 2008. According to this report, "the safe performance of the Kashiwazaki-Kariwa nuclear power plant during and after the earthquake that hit Japan's Niigata and Nagano prefectures on 16 July 2007 has been confirmed." The head of the IAEA's Division of Installation Safety, and the leader of the mission, also stated that "[t]he four reactors in operation at the time in the seven unit complex—the world's largest nuclear power plant—shut down safely and there was a very small radioactive release well below public health and environmental safety limits." The lessons learned from the results of the plant integrity evaluation

process will be reviewed by the NRC and may be incorporated, as necessary, to improve the approaches for design and evaluation criteria currently used for NPPs in the United States.

The Michigan Earthquake in April 2008:

NRC Staff reviewed NRC's *Preliminary Notification of Event or Unusual Occurrence,* PNO–III–08–004A, April 18, 2008 (ADAMS Accession Number ML081090639) on the April 2008 earthquake in Michigan. This Notification revealed that licensee personnel and NRC inspectors at the D.C. Cook and Palisades NPPs, both of which experienced onsite seismic activity, conducted independent equipment walkdowns after the initial earthquake and aftershock, and identified no issues. In addition, licensee personnel and NRC inspectors conducted equipment walkdowns at all operating power reactors that felt seismic activity and also identified no issues. The NRC staff concluded that the earthquake will have little overall influence on the postulated seismic hazard estimates at ISFSIs located in the CEUS.

The seismic design requirements for spent fuel pools are the same as for NPPs; these events do not undermine confidence in the safety of storage of spent fuel in spent fuel pools. With respect to dry storage, under 10 CFR 72.210, a general license for the storage of spent fuel in an ISFSI is granted to all holders of a license issued under 10 CFR Part 50 to possess or operate a NPP. The conditions of this general license are given in 10 CFR 72.212. The conditions of the license require a general licensee to perform written evaluations prior to use that establish that: (a) Conditions set forth in the Certificate of Compliance (CoC) have been met; (b) cask storage pads and areas have been designed to adequately support the static and dynamic loads of the stored casks, considering potential amplification of earthquakes through soil-structure interaction, and soil liquefaction potential or other soil instability due to vibratory ground motion; and (c) the requirements of 10 CFR 72.104 (dose limitations for normal operation and anticipated occurrences) have been met. Additionally, the ISFSI foundation analysis must include soil-structure interaction and must address liquefaction potential. *See* 10 CFR 72.212(b)(2). Further, 10 CFR 72.212(b)(3) requires that a general licensee "[r]eview the Safety Analysis Report (SAR) referenced in the [CoC] and the related NRC Safety Evaluation Report, prior to use of the general license, to determine whether or not the reactor site parameters, including analyses of earthquake intensity and tornado missiles, are enveloped by the cask design bases considered in these reports."

In the continental United States, geographic areas located east of the Rocky Mountain Front (east of approximately 104 degrees west longitude) are generally known as "CEUS." For NPP sites that have been evaluated under the criteria of 10 CFR part 100, appendix A, the Design Earthquake must be equivalent to the safe shutdown earthquake for the NPP, but in no case less than 0.10g. For the existing NPPs in the United States, the design basis response spectra used for the design of dry cask storage systems are based on the response spectrum defined in NRC Regulatory Guide 1.60, "Design Response Spectra for Seismic Design of Nuclear Power Plants," Rev. 1, December 1973, anchored at a Peak Ground Acceleration of 0.3g in the horizontal direction and 0.2g in the vertical direction.

As a condition for using a general license to operate an ISFSI, licensees are required to perform written evaluations to establish, for their site-specific conditions, that the conditions set forth in the CoC have been met and that cask storage pads and areas have been designed to adequately support the static and dynamic loads of the stored casks, considering potential amplification of earthquakes through soil-structure interaction, and soil liquefaction potential or other soil instability due to vibratory ground motion. The Indian Point, Vermont Yankee, and Palisades NPPs, which were specifically cited in the comment, have ISFSIs co-located at their existing NPPs and are operating their ISFSIs under an NRC general license. Entergy Nuclear Generation Company has informed the NRC of its intentions to store spent fuel in dry casks at the Pilgrim NPP.

Based on currently available information, the NRC concludes that the storage casks being used at Indian Point, Vermont Yankee, and Palisades (all located in CEUS) demonstrate an adequate margin of safety for any design-basis earthquake loads postulated at these respective sites. There is no safety concern; however, there were a few limitations to the risk methodology employed and uncertainties associated with the data used. As a result, licensees of operating power reactors and ISFSI facilities in the CEUS may need to evaluate whether the updated seismic hazard estimates will have any adverse impact on their current design/licensing basis. This is currently being considered as part of the NRC's Generic Issue Resolution Process. Additionally, the storage cask analyses and designs at operating ISFSIs provide an adequate safety margin and comply with the requirements in 10 CFR part 72. Since Generic Issue No. 199, "Implications of Updated Probabilistic Seismic Hazard Estimates in Central and Eastern United States on Existing Plants," November 17, 2008, is still an open issue, implications of any new information and its effects, if any, on CEUS–ISFSI seismic design for the storage casks and support pads will be evaluated as part of the resolution of that issue.

On September 2, 2010, the NRC issued Information Notice (IN) 2010–18, "Implications of Updated Probabilistic Seismic Hazard Estimates in Central and Eastern United States on Existing Plants" to all operating reactors licensees. IN 2010–18 discusses recent updates to estimates, which apply to ISFSIs as well as existing plants, of the seismic hazard in the central and eastern United States. In summary, the information provided by the commenters has little overall influence on the postulated seismic hazard estimates in the CEUS.

August 2008 Study of Seismic Hazard Estimates in the Eastern United States:

In August 2008, a technical paper, *Observations and Tectonic Setting of Historic and Instrumentally Located Earthquakes in the Greater New York City—Philadelphia Area* by Lynn R. Sykes *et al.* was published in the Bulletin of the Seismological Society of America, Vol. 98, No. 4. NRC staff from the Office of Nuclear Regulatory Research (RES) reviewed this paper to assess the impacts, if any, of this new information on the existing design basis seismic hazard estimates used for NPPs located in this area of Central and Eastern United States (CEUS). RES's assessment was as follows:

> In addition to publishing a seismicity map of the area covering the time period from 1677 to 2006, the paper identifies for the first time a boundary in seismicity, with earthquakes with magnitudes less than 3 occurring south of the boundary but not north of it. The boundary intersects the Ramapo Fault on the northwest near Peekskill, NY, and this point appears to coincide with an offset in the Hudson River. The southeast terminus of the boundary is near Stamford, CT, with a length of about 30 miles (50 km). The authors inferred that the boundary is a fault.
>
> If the boundary is a fault, it is only about 30 miles long and much shorter than the Ramapo Fault, which has already been considered in the seismic hazard of the area and in the seismic design of the Indian Point NPPs. The Ramapo Fault was already

considered in a probabilistic seismic hazard assessment (PSHA) covering the Indian Point area. The newly identified boundary/fault would not change the maximum magnitude in the PSHA calculations; the Ramapo already controls that. The vast majority of earthquakes identified in the paper and the general seismicity of the area were known and were used in the US Geological Survey PSHA. Thus, the rate of seismicity used in their PSHA is little changed by the paper. Thus, with the maximum magnitude and the rate of seismicity little changed or unchanged by the paper, the PSHA assessment is not expected to have changed.

This means that the paper would have little overall influence on the perceived hazard near Buchanan, NY. E-mail from Andrew Murphy to Scott Burnell, Diane Screnci, and Neil Sheehan, August 22, 2008 (ADAMS Accession Number ML091530483).

The rate of seismicity of the area used in the USGS PSHA is little changed by the information published in the paper. As the maximum magnitude and the rate of seismicity changed little or was practically unchanged by the information in the paper, the USGS PSHA assessment is not expected to change.

Comment 21: A commenter believes that the NRC, in judging the safety and security of onsite storage for time periods extending to the middle of the next century, should seriously consider the safety of subsequent pick-up and transport of the SNF.

NRC Response: The NRC's regulations establish the safety standards for the design, construction and use of spent fuel transportation packages. *See* 10 CFR part 71. The NRC conducts rigorous independent reviews to certify that spent fuel transportation packages meet the design standards and test conditions in the regulations. In addition, the NRC reviews and approves the operational procedures and conditions for use of the transport package. These requirements include maintenance of the transport package in full compliance with the NRC-approved package design and material conditions, and the requirements include strict adherence to the NRC-approved operating procedures for the preparation for and loading of the spent fuel transport package. The requirements for use of an NRC-approved spent fuel transport package apply irrespective of how long the spent fuel may have been in interim storage.

Packages that are designed, tested, operated and maintained according to NRC requirements will provide for the safe transport of spent fuel. Spent fuel packages are very robust and are designed to withstand severe accidents. Numerous studies and physical testing programs have demonstrated that the safety standards that the NRC uses to certify transportation packages provide a very high degree of protection against real world accidents. *See* NUREG/CR–4829, *Shipping Container Response to Severe Highway and Railway Accident Conditions;* NUREG/CR–6894, *Spent Fuel Transportation Package Response to the Caldecott Tunnel Fire Scenario;* NUREG/CR–6886, *Spent Fuel Transportation Package Response to the Baltimore Tunnel Fire Scenario;* NUREG–0170, *Final Environmental Statement on the Transportation of Radioactive Material by Air and Other Modes;* "Going the Distance? The Safe Transport of Spent Nuclear Fuel and High-Level Radioactive Waste in the United States," National Research Council of the National Academies, National Academies Press, Washington DC, 2006, available at *http://www.nap.edu/catalog.php?record_id=11538.*

Additionally, the NRC periodically reviews the basis for the transportation regulations to ensure that the regulations continue to provide an adequate level of safety for the shipment of spent fuel. These reviews account for changes in analytical methods, materials, package contents, and operating history. The last periodic review confirmed that initial transportation studies done in the 1970s (which are the basis for the NRC's regulations) contained very conservative assumptions and that the risk to the public from transportation of spent fuel is very low. *See* NUREG/CR–6672, *Reexamination of Spent Fuel Shipment Risk Estimates,* March 2000. The same robust design features that make spent fuel packages safe also make them secure from terrorist attack.

Comment 22: The Decommissioning Plant Coalition (DPC) noted that in 1990 the Commission expressed support for timely disposal of SNF and HLW and stated that it did not intend to support storage of spent fuel for an indefinitely long period (*See* 55 FR 38482; September 18, 1990). The DPC urges the Commission to explicitly reaffirm this position and, further, express its expectation that the Federal Government will soon provide a demonstration that it can reach a consensus on a plan to take title to and remove SNF and Greater-Than-Class-C (GTCC) waste from permanently shut-down, single-site facilities. The DPC outlines the burdens imposed on decommissioned sites by continuing long-term onsite storage, such as restricting the property owners and other local stakeholders from other potential uses for the site. The National Association of Regulatory Utility Commissioners agrees with the NRC that today SNF is better protected than ever, but also believes that the SNF will be even more secure in a centralized interim storage or permanent disposal facility. Similarly, a number of commenters expressed the view that a centralized interim storage facility would be a safe and cost-effective option for managing and storing SNF until a repository is available. The DPC also takes exception to the NRC's "analysis" of difficulties that may block the opening of the Private Fuel Storage (PFS) ISFSI and the NRC's "analysis" of a February 2006 NAS study, in footnote 24 of the proposed update to the Waste Confidence Decision, and would like the footnote eliminated or rewritten.

NRC Response: The Commission continues to support timely disposal of HLW and SNF, but recognizes in this Waste Confidence Decision that storage of SNF may safely continue for at least 60 years beyond the licensed life for operation of a reactor. The Commission agrees that centralized interim storage would be an acceptable method for managing and storing SNF until a repository is available, but determining when DOE will take spent fuel and GTCC wastes from reactor sites and how waste will then be managed are issues for DOE to resolve.

The NRC's proposed update noted that the issuance of a license for the PFS ISFSI confirmed the feasibility of licensing an away-from-reactor ISFSI under 10 CFR Part 72, but also noted that several issues would have to be resolved before the PFS ISFSI could be built and operated (*See* 73 FR 59566; October 9, 2008). Footnote 24 identified these issues as two approvals from the Department of the Interior and a NAS Report on the transportation of SNF in the United States (National Research Council 2006, *Going the Distance: The Safe Transport of [SNF and HLW] in the United States*). The footnote is not an analysis of these issues; it simply acknowledges issues raised by the Department of the Interior and NAS that need to be addressed. With respect to PFS, the DPC states: "The Commission would do well to comment that it is THE safe and secure licensed facility that should be utilized to reduce waste confidence concerns. You can observe, consistent with historical Commission concerns about dual and multiple regulation, that legislation can effect a reduction in the multiple and redundant political and regulatory jurisdictions over use of such facilities." The license issued to PFS demonstrates that the Commission believes that the facility can be constructed and operated without jeopardizing public health and safety, but it is up to the licensee and

other agencies to resolve issues within their purview that may block construction of the facility.

Issue 8: Miscellaneous Comments

Comment 23: One commenter stated that the proposed rulemaking appears to countenance the stranding of SNF at or near plant sites for up to 150 years or more and contains no effective or reasonable time frame in 20 or so years to revisit this matter, or to contain any form of limitations, guidelines, or other provisions to ensure the ultimate safe and proper disposal of SNF.

NRC Response: The Commission, in its 1999 review of the Waste Confidence Decision, stated that it would consider undertaking a comprehensive reevaluation of the Waste Confidence Findings when the impending repository development and regulatory activities run their course or if significant and pertinent unexpected events occur, raising substantial doubt about the continuing validity of the Waste Confidence Findings (*See* 64 FR 68005; December 6, 1999). Although those criteria have not triggered this update, it is apparent that the ultimate disposition of the YM application is uncertain. This update reflects the uncertainty regarding the ultimate grant or denial of the YM license by considering the possibility that the license is not granted. For this reason, termination of the YM program would not be a basis for a further review of the Waste Confidence Decision. However, if significant and pertinent unexpected events that raise substantial doubt about the continuing validity of the Waste Confidence Findings occur, the Commission will consider undertaking another review of the Waste Confidence Decision. Further, the Commission has directed the NRC staff to begin an EIS to consider the long-term (greater than 120 years) storage of SNF and HLW and to consider further rulemaking in accordance with the findings of this review. The Commission will revisit the criteria for reopening the Waste Confidence Decision and Rule as part of this longer-term effort.

Comment 24: A commenter stated that the cost of the proposed rule change is only briefly and minimally discussed and expressed the view that there would be significant costs to both ratepayers and taxpayers stemming from storage of this waste for an additional 50 to 60 years at plant sites. The commenter recommended that the full cost of implementing this rule be completely evaluated by the NRC under the NRC's Regulatory Analyses Guidelines and the requirements for assessing the impacts of proposed rules which have a certain threshold cost. TSEP believes it is not reasonable to assume that the present 1.0 mil per kWh fee will suffice to pay for the U.S. repository program.

NRC Response: The Commission's action of enlarging its generic determination in 10 CFR 51.23(a) by 30 years is not a licensing decision and does not give permission to reactor licensees to store spent fuel that they do not already possess (or may not obtain) under a 10 CFR Part 72 general or specific license. See Response to Comment 6. Finding 4 only states the Commission's reasonable assurance that SNF can be stored safely and without significant environmental impact for at least 60 years beyond the licensed life for operation of any reactor, *if necessary.* The NRC generally provides a Regulatory Analysis for actions that "would affect a change in the use of resources by its licensees." *Regulatory Analysis Guidelines of the U.S. Nuclear Regulatory Commission,* NUREG/BR–0058, 5 (September 2004). A Regulatory Analysis may be appropriate when the NRC is considering placing burdens on its licensees through a licensing or regulatory action (*e.g.,* in the prospective ISFSI security rulemaking), but that is not the case here. The NRC recognizes that many commenters are concerned about the burden placed on ratepayers charged by utilities for the cost of continued storage of SNF at reactor sites and on taxpayers paying the cost of DOE's default in failing to remove SNF from reactor sites as specified in DOE's contracts with the utilities. However, until DOE is able to fulfill its contracts, these burdens will exist irrespective of these updates to the Waste Confidence Decision and Rule; and NRC licensees still have to comply with the NRC's regulations, which continue to provide reasonable assurance that SNF and HLW will be stored safely.

The fee mandated by the NWPA that reactor licensees must pay into the Nuclear Waste Fund to provide for eventual disposal of HLW and SNF has so far been more than adequate to support DOE's HLW program with approximately $25 billion in the Fund as of July 2010. *See* Statement of Kristina M. Johnson, Undersecretary of Energy, before the Committee on the Budget, U.S. House of Representatives, 1 (July 27, 2010).[11] Moreover, the NWPA provides a mechanism for increasing the fee if the current fee becomes inadequate to cover costs. *See* Section 302(a)(4) of NWPA, 42 U.S.C. 10222 (2006). DOE has periodically issued a total system cost estimate for the disposal program to provide a basis for assessing the adequacy of the fee.[12] *See, e.g., 2008 Fee Adequacy Assessment Letter Report,* (January 13, 2009).

Comment 25: A commenter raised the question of how the Commission's expectation that repository capacity can reasonably be expected to be available within 50–60 years beyond the licensed life for operation of any reactor would be met in the case of the Humboldt Bay 3 NPP which was decommissioned in 1976, meaning that 50 years beyond its decommissioning would be 2026. The commenter asked if this meant that SNF would be removed from Humboldt Bay 3 by 2026 and, if so, what is the need for amending Finding 2.

NRC Response: The commenter has confused the end of operation of the reactor with the end of the licensed life for operation. Humboldt Bay 3 was issued a 40-year operating license in 1962. The end of its *licensed life for operation,* therefore, was 2002 and 50 years beyond that would be 2052. Even if a reactor is retired prematurely, resulting in the need to manage and store SNF for a longer period after the end of reactor operation, the Commission is confident, for all the reasons expressed in reaching Findings 3 and 4, that the management and storage of the SNF will be conducted safely and securely without significant impact to the environment.

Comment 26: The Attorney General of New York submitted supplemental comments, many of which are discussed above. These comments did, however, raise an issue that, although similar to other comments, the NRC is addressing here: "Recent actions by the Commission, particularly since 2001, have demonstrated that a significant number of substantial environmental and safety issues related to indefinite storage of spent fuel at the site of shutdown nuclear reactors are specific to the particular reactor and site and cannot be addressed on a generic basis." More generally, the Attorney General argues that there are environmental and safety issues associated with spent fuel storage (not just indefinite storage) that

[11] Congress must make annual appropriations for the HLW program from the Fund, so the amount actually available to DOE in any given year is dependent upon the amount appropriated.

[12] NRC is aware that there is a pending DC Circuit case—*National Association of Regulatory Utility Commissioners* v. *DOE,* Nos. 10–1074 and 10–1076 (consolidated) (DC Cir.)—where petitioners have asked the court of appeals to suspend further payments to the nuclear waste fund. The pending DC Circuit litigation relates to Yucca Mountain-related developments. Whatever that litigation's outcome, DOE's fee-adjustment authority would remain in the NWPA, available to be exercised in appropriate circumstances.

are site and facility-specific and therefore cannot be addressed through a generic rulemaking. The Attorney General believes that the NRC could address these concerns by permitting States to raise site-specific concerns with respect to issues that are now foreclosed by the Waste Confidence Decision and Rule.

NRC Response: The Attorney General is correct that there may be some issues that cannot be addressed through a generic process like the Waste Confidence Decision. The Commission has long recognized this, even in cases where issues are resolved through a generic rulemaking. Site-specific circumstances may require a site-specific analysis; the Commission has provided for these situations through its regulations in 10 CFR 2.335, which allows parties to adjudicatory proceedings to petition for the waiver of or an exception to a rule in a particular proceeding. These requests require the petitioning party to demonstrate that special circumstances exist so that the application of the rule or regulation would not serve the purposes for which the rule or regulation was adopted.

Further, in the case of license renewal proceedings, the licensee is required to look for and identify "new and significant" information that would put the facility outside of the generic assessment in the GEIS for license renewal; the NRC staff also looks for new and significant information as part of its review. If no new and significant information is found, the staff concludes that the issue is generic and within the environmental impacts of the GEIS. With respect to the ongoing Indian Point license renewal proceeding, where the State of New York is a party, and has raised similar issues in the context of that proceeding, the license renewal proceeding is the proper venue in which to seek a waiver to the Waste Confidence Rule. If the State believes that there are site-specific issues associated with the Indian Point license renewal proceeding, the State should seek a waiver of the rule through that proceeding using the procedures in 10 CFR 2.335.[13] But the potential that one or more sites might not fall under the generic determination in the Waste Confidence Decision and Rule is not sufficient reason for the Commission to require to a site-specific analysis for all sites. The 10 CFR 2.335 waiver process is intended to address the circumstances that the Attorney General claims are present at Indian Point; and the adjudicatory proceeding for the Indian Point license renewal, not this rulemaking, is the proper venue to raise these issues.

Comment 27: The Attorney General of New York's supplemental comments raised two new "conclusions" to support its original comments:

> Subsequent to 2001, the Commission has abandoned any attempt to treat safety and environmental issues associated with spent fuel storage at reactor sites on a generic basis. Rather, the Commission, operating through its regulatory staff, has ordered implementation of site-specific mitigation measures for each reactor to address concerns with spent fuel storage. NRC has acknowledged that there are differences in spent fuel pool designs and capabilities. NRC has also required the implementation of site-specific mitigation measures in response to Congressional directives to NRC to develop site-specific analyses and measures for each spent fuel pool. Moreover, while these mitigation measures have been the subject of extensive discussion between NRC and industry, their details have not been disclosed to the States, and there has not been any opportunity for public input regarding the adequacy of the measures being taken or even whether measures are being taken to address all the potential environmental and safety issues associated with spent fuel storage at reactors sites or whether more effective alternatives are available.

And

> Previous indications that the Yucca Mountain waste repository would never come to fruition have now become more certain as the funding for the program has been removed from the proposed federal budget and DOE staff have publicly stated that the project will not go forward.

NRC Response: Contrary to the State's assertion, the NRC continues to treat some issues associated with spent fuel storage on a generic basis; the Commission's approval of these updates to the Waste Confidence Decision and Rule are evidence of that fact. To the extent that the Attorney General's comments relate to the license renewal process at Indian Point, the Commission has a process in place to ensure that generic issues at specific sites under review for license renewal are, in fact, generic. Although spent fuel storage is a Category 1 (generic) issue and does not require a site-specific evaluation, the licensee and the staff both evaluate these generic issues to ensure that there is no new and significant information that would require a site-specific analysis for these issues. To the extent that the rest of the Attorney General's conclusion raises issues associated with the Indian Point license renewal, this rulemaking is not the appropriate venue to raise these issues; the State should raise these concerns in its capacity as a party to the Indian Point relicensing proceeding.

As acknowledged in the Attorney General's conclusion, the Commission discussed the relationship between the YM repository and the draft final updates to the Waste Confidence Decision and Rule in the attachments to SECY–09–0090. In these documents (the draft final Decision and Rule), the Commission discussed how the Waste Confidence Decision and Rule *assume that YM will not be opened as a repository.* This conclusion continues in these documents: The Waste Confidence Decision and Rule assume that YM is not an option. As the Commission states throughout this document and has stated on multiple occasions, the availability of the YM repository has no bearing on the outcome of this rulemaking or update to the Waste Confidence Decision.

Evaluation of Waste Confidence Findings

Having considered and addressed the comments received on the Commission's proposed updates to the Waste Confidence Decision and Rule, the Commission now reexamines the 1984 and 1990 bases for its findings and supplements those bases with an evaluation of events and issues that have arisen since 1990 and affect the findings.

Table of Contents

I. Finding 1: The Commission finds reasonable assurance that safe disposal of high-level radioactive waste and spent fuel in a mined geologic repository is technically feasible.
  A. Bases for Finding 1
  B. Evaluation of Finding 1
II. Finding 2 (1990): The Commission finds reasonable assurance that at least one mined geologic repository will be available within the first quarter of the twenty-first century, and that sufficient repository capacity will be available within 30 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of any reactor to dispose of the commercial high-level radioactive waste and spent fuel originating in such reactor and generated up to that time.
  A. Bases for Finding 2
  B. Evaluation of Finding 2
  C. Finding 2
III. Finding 3: The Commission finds reasonable assurance that HLW and spent fuel will be managed in a safe manner until sufficient repository capacity is available to assure the safe disposal of all HLW and spent fuel.

[13] On July 8, 2010, the Commission directed the ASLB to deny admission of two new contentions regarding waste confidence in the Indian Point proceeding. The Commission explained that it has been longstanding policy to preclude initiating litigation on issues that will soon be resolved generically. *See In the Matter of Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), CLI–10–19, 2010 WL 2753785 (2010).

A. Bases for Finding 3
B. Evaluation of Finding 3
IV. Finding 4 (1990): The Commission finds reasonable assurance that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 30 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor at its spent fuel storage basin, or at either onsite or offsite independent spent fuel storage installations.
A. Bases for Finding 4
B. Evaluation of Finding 4
C. Finding 4
V. Finding 5: The Commission finds reasonable assurance that safe, independent onsite spent fuel storage or offsite spent fuel storage will be made available if such storage capacity is needed.
A. Bases for Finding 5
B. Evaluation of Finding 5

I. Finding 1: The Commission Finds Reasonable Assurance That Safe Disposal of High-Level Radioactive Waste and Spent Fuel in a Mined Geologic Repository Is Technically Feasible

A. Bases for Finding 1

The Commission reached this finding in 1984 and reaffirmed it in 1990. The focus of this finding is on whether safe disposal of HLW and SNF is technically possible using existing technology and without a need for any fundamental breakthroughs in science and technology. To reach this finding, the Commission considered the basic features of a repository designed for a multi-barrier system for waste isolation and examined the problems that the DOE would need to resolve as part of a final design for a mined geologic repository. The Commission identified three major technical problems: (1) The selection of a suitable geologic setting as host for a technically acceptable repository site; (2) the development of waste packages that will contain the waste until the fission products are greatly reduced; and (3) the development of engineered barriers, such as backfilling and sealing of the drifts and shafts of the repository, which can effectively retard migration of radionuclides out of the repository (49 FR 34667; August 31, 1984).

DOE's selection of a suitable geologic setting is governed by the NWPA. DOE explored potential repository sites before the NWPA was enacted, but that Act set in place a formal process and schedule for the development of two geologic repositories. The following brief summary of key provisions of this Act may assist readers in understanding DOE's process for locating a suitable geologic setting.

As initially enacted, the Nuclear Waste Policy Act of 1982 directed DOE to issue guidelines for the recommendation of sites and then to nominate at least five sites as suitable for site characterization for selection as the first repository site and, not later than January 1, 1985, to recommend three of those sites to the President for characterization as candidate sites. Nuclear Waste Policy Act of 1982, § 112, 96 Stat. 2201 (1983) (current version at 42 U.S.C. 10132 (2006)). Not later than July 1, 1989, DOE was to again nominate five sites and recommend three of them to the President for characterization for selection as the second repository. *Id.* DOE was then to carry out site characterization activities for the approved sites. Nuclear Waste Policy Act of 1982, § 113, 96 Stat. 2201 (1983) (current version at 42 U.S.C. 101323 (2006)). Following site characterization, DOE was to recommend sites to the President as suitable for development as repositories and the President was to recommend one site to the Congress by March 31, 1987, and another site by March 31, 1989, for development as the first two repositories. Nuclear Waste Policy Act of 1982, § 114, 96 Stat. 2201 (1983) (current version at 42 U.S.C. 10134 (2006)). States and affected Indian tribes were given the opportunity to object, but if the recommendations were approved by Congress, DOE was to submit applications for a construction authorization to the NRC. *Id.* The NRC was given until January 1, 1989, to reach a decision on the first application, and until January 1, 1992, on the second. The Commission was directed to prohibit the emplacement in the first repository of more than 70,000 MTHM until a second repository was in operation. *Id.* The NWPA, *inter alia,* restricted site characterization solely to a site at Yucca Mountain, NV (YM) and terminated the program for a second repository. The NWPA provided that if DOE at any time determines Yucca Mountain to be unsuitable for development as a repository, DOE must report to Congress its recommendations for further action to ensure the safe, permanent disposal of SNF and HLW, including the need for new legislation. Section 113 of NWPA, 42 U.S.C. 10133 (2006).

In 1984, the Commission reviewed DOE's site exploration program and concluded that it was providing information on site characteristics at a sufficiently large number and variety of sites and geologic media to support the expectation that one or more technically acceptable sites would be identified (49 FR 34668; August 31, 1984). In 1990, the Commission noted that the 1987 amendment of the Nuclear Waste Policy Act of 1982, which focused solely on the YM site, could cause considerable delay in opening a repository if that site were found not suitable for licensing. But the possibility of that delay did not undermine the Commission's confidence that a technically acceptable site would be located, either at YM or elsewhere. The Commission observed that the NRC staff had provided extensive comments on DOE's draft environmental assessments of the nine sites it had identified as being potentially acceptable and on the final environmental assessments for the five sites nominated.[14] The NRC had not identified any fundamental technical flaws or disqualifying factors that would render any of the sites unsuitable for characterization or potentially unlicenseable, although the NRC noted that many issues would need to be resolved during site characterization for YM or any other site (55 FR 38486; September 18, 1990).

With respect to the development of effective waste packages, the Commission, in 1984, reviewed DOE's scientific and engineering program on this subject. The Commission also considered whether the possibility of renewed reprocessing of SNF could affect the technical feasibility of the waste package because it would need to consider waste form other than spent fuel. The Commission concluded that the studies by DOE and others demonstrated that the chemical and physical properties of SNF and HLW can be sufficiently understood to permit the design of a suitable waste package and that the possibility of commercial reprocessing would not substantially affect this conclusion (49 FR 34671; August 31, 1984). In 1990, the Commission reviewed DOE's continued research and experimentation on waste packages, which primarily focused on work in Canada and Sweden. The NRC noted that the DOE had narrowed the range of waste package designs to a design tailored for unsaturated tuff[15] at the YM site due to the 1987 redirection of the HLW program. The NRC also noted that some reprocessing wastes from the defense program and the West Valley Demonstration Project were now

[14] Under the program established by the initial NWPA, DOE had nominated sites at Hanford WA, Yucca Mountain, NV, Deaf Smith County, TX, Davis Canyon, UT, and Richton Dome, MS, and had recommended the first 3 sites for site characterization.

[15] Tuff is a type of rock consisting of successive layers of fine-grained volcanic ash. *See* DOE/RW–0573, Rev. 0 *Yucca Mountain Repository GI.* (ADAMS Accession Numbers ML081560408, ML081560409, and ML081560410).

anticipated to be disposed of in the repository. The NRC remained confident that, given a range of waste forms and conservative test conditions, the technology is available to design acceptable waste packages (55 FR 38489; September 18, 1990).

With respect to the development of effective engineered barriers, the Commission's confidence in 1984 rested upon its consideration of DOE's ongoing research and development activities regarding backfill materials and borehole and shaft sealants, which led the Commission to conclude that these activities provided a basis for reasonable assurance that engineered barriers can be developed to isolate or retard radioactive material released by the waste package (49 FR 34671; August 31, 1984). In 1990, although DOE's research had narrowed to focus on YM, the Commission continued to have confidence that backfill or packing materials can be developed as needed for the underground facility and waste package and that an acceptable seal can be developed for candidate sites in different geologic media (55 FR 38489–38490; September 18, 1990).

B. Evaluation of Finding 1

Today, the scientific and technical community engaged in waste management continues to have high confidence that safe geologic disposal is achievable with currently available technology. See, *e.g.,* National Research Council, "*Technical Bases for Yucca Mountain Standards,*" 1995. No insurmountable technical or scientific problem has emerged to disturb this confidence that safe disposal of SNF and HLW can be achieved in a mined geologic repository. To the contrary, there has been significant progress in the scientific understanding and technological development needed for geologic disposal over the past 18 years. There is now a much better understanding of the processes that affect the ability of repositories to isolate waste over long periods. *Id.* at 71–72; International Atomic Energy Agency (IAEA), "Scientific and Technical Basis for the Geologic Disposal of Radioactive Wastes, Technical Reports Series No. 413," 2003. The ability to characterize and quantitatively assess the capabilities of geologic and engineered barriers has been repeatedly demonstrated. NRC, "Disposal of High-Level Radioactive Wastes in a Proposed Geologic Repository at Yucca Mountain, Nevada; Proposed Rule," (64 FR 8640, 8649; February 22, 1999); Organization for Economic Cooperation and Development, Nuclear Energy Agency, "Lessons Learned from Ten Performance Assessment Studies," 1997. Specific sites have been investigated and extensive experience has been gained in underground engineering. IAEA, "Radioactive Waste Management Studies and Trends, IAEA/WMDB/ST/4," 2005; IAEA, "The Use of Scientific and Technical Results from Underground Research Laboratory Investigations for the Geologic Disposal of Radioactive Waste, IAEA–TECDOC–1243," 2001. These advances and others throughout the world continue to confirm the soundness of the basic concept of deep geologic disposal. IAEA, "Joint Convention on Safety of Spent Fuel Management and on Safety of Radioactive Waste Management, INFCIRC/546," 1997.

In the United States, the technical approach for safe HLW disposal has remained unchanged for several decades: Use a deep geologic repository containing natural barriers to hold canisters of HLW with additional engineered barriers to further retard radionuclide release. Although some elements of this technical approach have changed in response to new knowledge (*e.g.,* engineered backfill was removed as a design concept for YM in the late 1990s in response to enhanced understandings of heat and water transfer processes in the near-field drift environment), safe disposal still appears to be feasible with current technology. In 1998, DOE conducted assessments for long-term performance of a potential repository at YM (DOE/RW–0508, Viability Assessment) and 2002 (DOE/RW–0539, Site Recommendation). These assessments used existing technology and available scientific information and did not identify areas where fundamental breakthroughs in science or technology were needed to support safe disposal.

With respect to the issue of identifying a suitable geologic setting as host for a technically acceptable site, DOE made its suitability determination for the YM site in 2002. On June 3, 2008, DOE submitted the application for construction authorization to the NRC and on September 8, 2008, NRC staff notified DOE that it found the application acceptable for docketing (73 FR 53284; September 15, 2008). Whether YM is technically acceptable must await the outcome of an NRC licensing proceeding, which, if completed, would rule on the technical acceptability of a repository at YM. Even if DOE does not construct a repository at YM, this would not change the fact that the Commission continues to have reasonable assurance that the technology exists today to safely dispose of SNF and HLW in a geologic repository. Although the 1987 amendments to NWPA barred DOE from continuing site investigations elsewhere, the U.S. Congress's decision to focus solely on YM was not based on any finding that any of the other sites were unsuitable for technical reasons; rather, the decision was aimed at controlling the costs of the HLW program (55 FR 38486; September 18, 1990).

Repository programs in other countries, which could inform the U.S. program, are actively considering crystalline rock, clay, and salt formations as repository host media. IAEA, "Radioactive Waste Management Status and Trends, IAEA/WMDB/ST/4," 2005; IAEA, "The Use of Scientific and Technical Results from Underground Research Laboratory Investigations for the Geologic Disposal of Radioactive Waste, IAEA–TECDOC–1243," 2001. Many of these programs have researched these geologic media for several decades. Although there are relative strengths to the capabilities of each of these potential host media, no geologic media previously identified as a candidate host, with the exception of salt formations for SNF, has been ruled out based on technical or scientific information. Salt formations are being considered as hosts only for reprocessed nuclear materials because heat-generating waste, like SNF, exacerbates a process by which salt can rapidly deform. This process could cause problems with keeping drifts stable and open during the operating period of a repository.

In 2001, the NRC amended its regulations to include a new 10 CFR part 63, "Disposal of High-Level Radioactive Wastes in a Geologic Repository at Yucca Mountain, Nevada," (66 FR 55732; November 2, 2001).

Part 63 requires use of both natural and engineered barriers to meet overall total system performance objectives without pre-determined subsystem performance requirements, which are required in 10 CFR part 60.[16] Accordingly, U.S. research and development activities have focused on understanding the long-term capability of natural and engineered barriers, which can prevent or substantially reduce the release rate of radionuclides

[16] NRC's regulations at 10 CFR part 63 apply only to the proposed repository at YM. NRC's regulations at 10 CFR part 60, "Disposal of High-Level Radioactive Wastes in Geologic Repositories," govern the licensing of any repository other than one located at YM. However, at the time part 63 was proposed, the Commission indicated it would consider revising Part 60 if it seemed likely to be used in the future. (64 FR 8640, 8643; February 22, 1999).

from a potential repository system. Although the performance of individual barriers may change over time, the overall performance of the total system is required to be acceptable throughout the performance period of the repository. In this context of total system performance, research and development has found that it appears technically possible to design and construct a waste package and an engineered barrier system that, in conjunction with natural barriers, could prevent or substantially reduce the release rate of radionuclides from a potential repository system during the performance period. NRC, "Disposal of High-Level Radioactive Wastes in a Proposed Geologic Repository at Yucca Mountain, Nevada; Proposed Rule," (64 FR 8649; February 22, 1999); IAEA, "Joint Convention on Safety of Spent Fuel Management and on Safety of Radioactive Waste Management, INFCIRC/546," 1997.

Since the Commission last considered Waste Confidence, the NRC has issued design certifications for new reactors under its regulations at 10 CFR part 52, "Early Site Permits; Standard Design Certifications; and Combined Licenses for Nuclear Power Plants," and is currently reviewing several plant designs in response to applications for design certifications. The NRC is also considering COL applications for nuclear power plants that reference these certified and under-review designs. These facilities would use the same or similar fuel assembly designs as the nuclear power plants currently operating in the United States. If these new facilities use a new fuel type or different cladding, then it may be necessary to modify the design of a repository to accommodate these changes. But if limited reliance is placed on the barrier capabilities of cladding or fuel type to comply with repository safety requirements, then minimal design changes may be needed to accommodate new types of SNF or cladding. As such, the new reactor designs and specific license applications currently under review would not raise issues as to the technical feasibility of repository disposal.

The NRC is also engaged in preliminary interactions with DOE and possible reactor vendors proposing advanced reactor designs that are different from the currently operating light-water reactors. Some of these advanced reactors use gas-cooled or liquid metal cooled technologies and have fuel and reactor components that might require different transportation and storage containers. Geometric, thermal, and criticality constraints could conceivably require a design modification to disposal containers from those currently proposed for YM. Nevertheless, the technical requirements for disposal of advanced reactor components appear similar to the requirements for disposal of components for current light-water reactors. For example, DOE had planned to dispose of spent fuel at YM from both gas-cooled (Peach Bottom 1) and liquid-metal cooled (Fermi 1) reactors, using the same basic technological approach as for SNF from light-water reactors. Although radionuclide inventory, fuel matrix, and cladding characteristics for advanced fuels might be different from current light-water reactors, the safe disposal of advanced fuel appears to involve the same scientific and engineering knowledge as used for fuel from current light-water reactors.

There is currently a high uncertainty regarding the growth of advanced reactors in the U.S. In the licensing strategy included in a joint report to Congress in August 2008 from the NRC and the DOE for the next generation nuclear plant (NGNP) program, the agencies found that an aggressive licensing approach may lead to operation of a prototype facility in 2021. (ADAMS Accession Number ML082290017). Based on comparison with current disposal strategies for fuel from existing gas cooled or liquid-metal cooled reactors, the NRC is confident that current technology is adequate to support the safe disposal of spent fuel from a potential prototype facility. Small modular light-water reactors being developed will use fuel very similar in form and materials to the existing operating reactors and will not, therefore, introduce new technical challenges to the disposal of spent fuel. In addition to the NGNP activities related to the prototype reactor, various activities, such as DOE's Fuel Cycle Research and Development Program, are underway to evaluate fuel cycle alternatives that could affect the volume and form of waste from the prototype reactor or other nuclear reactor designs. The need to consider waste disposal as part of the overall research and development activities for advanced reactors is recognized and included in the activities of designers, the DOE, and the NRC. *See, e.g.,* DOE Nuclear Energy Research Advisory Committee and the Generation IV International Forum, "A Technology Roadmap for Generation IV Nuclear Energy Systems," December 2002.

Based on the above discussion, including its response to the public comments, the Commission reaffirms Finding 1.

II. Finding 2 (1990): The Commission Finds Reasonable Assurance That at Least One Mined Geologic Repository Will Be Available Within the First Quarter of the Twenty-First Century, and That Sufficient Repository Capacity Will Be Available Within 30 Years Beyond the Licensed Life for Operation (Which May Include the Term of a Revised or Renewed License) of Any Reactor To Dispose of the Commercial High-Level Radioactive Waste and Spent Fuel Originating in Such Reactor and Generated Up to That Time

A. Bases for Finding 2

In the 1984 and 1990 Waste Confidence Decisions, the dual objectives of this finding were to predict when a repository will be available for use and to predict how long spent fuel may need to be stored at a reactor site until repository space is available for the spent fuel generated at that reactor. With respect to the first prediction, the Commission's focus in 1984 was on the years 2007–2009—the years during which the operating licenses for the Vermont Yankee [17] and Prairie Island [18] nuclear power plants would expire.[19] In 1984, DOE anticipated that the first repository would begin operation in 1998 and the second in 2004. But the NRC concluded that technical and institutional uncertainties made it preferable to focus on the 2007–2009 time period. The technical uncertainties involved how long it would take DOE to locate a suitable geologic setting for a potentially technically acceptable repository and how long it would take to develop an appropriate waste package

[17] The Commission amended Vermont Yankee's operating license on January 23, 1991, to extend the expiration date of the license to 2012. (56 FR 2568; January 24, 1991). Vermont Yankee has applied for a license renewal, which is being reviewed by the Commission and would extend the plant's operating license for 20 years. *http://www.nrc.gov/reactors/operating/licensing/renewal/applications.html* (last visited September 15, 2010).

[18] The Commission amended Prairie Island 1 and 2's operating licenses on September 23, 1986, to extend the expiration date of the licenses to August 9, 2013, and October 29, 2014 (ADAMS Accession Number ML022200335). Prairie Island 1 and 2 have applied for license renewals, which are being reviewed by the Commission and would extend the plants' operating licenses for 20 years. *http://www.nrc.gov/reactors/operating/licensing/renewal/applications.html* (last visited September 15, 2010).

[19] Under the court remand that precipitated the initial waste confidence review, NRC was required to consider whether there was reasonable assurance that an offsite storage solution would be available by the years 2007–2009 and, if not, whether there was reasonable assurance that the spent fuel could be stored safely at those sites beyond those dates. *See State of Minnesota* v. *NRC,* 602 F.2d 412, 418 (DC Cir. 1979).

and engineered barriers. The Commission expressed the view that despite early delays, DOE's program was on track and, under the impetus given by the recently-enacted NWPA, would timely resolve the technical problems (49 FR 34674–34675; August 31, 1984).

The Commission also identified institutional uncertainties that needed to be resolved: (1) Measures for dealing with Federal-state disputes; (2) An assured funding mechanism that would be sufficient over time to cover the period for developing a repository; (3) An organizational capability for managing the HLW program; and (4) A firm schedule and establishment of responsibilities. The Commission expressed its confidence in the ability of the provisions of the then recently-passed NWPA to timely resolve these uncertainties (49 FR 34675–34679; August 31, 1984).

With respect to the second prediction, the NRC reviewed DOE's estimates of the amount of installed generating capacity of commercial nuclear power plants in the year 2000 and concluded that the total amount of spent fuel that would be produced during the operating lifetimes of these reactors would be about 160,000 MTHM. To accommodate this volume of spent fuel, the NRC assumed that two repositories would be needed. The NRC calculated that if the first repository began to receive SNF in 2005 and the second in 2008, then all the SNF would be emplaced by about 2026. This would mean that sufficient repository capacity would be available within 30 years beyond the expiration of any reactor license for disposal of its SNF (49 FR 34679; August 31, 1984).

In reviewing these predictions in 1990, the Commission faced a considerably changed landscape. First, DOE's schedule for the availability of a repository had slipped several times so that its then-current projection was 2010. Second, Congress's 1987 amendment of NWPA had confined site characterization to the YM site, meaning that there were no "back-up" sites being characterized in case the YM site was found unsuitable or unlicenseable. Finally, site characterization activities at YM had not proceeded without problems, notably in DOE's schedule for subsurface exploration and in development of its quality assurance program. Given these considerations, the Commission found it would not be prudent to reaffirm its confidence in the availability of a repository by 2007–2009 (55 FR 38495; September 18, 1990).

Instead, the Commission found that it would be reasonable to assume that DOE could make its finding whether YM was suitable for development of a repository by the year 2000. The Commission was unwilling to assume that DOE would make a finding of suitability (which would be necessary for a repository to be available by 2010). To establish a new time frame for repository availability, the Commission made the assumption that DOE would find the YM site unsuitable by the year 2000 and that (as DOE had estimated) it would take 25 years for a repository to become available at a different site. The Commission then considered whether it had sufficient bases for confidence that a repository would be available by 2025 using the same technical and institutional criteria it had used in 1984. The Commission found no reason to believe that another potentially technically acceptable site could not be located if the YM site were found unsuitable. The development of a waste package and engineered barriers was tied to the question of the suitability of the YM site, but the NRC found no reason to believe that a waste package and engineered barriers could not be developed for a different site by 2025, if necessary (55 FR 38495; September 18, 1990).

The institutional uncertainties were perhaps more difficult to calculate. The Commission acknowledged that DOE's efforts to address the concerns of states, local governments, and Indian tribes had met with mixed results. Nevertheless, the Commission retained its confidence that NWPA had achieved the proper balance between providing for participation by affected parties and providing for the exercise of Congressional authority to carry out the national program for waste disposal (55 FR 38497; September 18, 1990). Similarly, the Commission believed that management and funding issues had been adequately resolved by NWPA and would not call into question the availability of a repository by 2025 (55 FR 38497–38498; September 18, 1990). Thus, except for the schedule, the Commission was confident that the HLW program set forth in the NWPA would ultimately be successful.

The Commission also considered whether the termination of activities for a second repository, combined with the 70,000 MTHM limit for the first repository, together with its new projection of 2025 as the date for the availability for a repository, undermined its assessment that sufficient repository capacity would be available within 30 years beyond expiration of any reactor operating license to dispose of the SNF originating in such reactor and generated up to that time (55 FR 38501–38504; September 18, 1990). The Commission noted that almost all reactor licenses would not expire until sometime in the first three decades of the twenty-first century and license renewal was expected to extend the terms of some of these licenses. Thus, a repository was not needed by 2007–2009 to provide disposal capacity within 30 years beyond expiration of most operating licenses.[20] The Commission acknowledged, however, that it appeared likely that two repositories would be needed to dispose of all the SNF and HLW from the current generation of reactors unless Congress provided statutory relief from the 70,000 MTHM limit for the first repository and unless the first repository had adequate capacity to hold all the SNF and HLW generated. This was because DOE's 1990 spent fuel projections, which assumed that no new reactors would be constructed, called for 87,000 MTHM to be generated by 2036. The Commission believed that that assumption probably underestimated the expected total spent fuel discharges due to the likelihood of reactor license renewals.

Further, the Commission expressed the belief that if the need for a second repository was established, Congress would provide the needed institutional support and funding, as it had for the first repository.[21] The Commission reasoned that if work began on the second repository program in 2010, that repository could be available by 2035. Two repositories available in approximately 2025 and 2035, each with acceptance rates of 3400 MTHM/year within several years after commencement of operations, would provide assurance that sufficient repository capacity will be available within 30 years of operating license expiration for reactors to dispose of the spent fuel generated at their sites up to that time. The Commission concluded that a second repository, or additional capacity at the first repository, would be

[20] NRC identified Dresden 1, licensed in 1959, as the earliest licensed power reactor and noted that 30 years beyond its licensed life for operation would be 2029 and that it was possible, if a repository were to become available by 2025, for all the Dresden 1 SNF to be removed from that facility by 2029 (55 FR 38502; September 18, 1990).

[21] DOE was statutorily required to report to the President and to Congress on the need for a second repository between January 1, 2007, and January 1, 2010. Section 161 of NWPA, 42 U.S.C. 10172a. DOE submitted the report to Congress in December 2008. The report recommended that Congress remove the 70,000 MTHM limit for the YM repository, but Congress has not yet responded to the recommendation. The Report to the President and the Congress by the Secretary of Energy on the Need for a Second Repository, 1, (2008) available at *http://www.energy.gov/media/Second_Repository_Rpt_120908.pdf* (last visited October 16, 2010).

needed only to accommodate the additional quantity of spent fuel generated during the later years of reactors operating under a renewed license. The Commission stated that the availability of a second repository would permit spent fuel to be shipped offsite well within 30 years after expiration of these reactors' operating licenses and that the same would be true of the spent fuel discharged from any new generation of reactor designs (55 FR 38503–38504; September 18, 1990).

The Commission acknowledged that there were several licenses that had been prematurely terminated where it was possible that SNF would be stored more than 30 years beyond the effective expiration of the license and that there could be more of these premature terminations. But the Commission remained confident that in these cases the overall safety and environmental impacts of extended spent fuel storage would be insignificant. The Commission found that spent fuel could be safely stored for at least 100 years (Finding 4)[22] and that spent fuel in at-reactor storage would be safely maintained until disposal capacity at a repository was available (Finding 3). The Commission emphasized that it had not identified a date by which a repository must be available for health and safety reasons. Under the second part of Finding 2, safe management and safe storage would not need to continue for more than 30 years beyond expiration of any reactor's operating license because sufficient repository capacity was expected to become available within those 30 years (55 FR 38504; September 18, 1990).

B. Evaluation of Finding 2

As explained previously, the Commission based its estimate in 1990—that at least one geologic repository would be available within the first quarter of the twenty-first century—on an assumption that DOE would make its suitability determination under section 114 of NWPA around 2000. To avoid being put in the position of assuming the suitability of the YM site, the Commission then assumed that DOE would find that site unsuitable and, as DOE had estimated, that it would take 25 years before a repository could become available at an alternate site.

The DOE made its suitability determination in early 2002 and found the YM site suitable for development as a repository.[23] Although DOE's application for a construction authorization for a repository was considerably delayed from the schedule set out in the NWPA,[24] on June 3, 2008, the DOE submitted the application to the NRC and on September 8, 2008, the NRC staff notified the DOE that it found the application acceptable for docketing (73 FR 53284; September 15, 2008). Although the licensing proceeding for the YM repository is ongoing, DOE and the Administration have made it clear that they do not support construction of Yucca Mountain. On March 3, 2010, the DOE filed its Notice of Withdrawal with the Atomic Safety and Licensing Board (ASLB) that is presiding over the Yucca Mountain licensing proceeding (ADAMS Accession Number ML100621397). On June 29, 2010, the ASLB denied the Department's motion; and on June 30, 2010, the Secretary of the Commission invited the parties to file briefs regarding whether the Commission should review, reverse, or uphold the ASLB's decision (ADAMS Accession Numbers ML101800299 and ML101810432). The Commission has not yet issued its decision.

In 2005, the State of Nevada filed a petition for rulemaking with the NRC (PRM–51–8) that questioned whether continued use of the 2025 date, in effect, indicated prejudgment of the outcome of any licensing proceeding that might be held. The Commission rejected this notion in its denial of the petition:

> Even if DOE's estimate as to when it will tender a license application should slip further, the 2025 date would still allow for unforeseen delays in characterization and licensing. It also must be recognized that the Commission remains committed to a fair and comprehensive adjudication and, as a result, there is the potential for the Commission to deny a license for the Yucca Mountain site based on the record established in the adjudicatory proceeding. That commitment is not jeopardized by the 2025 date for repository availability. The Commission did not see any threat to its ability to be an impartial adjudicator in 1990 when it selected the 2025 date even though then, as now, a repository could only become available if the Commission's decision is favorable. Should the Commission's decision be unfavorable and should DOE abandon the site, the Commission would need to reevaluate the 2025 availability date, as well as other findings made in 1990. *State of Nevada; Denial of a Petition for Rulemaking* (70 FR 48329, 48333; August 17, 2005); *affirmed, Nevada* v. *NRC,* 199 Fed. Appx. 1 (DC Cir., Sept. 22, 2006).

In the absence of an unfavorable NRC decision or DOE's abandonment of the site, the Commission found no reason to reopen its Waste Confidence Decision. Now that it appears uncertain whether the YM project will ever be constructed, the Commission would have adequate reasons to reopen the Waste Confidence Decision; but the Commission, in any event, had already decided to revisit its decision before DOE filed its motion to withdraw.

The initial decision to revisit the Waste Confidence Decision was supported by the recommendations of the Combined License Review Task Force Report. In its June 22, 2007 SRM on that report, the Commission approved rulemaking to resolve generic issues associated with combined license applications. SRM–COMDEK–07–0001/COMJSM–07–0001—Report of the Combined License Review Task Force (ADAMS Accession Number ML071760109). In a subsequent SRM, issued on September 7, 2007, the Commission expressed the view that a near-term update to the Waste Confidence Findings was appropriate. SRM—Periodic Briefing on New Reactor Issues (ADAMS Accession Number ML072530192). The staff, in its response to these SRMs, recognized that there would likely be long-term inefficiencies in combined license application proceedings due to the need to respond to potential questions and petitions directed to the existing Waste Confidence Decision and committed to evaluate possible updates to the decision.[25] See Memorandum from Luis

[22] The Commission conservatively assumed that licenses would be renewed for 30-year terms (55 FR 38503; September 18, 1990). Thus, the initial 40-year term of the operating license, plus 30 years for the renewed operating license term and 30 years beyond the expiration of the renewed license amounts to storage for at least 100 years.

[23] On February 14, 2002, the Secretary of Energy recommended the YM site for the development of a repository to the President thereby setting in motion the approval process set forth in sections 114 and 115 of the NWPA. *See* 42 U.S.C. 10134(a)(1); 10134(a)(2); 10135(b), 10136(b)(2) (2006). On February 15, 2002, the President recommended the site to Congress. On April 8, 2002, the State of Nevada submitted a notice of disapproval of the site recommendation to which Congress responded on July 9, 2002, by passing a joint resolution approving the development of a repository at YM, which the President signed on July 23, 2002. *See* Public Law 107–200, 116 Stat. 735 (2002) (codified at 42 U.S.C. 10135 note (Supp. IV 2004)).

[24] Section 114(b) of NWPA directs the Secretary of Energy to submit a construction authorization application to NRC within 90 days of the date the site designation becomes effective. 42 U.S.C. 10134(b).

[25] Challenges to 10 CFR 51.23 in individual COL proceedings would likely be addressed through application of 10 CFR 2.335, "Consideration of Commission rules and regulations in adjudicatory proceedings." This rule generally prohibits attacks on NRC rules during adjudicatory proceedings, but does allow a party to an adjudicatory proceeding to petition that application of a specified rule be waived or an exception made for the particular proceeding. 10 CFR 2.335(b). The sole grounds for a waiver or exception is that "special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule

A. Reyes, Executive Director for Operations, to the Commissioners, "Rulemakings that Will Provide the Greatest Efficiencies to Complete the Combined License Application Reviews in a Timely Manner," December 17, 2007, at 3 (ADAMS Accession Number ML073390094).

Based upon these and more recent developments, undertaking a public rulemaking proceeding now to consider revisions to the Waste Confidence Decision and Rule is appropriate and has allowed sufficient time to conduct a studied and orderly reassessment and to revise and update the findings and rule. In particular, the Commission has been able to consider alternative time frames (including no specific time frame) that would provide reasonable assurance for the availability of a repository. Further, the Commission does not believe that any of the developments since it issued its proposed update and proposed rule would require it to revise any of its proposed findings—the alternative to proposed Finding 2 that the Commission approves in this update to the Waste Confidence Decision was proposed as part of the initial proposed rulemaking and update (73 FR 59561; October 9, 2008). Although none of the developments in the last year *requires* the Commission to revise any of the proposed findings, the Commission does believe that recent developments make it imprudent to continue to include a target date in Finding 2. Therefore, as discussed in the response to Comment 9, the Commission has decided to remove the target date from Finding 2 and to express its confidence that a repository will be available when necessary. The proposed findings assumed that YM would not be built and that DOE would have to select a new repository site. The proposal to eliminate the YM project simply reinforces the appropriateness of revisiting the 1990 decision at this time.

In response to developments involving YM, as well as for other reasons, the Secretary of Energy appointed the Blue Ribbon Commission on America's Nuclear Future to assess the state of SNF storage and disposal in the United States. Because of the decades of scientific studies supporting the use of a geologic repository for the disposal of HLW and SNF, the Commission believes that the Blue Ribbon Commission could conclude that geologic disposal remains the preferred course of action. Further, the NWPA still mandates a national repository program, and until the law is changed disposal in a repository remains the controlling policy. But if the Blue Ribbon Commission were to recommend an option that does not involve eventual geologic disposal of waste in a repository and the Congress were to amend the NWPA to change the national policy, then the Commission would likely have to revisit the Waste Confidence Decision.

One possible approach to revising Finding 2 might be to set the expected availability of a new repository at a time around 25 years after the conclusion of the YM licensing process in accordance with DOE's 1990 estimate of the time it would take to make a repository available at a different site. But the Commission rejected this approach when denying the Nevada petition:

> [T]he use of a Commission acceptability finding as the basis for repository availability is impossible to implement because it would require the Commission to prejudge the acceptability of any alternative to Yucca Mountain in order to establish a reasonably supported outer date for the Waste Confidence finding. That is, if the Commission were to assume that a license for the Yucca Mountain site might be denied in 2015 and establish a date 25 years hence for the "availability" of an alternative repository (*i.e.,* 2040), it would still need to presume the "acceptability" of the alternate site to meet that date (70 FR 48333; August 17, 2005).

Another approach, which the Commission included in its proposed Finding 2, would be to revise the finding to include a target date or time frame for which it now seems reasonable to assume that a repository would be available. A target date for when a disposal facility can reasonably be expected to be available would result from an examination of the technical and institutional issues that would need to be resolved before a repository could be available. The target date approach would be consistent with the HLW disposal programs in other countries, as explained below.

But the Commission has concerns about the use of this approach and has not adopted it. A target date requires the Commission to have reasonable assurance of when a repository will become available, and without the resolution of the political and societal issues associated with the siting and construction of a repository, the Commission cannot reasonably predict that a repository can and will become available within a specific time frame. The Commission does, however, believe that a repository can be constructed within 25–35 years of a Federal decision to construct a repository. Further, given the ongoing activities of the Blue-Ribbon Commission, events in other countries, the viability of safe long-term storage for at least 60 years (and perhaps longer) after reactor licenses expire, and the Federal Government's statutory obligation to develop a HLW repository, the Commission has confidence that a repository will be made available well before any safety or environmental concerns arise from the extended storage of spent nuclear fuel and high-level waste. In other words, a repository will be available when necessary.

It must be emphasized that the removal of a target date from Finding 2 should not be interpreted as a Commission endorsement of indefinite storage. Instead, the Commission has confidence that the SNF and HLW can continue to be safely stored without significant environmental impacts for at least 60 years beyond the licensed life for operation of any nuclear power plant. The Commission is therefore amending Finding 2 to state that a deep geologic repository will be available when necessary.

This change to Finding 2 does not affect the Commission's confidence that spent fuel can be safely stored with minimal environmental impacts. This revision reflects the Commission's inability to predict with precision when the societal and political uncertainties associated with the construction of a repository can be resolved; the Commission is unwilling to predict a starting point for a new repository program—the time to complete a repository program remains unchanged from the discussion in the proposed rule. As discussed below, the Commission continues to have confidence that a deep geologic disposal facility can be completed within a reasonable time (25–35 years) and that disposal capacity for HLW and SNF will be available when necessary.

Most countries possessing HLW and SNF plan to eventually confine these wastes using deep geologic disposal. Currently, there are 24 other countries considering disposal of spent or reprocessed nuclear fuel in deep geologic repositories. From the vantage point of near-term safety, there has been little urgency in these countries for implementing disposal facilities because of the perceived high degree of safety provided by interim storage, either at reactors or at independent storage facilities. Of these 24 countries, 10 have established target dates for the availability of a repository. Most of the 14 countries that have not established target dates rely on centralized interim storage, which may include a protracted

or regulation * * * would not serve the purposes for which the rule or regulation was adopted." *Id.* Thus, a review of the Waste Confidence findings and rule now might be expected to obviate such challenges in individual COL proceedings.

period of onsite storage before shipment to a centralized facility.[26]

Unlike these other countries, recent events in the United States (*e.g.,* the DOE's motion to withdraw the YM application and the current Administration's decision to seek no funding for the YM Program) have not diminished the Commission's confidence that a repository is technologically feasible, but have diminished its confidence in the target-date approach. The Commission now believes that there is insufficient support for the continued use of a target date because of the difficulty associated with predicting the start-date for any repository program. The Commission is therefore adopting the position regarding the removal of a target date proposed in the "Additional Question for Public Comment" section of the proposed update (73 FR 59567; October 9, 2008). The Commission is revising Finding 2 to state that it has reasonable assurance that disposal capacity in a deep geologic repository will become available "when necessary." Although the Commission has declined to set a target date for the availability of a repository, it does believe that it would be beneficial to analyze the time required to successfully site, license, construct, and open a repository.

The technical problems should be the same as those examined in the earlier Waste Confidence reviews, namely, how long it would take DOE to locate a suitable site and how long it would take to develop a waste package and engineered barriers for that site. For the reasons explained in the evaluation of Finding 1, the Commission continues to have reasonable assurance that disposal in a geologic repository is technically feasible. That is the approach being taken in all the countries identified previously that have set target dates for the availability of a repository. It is also the approach of the 14 other countries that have HLW disposal programs but have not set target dates.[27] These target dates can be used to provide a reasonable idea of how much time is required to site, license, construct, and open a repository. In addition, when Congress amended the Nuclear Waste Policy Act in 1987 to focus exclusively on the YM site, it did so for budgetary reasons and not because the other sites DOE was considering were technically unacceptable. The ongoing research in the U.S. and other countries strongly suggests that many acceptable sites exist and can be identified.

The amount of time DOE might need to develop an alternative repository site would depend upon any enabling legislation, budgetary constraints, and the degree of similarity between a candidate site and other well-characterized sites with similar HLW disposal concepts. DOE began characterization of the YM site in 1982, made its suitability determination in 2002, and submitted a license application in 2008. But the history of potential repository development at YM may be a poor indicator of the amount of time needed to develop a new repository. Many problems extraneous to site characterization activities adversely affected DOE's repository program, such as changes in enabling legislation, public confidence issues, funding, and a significant delay in issuing environmental standards. In terms of the technical work alone, much would depend on whether Congress establishes a program involving characterization of many sites preliminary to the recommendation of a single site (similar to the 1982 NWPA) or a program focused on a single site (similar to the amended NWPA). The former would likely take longer, but might have a better chance of success if problems develop with a single site. The time needed to characterize the sites would also depend on whether the one or more sites chosen for characterization are similar to sites in this or other countries, which would allow DOE to use already existing knowledge and research to increase the efficiency of its repository program.

Alternatively, the sites could present novel challenges, which would require more time than sites that are similar to those that have already been studied. There are also many "lessons learned" from the YM repository program that could help to shorten the length of a new program. For example, performance assessment techniques have significantly improved over the past 20 years (*e.g.,* the Goldsim software package of DOE's Total System Performance Assessment that replaced the original FORTRAN based software); performance assessment models are now easier to develop and more reliable than those that were available 20 years ago. Similarly, operational and manufacturing techniques developed during the YM program (*e.g.,* manufacturing of waste packages, excavation of drifts, waste handling), would be applicable to another program. Regulatory issues considered during the YM program (*e.g.,* burn-up credit for nuclear fuel and seismic performance analysis) should provide useful information for setting new standards or revising current standards.[28] Finally, the experience gained by completing the NRC licensing process, if that were to occur, should help the DOE and the NRC improve the licensing process for any future repositories.

Whether waste package and engineered barrier information developed during the YM repository program would be transferable to a new program depends on the degree of similarity between an alternative site and YM. The fundamental physical characteristics of Yucca Mountain are significantly different from other potential repository sites that were considered in the U.S. repository program before 1987. DOE could select an alternative candidate site that is similar to YM in important physical characteristics (such as oxidizing conditions, drifts above the water table with low amounts of water infiltration, water chemistry buffered by volcanic tuff rocks). In this instance, much of the existing knowledge for engineered barrier performance at YM might be transferable to a different site. Nevertheless, much of DOE's current research on engineered barriers for YM could be inapplicable if an alternative site has significantly different characteristics from the YM site, such as an emplacement horizon in reducing conditions below the water table. In this instance, research from other DOE, industry, or international programs might provide important information on engineered barriers, provided the new site is analogous to sites and engineered barriers being considered elsewhere.

But broader institutional issues have emerged since 1990 that bear on the time it takes to implement geologic disposal. International developments have made it clear that technical experience and confidence in geologic disposal, on their own, are not sufficient to bring about the broad social and political acceptance needed to construct a repository. It is these issues that have caused the Commission to remove a target date as part of the revised Finding 2. As stated above, the Commission continues to have confidence that a repository can be constructed within

[26] The three countries with target dates that plan direct disposal of SNF are: Czech Republic (2050), Finland (2020), and Sweden (2025). The seven countries with target dates for disposal of reprocessed SNF and HLW are: Belgium (2035), China (2050), France (2025), Germany (2025), Japan (2030s), Netherlands (2013), Switzerland (2042).

[27] These countries are: Brazil, Canada, Hungary, Lithuania, Romania, South Korea, Slovak Republic, Spain (direct disposal of SNF); Bulgaria, India, Italy, Russia, United Kingdom, Ukraine (disposal of reprocessed SNF and HLW).

[28] Both NRC's 10 CFR part 63 and EPA's 40 CFR part 197 are applicable only for a repository at YM. NRC and EPA have in place standards for a repository at a different site, but these standards would likely be revised in a new repository program.

25–35 years of a Federal decision to do so and that a repository will become available when one is necessary.

As part of its evaluation of this finding, the Commission evaluated the programs in a number of other countries that support its conclusion that a repository will be available when necessary and that siting, licensing, construction, and operation can occur within 25–35 years of a Federal decision to do so.

In 1997, the United Kingdom rejected an application for the construction of a rock characterization facility at Sellafield, leaving the country without a path forward for long-term management or disposal of either intermediate-level waste or SNF. In 1998, an inquiry by the UK House of Lords endorsed geologic disposal, but specified that public acceptance was required. As a result, the UK Government embraced a repository plan based on the principles of voluntarism and partnership between communities and implementers. This led to the initiation of a national public consultation, and major structural reorganization within the UK program. The UK Nuclear Decommissioning Authority envisions availability of a geologic disposal facility for ILW in 2040 and a geologic facility for SNF and HLW in 2075. In 2007, however, the Scottish Government officially rejected any further consultation with the UK Government on deep geologic disposal of HLW and SNF. This action by the Scottish Government effectively ends more than 7 years of consultations with stakeholders near Scottish nuclear installations and represents yet another major setback for the UK program.

In Germany, a large salt dome at Gorleben had been under study since 1977 as a potential SNF repository. After decades of intense discussions and protests, the utilities and the government reached an agreement in 2000 to suspend exploration of Gorleben for at least three, and at most ten, years. In 2003, the Federal Ministry for the Environment set up an interdisciplinary expert group to identify, with public participation, criteria for selecting new candidate sites. In October, 2010 Germany resumed exploration of Gorleben as a potential SNF repository. A decision on whether the site is suitable for a repository could be reached in 2015.

Initial efforts in France, during the 1980s, also failed to identify potential repository sites, using solely technical criteria. Failure of these attempts led to the passage of nuclear waste legislation that prescribed a period of 15 years of research. Reports on generic disposal options in clay and granite media were prepared and reviewed by the safety authorities in 2005. In 2006, conclusions from the public debate on disposal options, held in 2005, were published. Later that year, the French Parliament passed new legislation designating a single site for deep geologic disposal of intermediate and HLW. This facility, to be located in the Bure region of northeastern France, is scheduled to open in 2025, some 34 years after passage of the original Nuclear Waste Law of 1991.

In Switzerland, after detailed site investigations in several locations, the Swiss National Cooperative for Radioactive Waste Disposal proposed, in 1993, a deep geologic repository for low- and intermediate-level waste at Wellenberg. Despite a 1998 finding by Swiss authorities that technical feasibility of the disposal concept was successfully demonstrated, a public cantonal referendum rejected the proposed repository in 2002. Even after more than 25 years of high quality field and laboratory research, Swiss authorities do not expect that a deep geologic repository will be available before 2040.

In 1998, an independent panel reported to the Governments of Canada and Ontario on its review of Atomic Energy of Canada Ltd.'s concept of geologic disposal. Canadian Nuclear Fuel Waste Disposal Concept Environmental Assessment Panel, *Report of the Nuclear Fuel Waste Management and Disposal Concept Environmental Assessment* Panel, February 1998. The panel found that from a technical perspective, safety of the concept had been adequately demonstrated, but from a social perspective, it had not. The panel concluded that broad public support is necessary in Canada to ensure the acceptability of a concept for managing nuclear fuel wastes. The panel also found that technical safety is a key part, but only one part, of acceptability. To be considered acceptable in Canada, the panel found that a concept for managing nuclear fuel wastes must: (1) Have broad public support; (2) be safe from both a technical and social perspective; (3) have been developed within a sound ethical and social assessment framework; (4) have the support of Aboriginal people; (5) be selected after comparison with the risks, costs, and benefits of other options; and (6) be advanced by a stable and trustworthy proponent and overseen by a trustworthy regulator. Resulting legislation mandated a nationwide consultation process and widespread organizational reform. Eight years later, in 2005, a newly-created Nuclear Waste Management Organization (NWMO), recommended an Adaptive Phased Management approach for long-term care of Canada's SNF, based on the outcomes of the public consultation. This approach includes both a technical method and a new management system. According to NWMO, it "provides for centralized containment and isolation of used nuclear fuel deep underground in suitable rock formations, with continuous monitoring and opportunity for retrievability; and it allows sequential and collaborative decision-making, providing the flexibility to adapt to experience and societal and technological change." NWMO, *Choosing a Way Forward: The Future Management of Canada's Used Nuclear Fuel, Final Study Report,* November 2005.

In 2007, the Government of Canada announced its selection of the Adaptive Phased Management approach and directed NWMO to take at least two years to develop a "collaborative community-driven site-selection process." NWMO will use this process to open consultations with citizens, communities, Aboriginals, and other interested parties to find a suitable site in a willing host community. For financial planning and cost estimation purposes only, NWMO assumes the availability of a deep geological repository in 2035, 27 years after initiating development of new site selection criteria, 30 years after embarking on a national public consultation, and 37 years after rejection of the original geologic disposal concept. NWMO, *Annual Report 2007: Moving Forward Together,* March 2008. In 2009, NWMO proposed a site selection process for public comment, and after considering the comments and input received is now welcoming expressions of interest from potential host communities. NWMO, Annual Report 2009: Moving Forward Together, March 2010.

Repository development programs in Finland and Sweden are further along than in other countries, but have nonetheless taken the time to build support from potential host communities. In Finland, preliminary site investigations started in 1986, and detailed characterizations of four locations were performed between 1993 and 2000. In 2001, the Finnish Parliament ratified the Government's decision to proceed with a repository project at a chosen site only after the 1999 approval by the municipal council of the host community. Finland expects this facility to begin receipt of SNF for disposal in 2020, 34 years after the start of preliminary site investigations.

Between 1993 and 2000, Sweden conducted feasibility studies in eight municipalities. Based on technical considerations, one site was found unsuitable for further study, and two sites, based on municipal referenda, decided against allowing further investigations. Three of the remaining five sites were selected for detailed site investigations. Municipalities adjacent to two of these sites agreed to be potential hosts and one refused.

On June 3, 2009, the Swedish Nuclear Fuel and Waste Management Company, SKB, selected a site near Oesthammer as the site for the final repository for disposal of Swedish SNF. Since 2007, detailed site investigations were conducted at both Oesthammer and Oskarshamn, both of which already host nuclear power stations. All Swedish spent fuel will be disposed of in the Oesthammer repository. It will be located at a depth of 500 meters, in crystalline bedrock that is relatively dry with few fractures. SKB plans to submit a license application in March 2011, along with an Environmental Impact Assessment and safety analysis. A government decision is expected in 2015. If Swedish authorities authorize construction, the repository could be available for disposal around 2025, some 30 years after feasibility studies began.

Before DOE can start the development of a new site, Congress may need to provide additional direction, beyond the current NWPA, for the long-term management and disposal of SNF and HLW. Whatever approach Congress mandates, international experience since 1990 would appear to suggest that greater attention may need to be paid to developing societal and political acceptance in concert with essential technical, safety, and security assurances. While there is no technical basis for making precise estimates of the minimum time needed to accomplish these objectives, examination of the international examples cited previously would support a range of between 25 and 35 years. The Commission believes that societal and political acceptance must occur before a successful repository program can be completed, and that this is unlikely to occur until a Federal decision is made, whether for technical, environmental, political, legal, or societal reasons, that will allow the licensing and construction of a repository to proceed.

Another important institutional issue is whether funding for a new repository program is likely to be available. The provisions of NWPA for funding the repository have proved to be adequate for the timely development of a repository in the sense that there have always been more than sufficient funds available to meet the level of funding Congress appropriates for the repository program. Section 302(e)(2) of NWPA provides that the Secretary of Energy may make expenditures from the Nuclear Waste Fund (NWF), subject to appropriations by the Congress. In her July 27, 2010 statement to the Committee on the Budget, Kristina M. Johnson, Undersecretary of Energy, testified that the NWF has a balance of approximately $25 billion. Thus, the NWF has the capacity to ensure timely development of a repository consistent with Congressional funding direction. Moreover, DOE has prepared updated contracts and a number of utility companies have signed contracts with the Department that provide for payment into the NWF (*See, e.g.,* ADAMS Accession Numbers ML100280755 and ML083540149). Therefore, there will be a source of funding for disposal of the fuel to be generated by these reactors.

Arriving at an estimate of the time necessary to successfully construct a repository involves considering the technical and institutional factors discussed previously. It appears that the technical work needed to make a repository available could be done in less time than it took DOE to submit a license application for the YM site (26 years measured from the beginning of site characterization). But as discussed previously, the time needed to develop societal and political acceptance of a repository might range between 25 and 35 years. Therefore, once a decision is made that it is necessary to construct a repository, it is likely that a repository could be sited, licensed, constructed, and in operation within 25–35 years.

Finding 2, as adopted in 1990, also predicts that sufficient repository capacity will be available within 30 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of any reactor to dispose of HLW and SNF originating in such reactor and generated up to that time. As explained previously, in 1990 DOE projected that 87,000 MTHM would be generated by 2036. Given the statutory limit of 70,000 MTHM for the first repository, either statutory relief from that limit or a second repository would be needed. The Commission's continued confidence that sufficient repository capacity would be available within 30 years of license expiration of all reactors rested on an assumption that two repositories would be available in approximately 2025 and 2035, each with acceptance rates of 3400 MTHM/year within several years after commencement of operations (See 55 FR 38502; September 18, 1990). DOE acknowledged that a second repository, or an expansion of the statutory disposal limit for a single repository, would be necessary to accommodate all the spent fuel from the currently operating and future reactors. The Report to the President and the Congress by the Secretary of Energy on the need for a second repository, 1, (2008), available at *http://brc.gov/library/docs/Second_Repository_Rpt_120908.pdf* (last visited September 17, 2010).

The revision to Finding 2 in this update to the Waste Confidence Decision reflects the Commission's concern that it may no longer be possible to have reasonable assurance that sufficient repository space will be available within 30 years beyond the licensed life for operation (which may include the term of a revised or renewed license).[29] According to the NRC's "High-Value Datasets", there are 14 reactor operating licenses that will expire between 2012 and 2020 and an additional 36 licenses that will expire between 2021 and 2030. NRC High-Value Datasets, *http://www.nrc.gov/public-involve/open.html#datasets* (last visited October 8, 2010). Many of these licenses could be renewed, which would extend their operating lifetimes, but this cannot be assumed.[30] For licenses that are not renewed, some spent fuel will need to be stored for more than 30 years beyond the expiration of the license if a repository is not available until after 2025. There are 23 reactors that were formerly licensed to operate by the NRC or the AEC and have been permanently shut down. *Id.* Thirty years beyond their licensed life of operation will come as early as 2029 for Dresden 1 and as late as 2056 for Millstone 1; but for many of these plants, 30 years beyond the licensed life for operation will occur in the 2030s and 2040s. Given the time necessary to successfully complete a repository program—25–35 years—and the uncertainty surrounding the start date of this program, it is likely that spent fuel will have to be stored beyond

[29] Based on the inventory of SNF in nuclear power plant pools and interim storage facilities, the amount of spent fuel is anticipated to exceed the 70,000 MTHM disposal limit in the NWPA by 2010. *See The Report to the President and the Congress by the Secretary of Energy on the Need for a Second Repository,* DOE/RW–0595, December 2008. Therefore, a new repository program would need to remove this limit or provide for more than one repository.

[30] Seven of the licenses that will expire between 2021 and 2030 are renewed licenses (Dresden 2, Ginna, Nine Mile Point 1, Robinson 2, Point Beach 1, Monticello, and Oyster Creek). Fifty-two other reactor operating licenses have been renewed and the renewed licenses will expire after 2030.

30 years after the expiration of the license at a number of these plants.

In 1990, the Commission emphasized that this 30 year period did not establish a safety limit on the length of SNF and HLW storage. It was only an estimate of how long SNF might need to be stored given the Commission's confidence that repository disposal would be available by 2025. In fact, the Commission said it was not concerned about the fact that it was already clear in 1990 that a few reactors would need to store spent fuel onsite beyond 30 years after the effective expiration date of their licenses (*i.e.,* the date the license prematurely terminated) due to its confidence in the safety of spent fuel storage (55 FR 38503; September 18, 1990). For the reasons presented in the evaluation of Finding 4, the Commission is now able to conclude that there is no public health and safety or environmental concern if the availability of a disposal facility results in the need to store fuel at some reactors for 60 years after expiration of the license or even longer.

If the Commission had not already issued a proposed rule and update to the Waste Confidence Decision, then the Administration's proposed budget and plan to terminate the YM project and DOE's filing of a motion to withdraw would likely have forced it to do so. The Commission's proposed update to the Waste Confidence Decision, although it could not consider these yet-to-occur developments, did assume that YM would not be built and that DOE would have to search for another repository location, which now appears quite possible.

The Commission has, in sum, reconsidered the use of a target date and, as discussed above, has elected to remove the target date from Finding 2 and adopt a finding that deep geologic disposal will be available "when necessary." This change adopts the alternative approach presented in the proposed update to the Waste Confidence Decision to revise Finding 2 without reference to a time frame for the availability of a repository (73 FR 59561; October 9, 2008). As discussed in the proposed update, this revision to Finding 2 is based both on the Commission's understanding of the technical issues involved and on predictions of the time needed to bring about the necessary societal and political acceptance for a repository site. *Id.* Because the Commission cannot predict when this societal and political acceptance will occur, it is unable to express reasonable assurance in a specific target date for the availability of a repository.

Based on the above information and consideration of the public comments, the Commission revises Finding 2 to eliminate its expectation that a repository will be available within the first quarter of the twenty-first century and to state that a repository may reasonably be expected to be available when necessary.

C. Finding 2

The Commission finds reasonable assurance that sufficient mined geologic repository capacity will be available to dispose of the commercial high-level radioactive waste and spent fuel generated in any reactor when necessary.

III. Finding 3: The Commission Finds Reasonable Assurance That HLW and Spent Fuel Will Be Managed in a Safe Manner Until Sufficient Repository Capacity Is Available To Assure the Safe Disposal of all HLW and Spent Fuel

A. Bases for Finding 3

The Commission reached this finding in 1984 and reaffirmed it in 1990. This finding focuses on whether reactor licensees can be expected to safely store their spent fuel in the period between the cessation of reactor operations and the availability of repository capacity for their fuel. The Commission found that the spent fuel would be managed safely because, under either a possession-only 10 CFR part 50 license or a 10 CFR part 72 license, the utility would remain under the NRC's regulatory control and inspections and oversight of storage facilities would continue (49 FR 34679–34680; August 31, 1984, 55 FR 38508; September 18, 1990). In 1990, when extended storage at the reactor site seemed more probable, the Commission noted that 10 CFR part 72 allowed for license renewals and that the NRC was considering issuance of a general 10 CFR part 72 license under which spent fuel could be stored in NRC-certified casks (55 FR 38508; September 18, 1990).[31] The Commission reasoned that these regulations would provide additional NRC supervision of spent fuel management. The Commission was not concerned about then-looming contractual disputes between the DOE and the utilities over the DOE's inability to remove spent fuel from reactor sites in 1998 because NRC licensees cannot abandon, and remain responsible for, spent fuel in their possession (55 FR 38508; September 18, 1990).

The Commission also considered the unusual case where a utility was unable to manage its spent fuel. If a utility were to become insolvent, the Commission believes that the cognizant state public utility commission would require an orderly transfer to another entity, which could be accomplished if the new entity satisfied the NRC's requirements (49 FR 34680; August 31, 1984). Further, the Commission expressed the view that, while the possibility of a need for Federal action to take over stored spent fuel from a defunct utility or from a utility that lacked technical competence to assure safe storage was remote, the authority for this type of action exists in sections 186c and 188 of the Atomic Energy Act. *Id.*

B. Evaluation of Finding 3

As explained above, the focus of Finding 3 is on whether reactor licensees can be expected to safely store their spent fuel in the period between the cessation of reactor operations and the availability of repository capacity for their fuel. In this regard, the NRC is successfully regulating four decommissioned reactor sites that continue to hold 10 CFR part 50 licenses and consist only of an ISFSI under the 10 CFR part 72 general license provisions.[32] In addition, the NRC staff has discussed plans to build and operate ISFSIs under the 10 CFR part 72 general license provisions with the licensees at the La Crosse and Zion plants, which are currently undergoing decommissioning. The La Crosse plant plans to load its ISFSI in July 2011 and the Zion plant is discussing its plans with the NRC staff. The NRC is also successfully regulating ISFSIs at two fully decommissioned reactor sites (Trojan and Ft. St. Vrain) under 10 CFR Part 72 specific licenses.[33]

The NRC monitors the performance of ISFSIs at decommissioned reactor sites by conducting periodic inspections that are identical to ISFSI inspections at operating reactor sites. When conducting inspections at these ISFSIs, NRC inspectors follow the guidance in NRC Inspection Manual Chapter 2690, "Inspection Program for Dry Storage of Spent Reactor Fuel at Independent Spent Fuel Storage Installations and for 10 CFR part 71 Transportation Packages." At all six decommissioned reactor sites mentioned previously, all

[31] 10 CFR Part 72 was, in fact, amended to provide for storage of spent fuel in NRC-certified casks under a general license (55 FR 29191; July 18, 1990).

[32] These reactor sites include Maine Yankee, Yankee Rowe, Connecticut Yankee (also known as Haddam Neck), and Big Rock Point.

[33] There are several additional sites with specific Part 72 ISFSI licenses that are in the process of decommissioning (*e.g.,* Humbolt Bay, Rancho Seco).

spent fuel on site has been successfully loaded into the ISFSI; only those inspection procedures applicable to the existing storage configurations are conducted. Also, any generally licensed ISFSI where decommissioning and final survey activities related to reactor operations have been completed is treated as an "away from reactor" (AFR) ISFSI for inspection purposes. Therefore, those programs that rely upon a 10 CFR part 50 license for the operation of a generally licensed ISFSI are also subject to inspection.

The NRC has not encountered any management problems associated with the ISFSIs at these six decommissioned reactor sites. Further, the NRC's inspection findings have not found any unique management problems at any currently operating ISFSI. Generally, the types of issues identified through NRC inspections of ISFSIs are similar to issues identified for 10 CFR part 50 licensees. Most issues are identified early in the operational phase of the dry cask storage process, during loading preparations and actual spent fuel loading activities. Once a loaded storage cask is placed on the storage pad, relatively few inspection issues are identified due to the passive nature of these facilities.

Further, the NRC's regulations require that every nuclear power reactor operating license issued under 10 CFR part 50 and every COL issued under 10 CFR part 52 must contain a condition requiring each licensee to submit written notification to the Commission of the licensee's plan for managing irradiated fuel between cessation of reactor operation and the time the DOE takes title to and possession of the irradiated fuel for ultimate disposal in a repository. The submittal, required by 10 CFR 50.54(bb), must include information on how the licensee intends to provide funding for the management of its irradiated fuel. Specifically, 10 CFR 50.54(bb) requires the licensee to:

> [W]ithin 2 years following permanent cessation of operation of the reactor or 5 years before expiration of the reactor operating license, whichever occurs first, submit written notification to the Commission for its review and preliminary approval of the program by which the licensee intends to manage and provide funding for the management of all irradiated fuel at the reactor following permanent cessation of operation of the reactor until title to the irradiated fuel and possession of the fuel is transferred to the Secretary of Energy for its ultimate disposal * * *. Final Commission review will be undertaken as part of any proceeding for continued licensing under part 50 or 72 of this chapter. The licensee must demonstrate to NRC that the elected actions will be consistent with NRC requirements for licensed possession of irradiated nuclear fuel and that the actions will be implemented on a timely basis. Where implementation of such actions requires NRC authorizations, the licensee shall verify in the notification that submittals for such actions have been or will be made to NRC and shall identify them. A copy of the notification shall be retained by the licensee as a record until expiration of the reactor operating license. The licensee shall notify the NRC of any significant changes in the proposed waste management program as described in the initial notification.

To date, the NRC has also renewed four specific 10 CFR part 72 ISFSI licenses. These renewals include the part 72 specific licenses for the General Electric Morris Operation (the only wet, or pool-type ISFSI), as well as the Surry, H.B. Robinson, and Oconee ISFSIs. Additionally, the NRC received a renewal application for the Fort St. Vrain ISFSI on November 23, 2009. Specific licenses for six additional ISFSIs will expire between 2012 and 2020. It is expected that license renewals will be requested by these licensees, unless a permanent repository or some other interim storage option is made available.

Although the NRC staff's experience with renewal of ISFSI licenses is limited to these four cases, it is noteworthy that the Surry, H.B. Robinson and Oconee ISFSI licenses were renewed for a period of 40 years, instead of the 20-year renewal period currently provided for under 10 CFR part 72. The Commission authorized the staff to grant exemptions to allow the 40-year renewal period after the staff reviewed the applicants' evaluations of aging effects on the structures, systems, and components important to safety. The Commission determined that the evaluations, supplemented by the licensees' aging management programs, provide reasonable assurance of continued safe storage of spent fuel in these ISFSIs. *See* SECY–04–0175, "Options for Addressing the Surry Independent Spent Fuel Storage Installation License-Renewal Period Exemption Request," September 28, 2004 (ADAMS Accession Number ML041830697).

With regard to generally licensed ISFSIs, the NRC staff submitted a draft final rule to the Commission on May 3, 2010, to clarify the processes for the renewal of ISFSIs operated under the general license provisions of 10 CFR part 72 and for renewal of the CoC for dry cask storage systems. See SECY 10–0056, "Final Rule: 10 CFR Part 72 License and Certificate of Compliance Terms (RIN 3150–A109)" (ADAMS Accession Number ML100710052). There are currently nine sites operating generally licensed ISFSIs that will reach the prescribed 20-year limit on storage between 2013 and 2020.

The Commission concludes that the events that have occurred since the last formal review of the Waste Confidence Decision in 1990 support a continued finding of reasonable assurance that HLW and spent fuel will be managed in a safe manner until sufficient repository capacity is available. Specifically, the NRC has continued its regulatory control and oversight of spent fuel storage at both operating and decommissioned reactor sites, through both specific and general 10 CFR part 72 licenses. With regard to general 10 CFR part 72 licenses, the NRC has successfully implemented a general licensing and cask-certification program, as envisioned by the Commission in 1990. There are currently 16 certified spent fuel storage cask designs. 10 CFR 72.214 (2010). In addition, the Commission's reliance on the license renewal process in its 1990 review has proven well-placed, with three specific 10 CFR part 72 ISFSI licenses having been successfully renewed for an extended 40-year renewal period, and a fourth having been renewed for a period of 20 years. NRC licensees have continued to meet their obligation to safely store spent fuel in accordance with the requirements of 10 CFR parts 50 and 72.[34]

Based on the above discussion, including its response to the public comments, the Commission reaffirms Finding 3.

[34] Section 302 of NWPA authorizes the Secretary of Energy to enter into contracts with utilities generating HLW and SNF under which the utilities are to pay statutorily imposed fees into the NWF in return for which the Secretary, "beginning not later than January 31, 1998, will dispose of the [HLW] or [SNF] involved * * *." 42 U.S.C. 10222(a)(5)(B). The NWPA also prohibits NRC from issuing or renewing a reactor operating license unless the prospective licensee has entered into a contract with DOE or is engaged in good-faith negotiations for a contract. 42 U.S.C. 10222(b)(1). When it became evident that a repository would not be available in 1998, DOE took the position that it did not have an unconditional obligation to accept the HLW or SNF in the absence of a repository. *See Final Interpretation of Nuclear Waste Acceptance Issues* (60 FR 21793; May 3, 1995). The U.S. Court of Appeals for the District of Columbia Circuit, however, held that DOE's statutory and contractual obligation to accept the waste no later than January 31, 1998, was unconditional. *Indiana Michigan Power Co.* v. *DOE,* 88 F.3d 1272 (DC Cir. 1996). Subsequently, the utilities have continued to safely manage the storage of SNF in reactor storage pools and in ISFSIs and have received damage awards as determined in lawsuits brought before the U.S. Court of Federal Claims. *See, e.g., System Fuels Inc.* v. *U.S.,* 78 Fed. Cl. 769 (October 11, 2007).

IV. Finding 4 (1990): The Commission Finds Reasonable Assurance That, If Necessary, Spent Fuel Generated in Any Reactor Can Be Stored Safely and Without Significant Environmental Impacts for at Least 30 Years Beyond the Licensed Life for Operation (Which May Include the Term of a Revised or Renewed License) of That Reactor at Its Spent Fuel Storage Basin, or at Either Onsite or Offsite Independent Spent Fuel Storage Installations

A. Bases for Finding 4

This finding focuses on the safety and environmental effects of long-term storage of spent fuel. In 1984, the Commission found that spent fuel can be stored safely and without significant environmental impacts for at least 30 years beyond the expiration of reactor operating licenses (49 FR 34660; August 31, 1984). In 1990, the Commission determined that if the reactor operating license were renewed for 30 years,[35] storage would be safe and without environmental significance for at least 30 years beyond the term of licensed operation for a total of at least 100 years (55 FR 38513; September 18, 1990). The Commission looked at four broad issues in making this finding: (1) The long-term integrity of spent fuel under water pool storage conditions, (2) the structure and component safety for extended facility operation for storage of spent fuel in water pools, (3) the safety of dry storage, and (4) the potential risks of accidents and acts of sabotage at spent fuel storage facilities (49 FR 34681; August 31, 1984; 55 FR 38509; September 18, 1990).

With respect to the safety of water pool storage, the Commission found in 1984 that research and experience in the United States, Canada, and other countries confirmed that long-term storage could be safely undertaken (49 FR 34681–34682; August 31, 1984). In 1990, the Commission determined that experience with water storage of spent fuel continued to confirm that pool storage is a benign environment for spent fuel that does not lead to significant degradation of spent fuel integrity and that the water pools in which the assemblies are stored will remain safe for extended periods. Further, degradation mechanisms are well understood and allow time for appropriate remedial action (55 FR 38509–38511; September 18, 1990). In sum, based on both experience and scientific studies, the Commission found wet storage to be a fully-developed technology with no associated major technical problems.

In 1984, the Commission based its confidence in the safety of dry storage on an understanding of the material degradation processes, derived largely from technical studies, together with the recognition that dry storage systems are simple and easy to maintain (49 FR 34683–34684; August 31, 1984). By 1990, the NRC and ISFSI licensees had considerable experience with dry storage. NRC staff safety reviews of topical reports on storage system designs, the licensing and inspection of dry storage at two reactor sites under 10 CFR part 72, and the NRC's promulgation of an amendment to 10 CFR part 72 that incorporated a monitored retrievable storage installation (MRS) (a dry storage facility) into the regulations confirmed the 1984 conclusions on the safety of dry storage. In fact, under the environmental assessment for the amendment (NUREG–1092), the Commission found confidence in the safety and environmental insignificance of dry storage at an MRS for 70 years following a period of 70 years of storage in spent fuel storage pools (55 FR 38509–38513; September 18, 1990).

The Commission also found that the risks of major accidents at spent fuel storage pools resulting in offsite consequences were remote because of the secure and stable character of the spent fuel in the storage pool environment and the absence of reactive phenomena—"driving forces"—that might result in dispersal of radioactive material. The Commission noted that storage pools and ISFSIs are designed to safely withstand accidents caused by either natural or man-made phenomena, and that, due to the absence of high temperature and pressure conditions, human error does not have the capability to create a major radiological hazard to the public (49 FR 34684–34685; August 31, 1984). By 1990, the NRC staff had spent several years studying catastrophic loss of reactor spent fuel pool water, which could cause a fuel fire in a dry pool and concluded that because of the large inherent safety margins in the design and construction of a spent fuel pool no action was needed to further reduce the risk (55 FR 38511; September 18, 1990).

In 1984, the Commission recognized that the intentional sabotage of a storage pool was theoretically possible, but found that the consequences would be limited because, with the exception of some gaseous fission products, the radioactive content of spent fuel is in the form of solid ceramic material encapsulated in high-integrity metal cladding and stored underwater in a reinforced concrete structure (49 FR 34685; August 31, 1984). Under these conditions, the Commission noted that the radioactive content of spent fuel is relatively resistant to dispersal to the environment. Similarly, because of the weight and size of the sealed protective enclosures, dry storage of spent fuel in dry wells, vaults, silos, and metal casks is also relatively resistant to sabotage and natural disasters. *Id.* Although the 1990 decision examined several studies of accident risk, no considerations affected the Commission's confidence that the possibility of a major accident or sabotage with offsite radiological impacts at a spent fuel storage facility is extremely remote (55 FR 38512; September 18, 1990).

Finally, the Commission noted that the generation and onsite storage of more spent fuel as a result of reactor license renewals would not affect the Commission's findings on environmental impacts. Finding 4 is not based on a determination of a specific number of reactors and amount of spent fuel; Finding 4 evaluates the safety of spent fuel storage and lack of environmental impacts overall. Further, individual license renewal actions are subject to separate safety and environmental reviews (55 FR 38512; September 18, 1990).

B. Evaluation of Finding 4

As discussed above, Finding 4 focuses on the safety and environmental significance of long-term storage of spent fuel. Specifically, the Commission examined four broad issues in making this finding: (1) The long-term integrity of spent fuel under water pool storage conditions; (2) the structure and component safety for extended facility operation for storage of spent fuel in water pools; (3) the safety of dry storage; and (4) the potential risks of accidents and acts of sabotage at spent fuel storage facilities.

1. Storage in Spent Fuel Pools

Since 1990, the NRC has continued its periodic examination of spent fuel pool storage to ensure that adequate safety is maintained and that there are no adverse environmental effects from the storage of spent fuel in pools. The Office of Nuclear Reactor Regulation (NRR) and the former Office for Analysis and Evaluation of Operational Data independently evaluated the safety of spent fuel pool storage, and the results of these evaluations were documented in a memorandum to the Commission dated July 26, 1996, "Resolution of Spent Fuel Storage Pool Action Plan

[35] Subsequently, the Commission limited the renewal period for power reactor licenses to 20 years beyond expiration of the operating license or combined license (10 CFR 54.31; 56 FR 64943, 64964; December 13, 1991).

Issues," (ADAMS Accession Number ML003706364) and a separate memorandum to the Commission dated October 3, 1996, "Assessment of Spent Fuel Pool Cooling," (ADAMS Accession Number ML003706381) (later published as NUREG–1275, Vol. 12, "Operating Experience Feedback Report: Assessment of Spent Fuel Cooling," February 1997). As a result of these studies, the NRC staff and industry identified a number of follow-up activities that are described by the NRR staff in a memo to the Commission dated September 30, 1997, "Followup Activities on the Spent Fuel Pool Action Plan," (ADAMS Accession Number ML003706412). These evaluations became part of the investigation of Generic Safety Issue 173, "Spent Fuel Pool Storage Safety," which found that the relative risk posed by loss of spent fuel cooling is low when compared with the risk of events not involving the SFP.

The safety and environmental effects of spent fuel pool storage were also addressed in conjunction with regulatory assessments of permanently shutdown nuclear plants and decommissioning nuclear power plants. NUREG/CR–6451, "A Safety and Regulatory Assessment of Generic BWR and PWR Permanently Shutdown Nuclear Power Plants," (August 1997) addressed the appropriateness of regulations (*e.g.,* requirements for emergency planning and insurance) associated with spent fuel pool storage. The study identified a number of regulations that apply only to an operating reactor and not to spent fuel storage. These regulations are not needed to ensure the safe maintenance of a permanently shutdown plant. The study also provided conservative bounding estimates of fuel coolability and offsite consequences for the most severe accidents, which involve draining of the spent fuel pool.

More recently, the NRC issued NUREG–1738, "Technical Study of Spent Fuel Pool Accident Risk at Decommissioning Nuclear Power Plants," (February 2001), which provides a newer and more robust analysis of the safety and environmental effects of spent fuel pool storage. This study provided the results of the NRC staff's latest evaluation of the accident risk in a spent fuel pool at decommissioning plants. The report discussed fuel coolability for various types of accidents and included potential offsite consequences based on assumed radiation releases. The study demonstrated that by using conservative and bounding assumptions regarding the postulated accidents, the predicted risk estimates were below those associated with reactor accidents and well below the Commission's safety goal.

Following the terrorist attacks of September 11, 2001, the NRC undertook an extensive reexamination of spent fuel pool safety and security issues. This reexamination included a significantly improved methodology, based on detailed state-of-the-art analytical modeling, for assessing the response of spent fuel assemblies during security events including those that might result in draining of the spent fuel pool. This more detailed and realistic analytical modeling was also supported by extensive testing of zirconium oxidation kinetics in an air environment and full scale coolability and "zirc fire" testing of spent fuel assemblies. This effort both confirmed the conservatism of past analyses and provided more realistic analyses of fuel coolability and potential responses during accident or security event conditions. Importantly, the new more detailed and realistic modeling led to the development of improvements in spent fuel safety, which were required to be implemented at spent fuel pools by the Commission for all operating reactor sites. (*See* 73 FR 46204; August 8, 2008).

In 2003, the U.S. Congress asked the NAS to provide independent scientific and technical advice on the safety and security of commercial SNF storage, including the potential safety and security risks of SNF presently stored in cooling pools and dry casks at commercial nuclear reactor sites. In July 2004, the NAS issued a classified report—a publicly available unclassified summary was made available in 2006 (as noted above, the unclassified summary of the NAS report can be purchased or downloaded for free by accessing the NAS Web site at: *http://www.nap.edu/catalog.php?record_id=11263*). As part of the information gathering for the study, the NRC and Sandia National Laboratories briefed the NAS authoring committee on the ongoing work to reassess spent fuel pool safety and security issues. The NAS report contains findings and recommendations for reducing the risk of events involving spent fuel pools as well as dry casks. NRC Chairman Nils J. Diaz provided the Commission's response to the NAS in a letter to Senator Pete V. Domenici, dated March 14, 2005 (ADAMS Accession Number ML050280428) (Diaz Letter). In essence, the NRC concluded, as a result of its own study and subsequent regulatory actions, that it had adopted the important recommendations of the report relevant to spent fuel pools. As a result of the improvements in spent fuel pool safety and security, and the inherent safety and robustness of spent fuel pool designs, the NRC concluded that the risk associated with security events at spent fuel pools is acceptably low. Because these safety improvements in spent fuel pool storage are applicable to non-security events (randomly initiated accidents), accident risk was also further reduced.

While the Commission continues to have reasonable assurance that storage in spent fuel pools provides adequate protection of public health and safety and the common defense and security, and will not result in significant impacts on the environment, the NRC acknowledges several incidents of groundwater contamination originating from leaking reactor spent fuel pools and associated structures. In 1990, the Commission specifically acknowledged two incidents where radioactive water leaked from spent fuel pools, one of which resulted in contamination outside of the owner controlled area (*See* 55 FR 38511; September 18, 1990). The Commission addressed these events stating, "[t]he occurrence of operational events like these have been addressed by the NRC staff at the plants listed. The staff has taken inspection and enforcement actions to reduce the potential for such operational occurrences in the future." *Id.*

On March 10, 2006, the NRC Executive Director for Operations established the Liquid Radioactive Release Lessons Learned Task Force in response to incidents at several plants involving unplanned, unmonitored releases of radioactive liquids into the environment. Liquid Radioactive Release Lessons Learned Task Force Final Report, September 1, 2006 (Task Force Report) (ADAMS Accession Number ML062650312). One of the incidents that prompted formation of the Task Force involved leaks from the Unit 1 and 2 spent fuel pools at Indian Point.[36] Task Force Report, at 1, 5–6, 11.

[36] In May 2008, the NRC staff completed an inspection at Indian Point Units 1 and 2. NRC Inspection Report Nos. 05000003/2007010 and 05000247/2007010, May 13, 2008 (ADAMS Accession Number ML081340425). The purpose of the inspection was to assess Entergy's site groundwater characterization conclusions and the radiological significance of Entergy's discovery of spent fuel pool leaks at Units 1 and 2. The NRC staff concluded that Entergy's response to the spent fuel pool leaks was reasonable and technically sound. The NRC staff stated that "[t]he existence of onsite groundwater contamination, as well as the circumstances surrounding the causes of leakage and previous opportunities for identification and intervention, have been reviewed in detail. Our inspection determined that public health and safety has not been, nor is likely to be, adversely affected, and the dose consequence to the public that can be attributed to current onsite conditions associated with groundwater contamination is negligible." *Id.*

The Task Force reviewed historical data on inadvertent releases of radioactive liquids, including four additional incidents involving leaks from spent fuel pools (Seabrook, Salem, Watts Bar, and Palo Verde). As a result of its review, the Task Force concluded that "[b]ased on bounding dose calculations and/or actual measurements, the near-term public health impacts have been negligible for the events at NRC-licensed operating power facilities discussed in this report." Task Force Report, at 15. While concluding that near-term public health impacts from the leaks the NRC had investigated were negligible, the Task Force also recommended that measures be taken to avoid leaks in the future. The Task Force made 26 specific recommendations for improvements to the NRC's regulatory programs concerning unplanned or unmonitored releases of radioactive liquids from nuclear power reactors.

The NRC staff has addressed, or is in the process of addressing, the Task Force recommendations. *See* "Liquid Release Task Force Recommendations Implementation Status as of February 26, 2008" (ADAMS Accession Number ML073230982) (Implementation Status). Actions taken in response to Task Force recommendations included revisions to several guidance documents, development of draft regulatory guidance on implementation of the requirements of 10 CFR 20.1406 (*i.e.* DG–4012),[37] revisions to Inspection Procedure 71122.01, and an evaluation of whether further action was required to enhance the performance of SFP tell-tale drains.[38]

For example, Regulatory Guide 4.1 is being revised to provide guidance to industry for detecting, evaluating, and monitoring releases from operating facilities via unmonitored pathways; to ensure consistency with current industry standards and commercially available radiation detection methodology; to clarify when a licensee's radiological effluent and environmental monitoring programs should be expanded based on data or environmental conditions; and to ensure that leaks and spills are detected before radionuclides migrate offsite via an unmonitored pathway. Also, Regulatory Guide 1.21 is being revised to provide a definition of "significant contamination" that should be documented in a licensee's decommissioning records under 10 CFR 50.75(g); to clarify how to report summaries of spills and leaks in a licensee's Annual Radioactive Effluent Release Report; to provide guidance on remediation of onsite contamination; and to upgrade the capability and scope of the in-plant radiation monitoring system to include additional monitoring locations and the capability to detect lower risk radionuclides. Further, Inspection Procedure 71122.01 has been revised to provide for review of onsite contamination events, including events involving groundwater; evaluation of effluent pathways so that new pathways are identified and placed in the licensee's Offsite Dose Calculation Manual, as applicable; and inclusion of limited, defined documentation of significant radioactive releases to the environment in inspection reports for those cases where such events would not normally be documented under current inspection guidance. See Implementation Status (ADAMS Accession Numbers ML073230982 and ML020730763).

Additionally, the NRC monitors the condition of SFPs through onsite Resident Inspectors, reviews of license amendment applications, and participation in industry forums. For example on October 28, 2009, the NRC issued Information Notice (IN) 2009–26, "Degradation of Neutron-Absorbing Materials in the Spent Fuel Pool" to all operating reactors licensees and construction permit holders. IN 2009–26 is the latest in a series of generic communications regarding material issues in SFPs. These and other documents demonstrate the NRC's continuing evaluation of the SFPs and their ability to provide an adequate level of safety. This engagement ensures any issues are identified and addressed through the current regulatory process before they could advance to a state where there is a significant environmental impact. Therefore the Commission has reasonable assurance that SFPs designed, tested, operated and maintained according to NRC requirements will provide for the safe storage of spent nuclear fuel.

2. Storage in Dry Casks

With regard to dry cask storage, studies of the accident risk of dry storage since 1990 have focused on specific dry cask storage systems located at either a generic Pressurized Water Reactor (PWR) site or a specific Boiling Water Reactor (BWR) site. In 2004, the Electric Power Research Institute (EPRI) performed a Probabilistic Risk Assessment (PRA) of a bolted dry spent fuel storage cask at a generic PWR site. K. Canavan, "Probabilistic Risk Assessment (PRA) of Bolted Storage Casks Updated Quantification and Analysis Report," Electric Power Research Institute, Palo Alto, California; EPRI Doc. No. 1009691, December 2004. In 2007, the NRC published a pilot PRA methodology that assessed the risk to the public and identified the dominant contributors to risk associated with a welded canister dry spent fuel storage system at a specific BWR site. NUREG–1864, "A Pilot Probabilistic Risk Assessment of a Dry Cask Storage System at a Nuclear Power Plant," March 2007. Both studies calculated the annual individual radiological risk and consequences associated with a single cask lifecycle where the lifecycle is divided into three phases: Loading, onsite transfer, and onsite storage. The EPRI study showed that risk is extremely low with no calculated early fatalities, a first year risk of latent cancer fatality of 5.6E–13 per cask, and subsequent year cancer risk of 1.7E–13 per cask. The NRC study also showed that risk is extremely low with no prompt fatalities expected, a first year risk of latent cancer fatality of 1.8E–12 per cask and subsequent year cancer risk of 3.2E–14 per cask.

The major contributors to the low risk associated with dry cask storage are that they are passive systems, relying on natural air circulation for cooling, and are inherently robust massive structures that are highly damage resistant. Current design light water reactor (LWR) uranium oxide based fuel and carbon coated uranium oxide fuel of low burn-up from a high temperature gas cooled reactor have been successfully stored in dry storage facilities for approximately 20 years. Extended dry-storage of this fuel has been approved for an additional 40-year term for facilities that have incorporated an appropriate aging management plan. Other potential new fuel types, such as fuels having different cladding alloys, fuel internal materials, new assembly designs, different operating conditions, or fuel higher than current burn-up limits, can be approved by the NRC for extended storage if the applicant provides sufficient data to demonstrate that storage of the newer designs can be safely accomplished.

NRC and licensee experience to date with ISFSIs and with certification of

[37] DG–4012 was formally issued as Regulatory Guide 4.21, "Minimization of Contamination and Radioactive Waste Generation: Life-Cycle Planning" in June 2008.

[38] In addition to the NRC's efforts, the nuclear industry collectively responded to these incidents of unplanned, unmonitored releases of radioactive liquids through the Industry Initiative on Groundwater Protection. The Industry Initiative has resulted in publication of voluntary industry guidance on the implementation of groundwater protection programs at nuclear power plants. *See* "Industry Ground Water Protection Initiative–Final Guidance Document," NEI–07–07, August 2007 (ADAMS Accession Number ML072610036); "Groundwater Protection Guidelines for Nuclear Power Plants: Public Edition, EPRI, Palo Alto, CA: EPRI Doc. No. 1016099, 2008.

casks has indicated that interim storage of spent fuel at reactor sites can be safely and effectively conducted using passive dry storage technology. There have not been any safety problems during dry storage. The problems that have been encountered primarily occur during cask preparation activities, after initial loading of spent fuel and before placement on the storage pad. One issue involved the unanticipated collection and ignition of combustible gas during cask welding activities. The NRC issued generic communications in 1996 to address the problem and provide direction for preventing its recurrence. NRC Bulletin 96–04, "Chemical, Galvanic, or Other Reactions in Spent Fuel Storage and Transportation Casks," and NRC Information Notice 96–34: "Hydrogen Gas Ignition During Closure Welding of a VSC–24 Multi-Assembly Sealed Basket." The NRC also revised its inspection and review guidance to ensure that appropriate measures are in place to preclude these events. See NRC Inspection Manual, Inspection Procedure 60854 Item 60854–02 and 02.03.a.6 and SFPO Interim Staff Guidance No. 15, dated January 10, 2001.

In addition, issuance of Materials License No. SNM–2513 for the Private Fuel Storage, LLC (PFS) facility has confirmed the feasibility of licensing an AFR ISFSI under 10 CFR Part 72. While there are several issues that have to be resolved before the PFS AFR ISFSI can be built and operated,[39] the extensive review of safety and environmental issues associated with licensing the PFS facility provides additional confidence that spent fuel may be safely stored at an AFR ISFSI for long periods after storage at a reactor site.

In addition, as noted in its 1990 Waste Confidence Decision, the Commission has confidence in the safety and environmental insignificance of dry storage at an MRS for 70 years following a period of 70 years of storage in spent fuel storage pools. Specifically, the Commission stated:

> Under the environmental assessment for the MRS rule [NUREG–1092], the Commission has found confidence in the safety and environmental insignificance of dry storage of spent fuel for 70 years following a period of 70 years of storage in spent fuel storage pools. Thus, this environmental assessment supports the proposition that spent fuel may be stored safely and without significant environmental impact for a period of up to 140 years if storage in spent fuel pools occurs first and the period of dry storage does not exceed 70 years. (55 FR 38509–38513; September 18, 1990).

Further, a commenter on the 1990 Waste Confidence Decision asserted that there was reasonable assurance that spent fuel could be stored safely and without significant environmental risk in dry casks at reactor sites for up to 100 years. The Commission responded:

> The Commission does not dispute a conclusion that dry spent fuel storage is safe and environmentally acceptable for a period of 100 years. Evidence supports safe storage for this period. A European study published in 1988 states, "in conclusion, present-day technology allows wet or dry storage over very long periods, and up to 100 years without undue danger to workers and population (*See* Fettel, W., Kaspar, G., and Guntehr, H., "Long-Term Storage of Spent Fuel from Light-Water Reactors" (EUR 11866 EN), Executive Summary, p.v., 1988).
>
> Although spent fuel can probably be safely stored without significant environmental impact for longer periods, the Commission does not find it necessary to make a specific conclusion regarding dry cask storage in this proceeding, as suggested by the commenter, in part because the Commission's Proposed Fourth Finding states that the period of safe storage is "at least" 30 years after expiration of a reactor's operating license. The Commission supports timely disposal of spent fuel and high-level waste in a geologic repository, and by this decision does not intend to support storage of spent fuel for an indefinitely long period. (55 FR 38482; September 18, 1990).

The Commission also explained the nature of its finding that spent fuel could be stored safely and without significant environmental impacts for at least 30 years beyond the licensed life for operation, stating:

> [I]n using the words "at least" in its revised Finding Four, the Commission is not suggesting 30 years beyond the licensed life for operation * * * represents any technical limitation for safe and environmentally benign storage. Degradation rates of spent fuel in storage, for example, are slow enough that it is hard to distinguish by degradation alone between spent fuel in storage for less than a decade and spent fuel stored for several decades. (55 FR 38509; September 18, 1990).

As explained above under the discussion of Finding 3, the NRC has renewed three specific ISFSI licenses for an extended 40-year period under exemptions granted from 10 CFR Part 72, which provides for 20-year renewals. In addition, the NRC staff submitted a final rule package to the Commission on May 3, 2010, that would provide a 40-year license term for an ISFSI with the possibility of renewal. *See* SECY 10–0056, "Final Rule: 10 CFR Part 72 License and Certificate of Compliance Terms (RIN 3150–A109)" (ADAMS Accession Number ML100710052). Continued suitability of materials is a prime consideration for ISFSI license renewals. As discussed under Finding 3 in this document, the applicants' evaluation of aging effects on the structures, systems, and components important to safety, supplemented by the licensees' aging management programs, provided reasonable assurance of continued safe storage of spent fuel in these ISFSIs. Thus, these cases reaffirm the Commission's confidence in the safety of interim dry storage for an extended period. While these license renewal cases only address storage for a period of up to 60 years (20-year initial license, plus 40-year renewal), studies performed to date have not identified any major issues with long-term use of dry storage. *See, e.g.,* NUREG/CR–6831, "Examination of Spent PWR Fuel rods after 15 Years in Dry Storage," (September 2003); J. Kessler, "Technical Bases for Extended Dry Storage of Spent Nuclear Fuel," Electric Power Research Institute, Palo Alto, California; EPRI Doc. No. 1003416, December 2002 (55 FR 38509; September 18, 1990). As noted above, the Commission has directed the NRC staff, separate from

[39] For example, on July 17, 2007, Private Fuel Storage and the Skull Valley Band of Goshute Indians (the Band) filed suit against the U.S. Department of Interior (DOI) in federal district court, challenging DOI's decisions to disapprove the lease between PFS and the Band and to deny PFS's application for right-of-way across public land. On July 26, 2010, the district court vacated both of DOI's denials and remanded the case to DOI for further consideration. *Skull Valley Band of Goshute Indians* v. *Davis,*—F.Supp.2d—, 2010 WL2990781 (D. Utah July 26, 2010). On September 27th, 2010, the Salt Lake Tribune reported that the Department of Interior would not challenge the court's ruling. *http://www.sltrib.com/sltrib/home/50365983–76/interior-nuclear-department-ruling.html.csp?page=1.*

In addition, timely petitions for review challenging the NRC's decision to issue a license to Private Fuel Storage for the construction of an interim spent fuel storage facility were filed in the Court of Appeals for the DC Circuit. *Ohngo Gaudadeh Devia* v. *NRC,* No. 05–1419 (and consolidated cases) (DC Cir.). By Order dated June 27, 2007, the court held the petitions for review in abeyance pending further court order, requiring the parties to file status reports every 120 days on the status of actions challenging DOI's lease and right-of-way decisions.

Another issue is associated with the February 2006 (NAS) Report on the transport of SNF in the United States, which concluded that while safe transport is technically viable, "the societal risks and related institutional challenges may impinge on the successful implementation of large-quantity shipping programs." National Research Council 2006, "Going the Distance? The Safe Transport of Spent Nuclear Fuel and High-Level Radioactive Waste in the United States," Washington, DC: National Academy Press, TIC: 217588, at pp. 214. The NAS committee found that "malevolent acts against spent fuel and high-level waste shipment are a major technical and societal concern," and recommended that "an independent examination of security of spent fuel and high-level waste transportation be carried out prior to the commencement of large-quantity shipments to a Federal repository or to interim storage." *Id.*

these updates to the Waste Confidence Decision and Rule, to examine the possibility of storage for more than 60 years after licensed life for operation. This longer-term analysis will be supported by an Environmental Impact Statement.

3. Terrorism and Spent Fuel Management

The NRC has, since the 1970s, regarded spent fuel in storage as a potential terrorist target and provided for appropriate security measures. Before September 11, 2001, spent fuel was well protected by physical barriers, armed guards, intrusion detection systems, area surveillance systems, access controls, and access authorization requirements for persons working inside nuclear power plants and spent fuel storage facilities. Since September 11, 2001, the NRC has significantly enhanced its requirements, and licensees have significantly increased their resources to further enhance and improve security at spent fuel storage facilities and nuclear power plants. *See* (Diaz Letter), at 20.

Consistent with the approach taken at other categories of nuclear facilities, the NRC responded to the terrorist attacks of September 11, 2001, by promptly developing and requiring security enhancements for spent fuel storage both in spent fuel pools and dry casks. In February 2002, the NRC required power reactor licensees to enhance security and improve their capabilities to respond to terrorist attacks. The NRC's orders included requirements for spent fuel pool cooling to deal with the consequences of potential terrorist attacks. These enhancements to security included increased security patrols, augmented security forces, additional security posts, increased vehicle standoff distances, and improved coordination with law enforcement and intelligence communities, as well as strengthened safety-related mitigation procedures and strategies. The February 2002 orders required licensees to develop specific guidance and strategies to maintain or restore spent fuel pool cooling capabilities using existing or readily available resources (equipment and personnel) that can be effectively implemented under the circumstances associated with the loss of large areas of the plant due to large fires and explosions.

In January and April 2003, the NRC issued additional orders on security, including security for spent fuel storage. The NRC subsequently inspected each facility to verify the licensee's implementation, evaluated inspection findings and, as necessary, required actions to address any noted deficiencies. The NRC's inspection activities in this area are ongoing. In 2004, the NRC reviewed and approved revised security plans submitted by licensees to reflect the implementation of new security requirements. The enhanced security at licensee facilities is routinely inspected using a revised baseline inspection program, and power reactor licensees' capabilities (including spent fuel pools) are tested in periodic (every 3 years) force-on-force exercises. Diaz Letter at iii, 7, 9. The NRC's ongoing ISFSI security rulemaking is discussed below.

In 2002, the NRC required power reactors in decommissioning, wet ISFSIs, and dry storage ISFSIs to enhance security and improve their capabilities to respond to, and mitigate the consequences of, a terrorist attack. In the same year, the NRC required licensees transporting more than a specified amount of spent fuel to enhance security during transport. Diaz Letter at 7, 8.

In 2002, the NRC also initiated a classified program on the capability of nuclear facilities to withstand a terrorist attack. The early focus of the program was on power reactors, including spent fuel pools, and on dry cask storage and transportation. As the results of the program became available, the NRC provided additional guidance to licensees on the Commission's expectations regarding the implementation of the orders on the spent fuel mitigation measures. Diaz Letter at iv.

In 2007 the NRC issued a final rule revising the Design Basis Threat, which also increased the security requirements for power reactors and their spent fuel pools (72 FR 12705; March 19, 2007). More recently, on March 27, 2009, the NRC issued a final rule to improve security measures at nuclear power reactors (74 FR 13926).

i. Spent Fuel Pools

Spent fuel pools that are designed, tested, operated and maintained according to NRC requirements will provide for the safe storage of spent nuclear fuel. Spent fuel pools are extremely robust structures that are designed to safely contain spent fuel under a variety of normal, off-normal, and hypothetical accident conditions (*e.g.,* loss of electrical power, floods, earthquakes, tornadoes). The pools are massive structures made of reinforced concrete with walls typically over six feet thick, lined with welded stainless steel plates to form a generally leak-tight barrier, fitted with racks to store the fuel assemblies in a controlled configuration, and provided with redundant monitoring, cooling, and make-up water systems. Spent fuel stored in pools is typically covered by about 25 feet of water, which serves as both shielding and an effective protective cover against direct impacts on the stored fuel. Diaz Letter at 2 (73 FR 46206; August 8, 2008).

The post-September 11, 2001 studies discussed above confirm the effectiveness of additional mitigation strategies to maintain spent fuel cooling in the event the pool is drained and its initial water inventory is reduced or lost entirely. Based on this recent information and the implementation of additional strategies following September 11, 2001, the risk of a spent fuel pool zirconium fire initiation will be less than reported in NUREG–1738 and previous studies. Given the physical robustness of the pools, the physical security measures, and the spent fuel pool mitigation measures, and based upon NRC site evaluations of every spent fuel pool in the United States, the NRC has determined that the risk of a spent fuel pool zirconium fire, whether caused by an accident or a terrorist attack, is very low. In addition, the NRC has approved license amendments and issued safety evaluations to incorporate mitigation measures into the plant licensing bases of all operating nuclear power plants in the United States (*See* 73 FR 46207–46208; August 8, 2008).

ii. Dry Storage Casks

Dry storage casks are massive canisters, either all metal or a combination of concrete and metal, and are inherently robust (*e.g.,* some casks weigh over 100 tons). Storage casks contain spent fuel in a sealed and chemically-inert environment. Diaz Letter at 3.

The NRC has evaluated the results of security assessments involving large commercial aircraft attacks, which were performed on four prototypical spent fuel cask designs, and concluded that the likelihood is very low that a radioactive release from a spent fuel storage cask would be significant enough to cause adverse health consequences to nearby members of the public. While differences exist between storage cask designs, the results of the security assessments indicate that any potential radioactive releases were consistently very low.

The NRC also evaluated the results of security assessments involving vehicle bomb and ground assault attacks against these same four cask designs. The NRC concluded that, while a radiological release was possible, the size and nature

of the release did not require the Commission to immediately implement additional security compensatory measures. Accordingly, the NRC staff recommended, and the Commission approved, development of risk-informed, performance-based security requirements and associated guidance applicable to all ISFSI licensees (general and specific), which would enhance existing security requirements. This proposed ISFSI security rulemaking would apply to all existing and future licensees. See SECY–07–0148, "Independent Spent Fuel Storage Installation Security Requirements for Radiological Sabotage," (August 28, 2007) (ADAMS Accession Number ML080250294); SRM–SECY–07–0148—Independent Spent Fuel Storage Installation Security Requirements for Radiological Sabotage, (December 18, 2007) (ADAMS Accession Number ML073530119).

On August 26, 2010, the NRC staff recommended an extension of the proposed rulemaking schedule to reassess the technical approach and evaluate the impacts from shifting technical approaches. *See* SECY 10–0114, "Recommendation to Extend the Proposed Rulemaking on Security Requirements For Facilities Storing Spent Nuclear Fuel and High-Level Radioactive Waste," (August 26, 2010) (ADAMS Accession Number ML101880013). In addition, the NRC has noted that distributing spent fuel over many discrete storage casks (*e.g.,* in an ISFSI) limits the total quantity of spent fuel that could be attacked at any one time, due to limits on the number of adversaries and the amount of equipment they can reasonably bring with them. Diaz Letter at 17, 18, 22.

iii. Conclusion-Security

Today, spent fuel is better protected than ever. The results of security assessments, existing security regulations, and the additional protective and mitigative measures imposed since September 11, 2001, provide high assurance that the spent fuel in both spent fuel pools and in dry storage casks will be adequately protected. The ongoing efforts to update the ISFSI security requirements to address the current threat environment will integrate the additional protective measures imposed since September 11, 2001, into a formalized regulatory framework in a transparent manner that balances public participation against protection of exploitable information.

4. Conclusion

The Commission concludes that the events that have occurred since the last formal review of its Waste Confidence Decision in 1990 provide support for a continued finding of reasonable assurance that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 30 years beyond the licensed life for operation of that reactor at its spent fuel storage basin. Specifically, the NRC finds continued support for this finding in the extensive study of spent fuel pool storage that has occurred since 1990, and the continued regulatory oversight of operating plants, which has been enhanced by the recommendations of the Liquid Release Task Force.

Further, the Commission is revising Finding 2 to reflect its expectation that repository capacity will be available when necessary. The analysis supporting Finding 2 concludes that a repository can be constructed within 25–35 years of a Federal decision to do so. This means that the earliest a repository could be available is 2035–2045, which is beyond the 30 years after licensed life of operation in the 1990 rule. But as the Commission discussed above, there is no safety finding that would preclude the extension of the 30 years of safe storage without significant environmental impacts. Indeed, the current technical information supports a finding that storage for at least 60 years after licensed life for operation is safe. Consistent with the changes to Finding 2 and its supporting analysis, the Commission is revising Finding 4 to reflect that spent fuel can be safely stored in dry casks for a period of at least 60 years without significant environmental impacts. Specifically, the inherent robustness and passive nature of dry cask storage—coupled with the operating experience and research accumulated to date, the 70-year finding in the Environmental Assessment for the MRS rule, and the renewal of three specific 10 CFR Part 72 licenses for an extended 40-year period (for a total ISFSI operating life of at least 60 years)—support this finding. Further, this finding is consistent with the Commission's statements in 1990 that it did not dispute that dry spent fuel storage is safe and environmentally acceptable for a period of 100 years (55 FR 38482; September 18, 1990); that spent fuel could probably be safely stored without significant environmental impact for periods longer than 30 years Id; and that the 30 year finding did not represent a technical limitation for safe and environmentally benign storage (55 FR 38509; September 18, 1990).

Therefore, based on all of the information set forth above and after consideration of the public comments received, the Commission is revising Finding 4 as proposed.

C. Finding 4

The Commission finds reasonable assurance that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 60 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor in a combination of storage in its spent fuel storage basin and either onsite or offsite independent spent fuel storage installations.

V. Finding 5: The Commission Finds Reasonable Assurance That Safe, Independent Onsite Spent Fuel Storage or Offsite Spent Fuel Storage Will Be Made Available if Such Storage Capacity Is Needed

A. Bases for Finding 5

The focus of this finding is on the timeliness of the availability of facilities for storage of spent fuel when the fuel can no longer be stored in the reactor's spent fuel storage pool. At the outset of the Waste Confidence proceeding, there was uncertainty as to who had the responsibility for providing this storage, with the expectation that the Federal Government would provide away-from-reactor (AFR) facilities for this purpose. But in 1981 DOE announced its decision to discontinue the AFR program. The Commission found that the industry's response to this change was a general commitment to do whatever was necessary to avoid shutting down reactors. The NWPA provided Federal policy on this issue by defining public and private responsibilities for spent fuel storage and by providing for an MRS program, an interim storage program at a Federal facility for utilities for which there was no other solution, and a research, development, and demonstration program for dry storage designed to assist utilities in using dry storage methods. These NWPA provisions, together with the availability of ISFSI technology and the fact that the 10 CFR part 72 regulations and licensing procedures were in place, gave the Commission reasonable assurance that safe, independent onsite or offsite spent fuel storage would be available when needed (49 FR 34686–34687; August 31, 1984).

In 1990, the Commission saw no need to revise this finding. It recognized that the NWPA had undermined the ability of an MRS to provide for timely storage by linking the MRS to the siting and schedule for a repository (*i.e.,* DOE was

not permitted to select an MRS site until it had recommended a site for development as a repository). *See* Section 145(b) of NWPA, 42 U.S.C. 10165 (2006) and Section 148(d)(1) of NWPA, 42 U.S.C. 10168 (2006). But the Commission found that whatever the uncertainty introduced by these NWPA provisions, it was more than compensated for by operational and planned spent fuel pool expansions and dry storage investments by the utilities themselves.

The Commission also considered the fact that it seemed probable that DOE would not meet the 1998 deadline for beginning to remove spent fuel from the utilities. This did not undermine the Commission's confidence that storage capacity would be made available as needed because NRC licensees cannot abrogate their safety responsibilities and would remain responsible for the stored fuel despite any possible contractual disputes with DOE. The Commission noted that DOE's research program had successfully demonstrated the viability of dry storage technology and that the utilities had continued to add dry storage capacity at their sites. Further, the Commission believed that there would be sufficient time for construction and licensing of any additional storage capacity that might be needed due to operating license renewals (55 FR 38513–38514; September 18, 1990).

B. Evaluation of Finding 5

In 1990, the Commission reaffirmed Finding 5 despite significant uncertainties regarding DOE's MRS and repository programs, and the potential for the renewal of reactor operating licenses. Specifically, in reaffirming Finding 5 the Commission stated:

> In summary, the Commission finds no basis to change the Fifth Finding in its Waste Confidence Decision. Changes by the NWPAA, which may lessen the likelihood of an MRS facility, and the potential for some slippage in repository availability to the first quarter of the twenty-first century * * * are more than offset by the continued success of utilities in providing safe at-reactor-site storage capacity in reactor pools and their progress in providing independent onsite storage. Therefore, the Commission continues to find '* * * reasonable assurance that safe independent onsite spent fuel storage or offsite spent fuel storage will be made available if such storage is needed.' (55 FR 38514; September 18, 1990).

In reaching this conclusion, the Commission stressed that—regardless of the outcome of possible contractual disputes between DOE and utilities—the utilities possessing spent fuel could not abrogate their safety responsibilities, which by law the NRC imposes and enforces. In addition, the Commission cited three situations where dry storage had been licensed at specific reactor sites (Surry, H.B. Robinson, and Oconee), and several additional applications for licenses permitting dry cask storage at reactor sites. *Id.*

1. Operating and Decommissioned Reactors

As in 1990, the NRC is not aware of any current operating reactor that has an insurmountable problem with safe storage of SNF. Spent fuel pool re-racking, fuel-pin consolidation, and onsite dry cask storage are successfully being used to increase onsite storage capacity. While there are cases where a licensee's ability to use an onsite dry cask storage option may be limited by State or Public Utility Commission authorities, the NRC is successfully regulating six fully decommissioned reactor sites that contain ISFSIs licensed under either the general or specific license provisions of 10 CFR part 72. The NRC has not encountered any management problems associated with the ISFSIs at these six decommissioned reactor sites and has discussed plans to build generally licensed ISFSIs with two additional licensees that are in the process of decommissioning.

In addition, since 1990, the NRC has renewed the specific 10 CFR part 72 ISFSI licenses for the Surry, H.B. Robinson, and Oconee plants for an extended 40-year period, instead of the 20-year renewal period currently provided for under 10 CFR part 72. As discussed above under Finding 3, the Commission authorized the staff to grant exemptions to allow the 40-year renewal period after the staff reviewed the applicants' evaluations of aging effects on the structures, systems, and components important to safety and determined that the evaluations, supplemented by the applicants' aging management programs, provided reasonable assurance of continued safe storage of spent fuel in these ISFSIs. See SECY–04–0175, "Options for Addressing the Surry Independent Spent Fuel Storage Installation License-Renewal Period Exemption Request," September 28, 2004 (ADAMS Accession Number ML041830697).

With regard to the uncertainty surrounding the contractual disputes between DOE and the utilities referenced by the Commission in 1990, the U.S. Court of Appeals for the District of Columbia Circuit has since held that DOE's statutory and contractual obligation to accept the waste no later than January 31, 1998, was unconditional. *Indiana Michigan Power Co.* v. *DOE,* 88 F.3d 1272 (DC Cir. 1996). Subsequently, the utilities have continued to manage spent fuel safely in spent fuel pools and ISFSIs and have received damage awards as determined in lawsuits brought before the U.S. Federal Claims Court. *See, e.g., System Fuels Inc.* v. *U.S.,* 78 Fed. Cl. 769 (October 11, 2007); 92 Fed. Cl. 101 (March 11, 2010).

In total, there are currently 51 licensed ISFSIs being managed at 47 sites across the country, under either specific or general 10 CFR Part 72 NRC licenses. As explained in the discussion of Finding 3, the NRC's inspection findings do not indicate unique management problems at any currently operating ISFSI regulated by the NRC. Generally, the types of issues identified through NRC inspections of ISFSIs are similar to issues identified for 10 CFR Part 50 licensees. Most issues are identified early in the operational phase of the dry cask storage process, during loading preparations and actual spent fuel loading activities. Once an ISFSI is fully loaded with spent fuel, relatively few inspection issues are identified due to the passive nature of these facilities.

2. New Reactors

With regard to the status of contracts requiring DOE to take title to and possession of the irradiated fuel generated by utilities, DOE has prepared updated contracts, and a number of utility companies have signed contracts with the department (*See, e.g.,* ML100280755 and ML083540149). In addition, before licensing a new reactor, the NRC must find that the applicant has entered into a contract with DOE for removal of spent fuel from the reactor site or received written affirmation from DOE that the applicant is actively and in good faith negotiating with the DOE for such a contract. NWPA, Section302(b). This finding will be documented in the Safety Evaluation Report produced by the NRC staff in response to specific license applications for new reactors (*See, e.g.,* ML100280755).

The near-term design certifications and existing or planned combined license applications do not undermine the Commission's confidence that spent fuel storage will become available when storage is needed. These facilities will use the same or similar fuel assembly designs as the nuclear power plants currently operating in the United States, and the spent fuel will be accommodated using existing or similar transportation and storage containers. As discussed under Finding 1, the NRC is also engaged in preliminary interactions with DOE on advanced reactors (*e.g.,* gas-cooled or liquid-metal

cooled technologies). The fuel and reactor components associated with some of these advanced reactor designs would likely require different storage, transportation, and disposal packages than those currently used for spent fuel from light-water reactors. The possible need for further assessment of performance and storage capability for new and different fuels would depend on the number and types of reactors actually licensed and operated. There is currently high uncertainty regarding the construction of advanced reactors in the U.S. In addition, the need to consider waste disposal as part of the overall research and development activities for advanced reactors is one of the issues being considered by DOE, reactor designers, and the NRC (*see, e.g.,* "A Technology Roadmap for Generation IV Nuclear Energy Systems," issued by the U.S. DOE Nuclear Energy Research Advisory Committee and the Generation IV International Forum, December 2002).

Nonetheless, the addition of new plants (if any are licensed and constructed) would add to the amount of spent fuel requiring disposal. This fact does not affect the Commission's confidence that safe storage options will be available when needed because, as the Commission stated in 1990, utilities have sought to meet storage capacity needs at their respective reactor sites (55 FR 38514; September 18, 1990). Specifically, as discussed under Finding 3, NRC licensees have successfully and safely used onsite storage capacity in spent fuel pools and, more recently, in onsite ISFSIs licensed under 10 CFR part 72. In addition, while construction and operation of an MRS facility by DOE is uncertain, the NRC has promulgated regulations that provide a framework for licensing an MRS (*See* 10 CFR part 72; 53 FR 31651; August 19, 1988). Further, while there are unresolved issues that are currently preventing construction and operation of the PFS facility, the extensive safety and environmental reviews that supported issuance of an NRC license for PFS provide added confidence that licensing of a private AFR facility is technically feasible.

The Commission concludes that the events that have occurred since the last formal review of the Waste Confidence Decision in 1990 support a continued finding of reasonable assurance that safe independent onsite spent fuel storage or offsite spent fuel storage will be made available if storage capacity is needed. Specifically, since 1990, NRC licensees have continued to develop and successfully use onsite storage capacity in the form of pool and dry cask storage in a safe and environmentally sound fashion. With regard to offsite storage, the Commission licensed the PFS facility after an extensive safety and environmental review process and a lengthy adjudicatory hearing that resulted in over 70 ASLB and Commission decisions. The Commission also has a regulatory framework for licensing an MRS facility, should the need arise. In addition, DOE has prepared updated contracts to provide for disposal of spent fuel and a number of utility companies have signed contracts with the DOE. This provides the NRC with continued confidence in the Federal commitment to providing for the ultimate disposal of spent fuel.

Based on the above discussion, including its response to the public comments, the Commission reaffirms Finding 5.

Dated at Rockville, Maryland, this 9th day of December 2010.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,

Secretary of the Commission.

[FR Doc. 2010–31637 Filed 12–22–10; 8:45 am]

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Federal Register

Vol. 75, No. 246

Thursday, December 23, 2010

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Presidential Documents
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FEDERAL REGISTER PAGES AND DATE, DECEMBER

74605–75144 1
75145–75362 2
75363–75618 3
75619–75844 6
75845–76250 7
76251–76610 8
76611–76920 9
76921–77520 10
77521–77748 13
77749–78150 14
78151–78586 15
78587–78874 16
78875–79260 17
79261–79946 20
79947–80286 21
80287–80672 22
80673–81076 23

CFR PARTS AFFECTED DURING DECEMBER

At the end of each month, the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

2 CFR
1536 80287

3 CFR
Proclamations:
8606 74605
8607 75613
8608 75615
8609 75617
8610 75845
8611 75847
8612 76251
8613 76611
8614 76613
8615 77519
8616 78149
8617 80671
Executive Orders:
13560 78875
Administrative Orders:
Presidential Determinations:
No. 2011-01 of October 6, 2010 75849
No. 2011-02 of October 8, 2010 75851
No. 2011-03 of October 15, 2010 75853
No. 2011-04 of October 25, 2010 75855
No. 2011-05 of November 19, 2010 75865
Memorandums:
Memorandum of December 20, 2010 80673

5 CFR
630 75363
890 76615
892 76615
1600 78877
1604 78877
1605 74607
1650 78877
1651 78877
1690 78877
5901 79261
Proposed Rules:
732 77783

6 CFR
5 79947

7 CFR
2 79949
6 76253
63 75867
205 77521
271 78151
272 78151
273 78151
276 78151
301 78587
802 76254
946 77749
1463 76921
Proposed Rules:
35 77561
201 ..... 78881, 78932
319 7515
916 77563
917 77563
930 77564

8 CFR
103 79264
214 79264
274a 79264

10 CFR
50 76923
51 ..... 81032, 81037
430 ..... 78810, 80289
431 80292
1010 75373
Proposed Rules:
70 80730
71 75641
73 ..... 75641, 79312
430 ..... 75290, 80731
850 80734

12 CFR
4 75574
21 75576
25 79278
203 80675
226 80675
228 79278
327 79286
345 79278
510 75583
563 75586
563e 79278
701 80677
708a 80678
708b 80678
950 76617
980 76617
1264 76617
1266 76617
1269 76617
1272 76617
1807 75376
Proposed Rules:
213 78632
226 78636
701 ..... 75648, 80634
704 75648
741 75648
745 80367
Ch. XIII 79982

14 CFR

29.....77524
39 .....74608, 74610, 74616, 75868, 75870, 75872, 75878, 75882, 76624, 78588, 78591, 78594, 78596, 78599, 78881, 78883, 79950, 79952, 80293
71 .....76924, 79293, 79294, 79295
97 .....76626, 76628, 80680, 80682
431.....75619, 75621

Proposed Rules:

25 .....76647, 77569, 80735
29.....79312
39 .....74663, 74665, 74668, 74670, 75159, 75932, 75934, 76317, 76926, 77570, 77790, 77793, 77796, 78177, 78937, 79317, 79984, 79988, 79990, 80370, 80738, 80742, 80744
65.....75649
71 .....76648, 76650, 76652, 77572, 77573, 77574, 78645
73.....80372
135.....80746
139.....76928

15 CFR

730.....78154
734.....78154
736.....78154
742.....78154
744.....78154, 78883
745.....78154
806.....76630, 80294
902.....77528, 78344

Proposed Rules:

732.....76653
738.....76653
740.....76653
743.....76653
758.....76653
774.....76653, 76664
922.....76319

16 CFR

322.....75092
1102.....76832

Proposed Rules:

310.....78179

17 CFR

232.....80296
44.....78892

Proposed Rules:

1 .....77576, 78185, 80174, 80572
16.....80572
21.....78185
23 .....75432, 76666, 80638
30.....77588
38.....80572
39 .....77576, 78185, 80747
43.....76140, 76930
45.....76574
49.....80898
155.....80638
165.....75728
190.....75162, 75432
229 .....80374, 80948, 80978
239.....80374
240 .....75208, 77306, 79320, 79992, 80174
242.....75208
249 .....77306, 79320, 80374, 80948, 80978
275.....75650, 77052
279.....77052

18 CFR

284.....80685
342.....80300

Proposed Rules:

35.....75336
40.....80391, 80397
284.....80758

20 CFR

404.....76256
418.....75884

Proposed Rules:

641.....78939

21 CFR

101.....78155
510.....79295, 79955
520.....76259
522.....76260
524.....79295
1308.....79296

Proposed Rules:

58.....80011
101.....76526
500.....79320
1141.....75936

22 CFR

Proposed Rules:

121.....76930, 76935

24 CFR

5.....76260
84.....76260
85.....76260
3500.....74620

26 CFR

1 .....75896, 75897, 76262, 78157, 78160, 80697
31.....75896, 75897
40.....75897
301 .....75896, 75897, 78897
602.....75896, 80697

Proposed Rules:

1 .....75439, 76321, 76940, 78940
300.....76940
301.....75439, 76940

27 CFR

Proposed Rules:

9.....78944

28 CFR

16.....80313
541.....76263

29 CFR

403.....74936, 75904
1926.....80315
4022.....78161
4044.....74622, 78161

Proposed Rules:

104.....80410
1910.....77798
1926.....77798

30 CFR

250.....76632, 80717

31 CFR

103.....75593, 75607
208.....80315
210.....80335
357.....78900
363.....78900
594.....75904
595.....75904
597.....75904

Proposed Rules:

103.....76677

32 CFR

241.....77753

Proposed Rules:

174.....78946

33 CFR

53.....79956
110.....76275
117 .....76279, 76632, 78162, 78163, 78601
154.....79961
155.....79961
165 .....75145, 76280, 77756, 80717
167.....77529

Proposed Rules:

117 .....76322, 76324, 76688
165.....76328, 76943

37 CFR

381.....74623
386.....75624

38 CFR

17.....78901
74.....80720

Proposed Rules:

63.....79323

39 CFR

20.....75151
111.....76282
232.....78915

Proposed Rules:

3055.....75655

40 CFR

36.....80287
51.....80118
52 .....74624, 75625, 75628, 77698, 77758, 78164, 78167, 78602, 79300, 80340
62.....78916
63.....77760
72.....75060
78.....75060
80.....76790, 79964
81.....70302
98 .....74774, 75060, 79092
112.....79961
124.....77230
131.....75762
144.....77230
145.....77230
146.....77230
147.....77230
180 .....74628, 74634, 75389, 76284, 80343, 80346
261.....78918
262.....70304
268.....78918
271.....76633
302.....78918
1500.....75628
1501.....75628
1502.....75628
1503.....75628
1504.....75628
1505.....75628
1506.....75628
1507.....75628
1508.....75628

Proposed Rules:

Ch. I 78198
49.....76331
50.....80420
51.....80420
52 .....74673, 75656, 75658, 76332, 77595, 77798, 78197, 78646, 78949, 78950, 79327
58.....76336
62.....78952
63.....75937,77799, 80220, 80761
82.....78558
85.....76337
86.....76337
168.....74673
262.....79328
271.....76691
600.....76337

41 CFR

300–3.....80350
Ch. 301 80350
301–10.....80350
301–12.....80350
301–30.....80350
301–70.....80350
302–1.....80350
302–2.....80350
302–3.....80350
302–7.....80350
302–11.....80350
303–70.....80350

42 CFR

424.....76293

Proposed Rules:

5.....79329, 79330
489.....80762

44 CFR

64.....80351
65 .....78606, 78607, 78610, 78613, 78615
67 .....77762, 78617, 78926

Proposed Rules:

67 .....75941, 75945, 75949, 77598, 78647, 78650, 78654, 78664

45 CFR

158.....74864

Proposed Rules:

154.....81004

46 CFR

45.....78928
71.....78064
114.....78064
115.....78064
122.....78064
170.....78064
171.....78064
172.....78064
174.....78064
175.....78064

176.....78064
178.....78064
179.....78064
185.....78064
Proposed Rules:
2.....74674

47 CFR

0.....75814, 78169
15.....75814
20.....77781
54.....75393
73 .....76293, 76294, 80354
97.....78169
Proposed Rules:
25.....77602
73.....80013, 80425

48 CFR

Ch. 1.....77722, 77745
1.....77723
2 .....77723, 77727, 77733, 77737
3.....77745
4.....77733
5.....77745
7.....77745
8.....77733
9.....77733, 77739
10.....77745
15.....77741
17.....77733
18.....77733
19.....77727, 77737
22.....77723
31.....77741
33.....77727
35.....77733
41.....77733
52 .....77723, 77727, 77737, 77739, 77741
216.....78619
222.....76295
225.....76297
237.....78619
252.....76295, 76297
Proposed Rules:
10.....78953
201.....75444
211.....80426
212.....80426
215.....75550, 76692
234.....75550, 76692
242.....75550, 76692
244.....75550, 76692
245 .....75444, 75550, 76692
252 .....75444, 75550, 76692, 80426

49 CFR

219.....79308
225.....75911
572.....76636
578.....79978
Proposed Rules:
171.....80765
173.....80765
178.....80765
180.....80765
Ch. 2.....76345
209.....75448
213.....75448
214.....75448
215.....75448
217.....75448
218.....75448
219.....75448
220.....75448
221.....75448
222.....75448
223.....75448
224.....75448
225.....75448
227.....75448
228.....75448
229.....75448
230.....75448
231.....75448
232.....75448
233.....75448
234.....75448
235.....75448
236.....75448
238.....75448
239.....75448
240.....75448
241.....75448
383.....80014
384.....80014
390.....80014
391.....80014
392.....80014
501.....76692
509.....76692
510.....76692
511.....76692
512.....76692
520.....76692
523.....76692
525.....76692
526.....76692
531.....76337, 80430
533.....76337, 80430
571.....76186, 76692
585.....76186
821.....80452
826.....80452
1030.....76946
1031.....76946
1032.....76946
1033.....76946
1034.....76946
1035.....76946
1036.....76946
1037.....76946
1038.....76946
1039.....76946

50 CFR

17 .....75913, 76086, 77962, 78430
21.....75153
253.....78619
300.....74640, 78929
622 .....74648, 74650, 74656, 76300, 76874, 76890, 79309
635 .....75416, 76302, 79309
648 .....74661, 76315, 76925, 80720
660 .....75417, 75638, 75639, 78344
679.....77535, 78172
Proposed Rules:
17 .....77801, 77817, 78030, 78094, 78514
217.....80260, 80773
223 .....77476, 77496, 77602
648.....76351
660.....75449
679 .....76352, 76372, 79330

LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with ''P L U S'' (Public Laws Update Service) on 202–741–6043. This list is also available online at *http://www.archives.gov/federal-register/laws.html*.

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H.R. 2965/P.L. 111–321
Don't Ask, Don't Tell Repeal Act of 2010 (Dec. 22, 2010; 124 Stat. 3515)

H.R. 3082/P.L. 111–322
Continuing Appropriations and Surface Transportation Extensions Act, 2011 (Dec. 22, 2010; 124 Stat. 3518)

Last List December 22, 2010

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