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Vol. 76, No. 139

Wednesday, July 20, 2011

FEDERAL RESERVE SYSTEM

[Docket No. R–1366]

12 CFR Part 226

Regulation Z; Truth in Lending

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

ACTION: Final rule; official staff interpretation.

SUMMARY: The Board is publishing final revisions to the official staff commentary to Regulation Z, which implements the Truth in Lending Act (TILA). The commentary applies and interprets the requirements of Regulation Z. The Board is revising the commentary so that it accurately reflects the effective date of a final rule on loan originator compensation practices that was published in the **Federal Register** on September 24, 2010. At the time the final rule on loan originator compensation was issued, the Board intended it to become effective on April 1, 2011. However, on March 31, 2011, the United States Court of Appeals for the District of Columbia Circuit entered an administrative stay to temporarily delay implementation of the final rule. The administrative stay was in effect from April 1, 2011, until it was dissolved on April 5, 2011. Accordingly, the commentary is being revised to reflect that compliance with the final rule on loan originator compensation was not mandatory until April 6, 2011.

DATES: *Effective Date:* This final rule is effective July 20, 2011.

FOR FURTHER INFORMATION CONTACT: Lorna Neill or Nikita Pastor, Senior Attorneys, (202) 452–3667, Board of Governors of the Federal Reserve System, Division of Consumer and Community Affairs, 20th and C Streets, NW., Washington, DC 20551. For users of a Telecommunications Device for the Deaf (TDD) only, contact (202) 263–4869.

SUPPLEMENTARY INFORMATION:

I. Background

Congress enacted the Truth in Lending Act (TILA; 15 U.S.C. 1601 *et seq.*) based on findings that economic stability would be enhanced and competition among consumer credit providers would be strengthen by the informed use of credit resulting from consumers' awareness of the cost of credit. TILA directs the Board to prescribe regulations to carry out its purposes. *See* 15 U.S.C. 1604(a). In 1994, TILA was amended by the Home Ownership and Equity Protection Act (HOEPA). Among other things, HOEPA directs the Board to prohibit, by regulation or order, acts or practices in connection with mortgage loans that the Board finds to be unfair or deceptive. *See* 15 U.S.C. 1639(l)(2).

TILA is implemented by the Board's Regulation Z (12 CFR part 226). The Board's official staff commentary interprets the regulation, and provides guidance to creditors in applying the regulation to specific transactions. *See* 12 CFR part 226 (Supp. I). Good faith compliance with the commentary affords protection from liability pursuant to section 130(f) of TILA (15 U.S.C. 1640(f)). The commentary is a substitute for individual staff interpretations; it is updated periodically to address significant questions that arise.

On September 24, 2010, the Board published a final rule amending Regulation Z to prohibit certain practices related to mortgage loan originator compensation (the September 2010 final rule). *See* 75 FR 58509, Sept. 24, 2010. The purpose of the final rule is to protect consumers in the mortgage market from unfair or abusive practices that can arise from certain loan originator compensation practices, while preserving responsible lending and sustainable homeownership. The September 2010 final rule prohibits payments to loan originators (which include mortgage brokers and loan officers) based on the terms or conditions of the transaction other than the amount of credit extended. The rule also prohibits any person other than the consumer from paying compensation to a loan originator in a transaction where the consumer pays the loan originator directly. Under the September 2010 final rule, loan originators are prohibited from steering consumers to consummate a loan not in their interest based on the fact that the loan originator will receive greater compensation for that loan.

II. Summary of the Revisions

At the time the September 2010 final rule on loan originator compensation was issued, it had an effective date of April 1, 2011. The commentary accompanying the final rule clarified that it would apply to closed-end transactions secured by a dwelling where the creditor receives a loan application on or after April 1, 2011. *See* comment 36–2. However, on March 31, 2011, the United States Court of Appeals for the District of Columbia Circuit issued an administrative stay to temporarily delay implementation of the September 2010 final rule. (Case No. 11–5078). Consequently, compliance with the final rule on loan originator compensation was not mandatory on April 1, 2011, as originally intended. That administrative stay was dissolved by the Court on April 5, 2011.[1]

Accordingly, the Board is revising the commentary so that it conforms to the Court's administrative stay. Based on the Court's order, during the period from April 1, 2011 to April 5, 2011, compliance with the September 2010 final rule on loan originator compensation was not required. Comment 36–2 is revised based on the fact that the mandatory compliance date was April 6, 2011. The example in comment 36–2 has also been revised to conform to the Court's order.

III. Authority To Issue Final Rule That Is Effective Immediately Without Notice and Comment

The Administrative Procedures Act (APA), 5 U.S.C. 551 *et seq.,* generally requires public notice before promulgation of regulations. *See* 5 U.S.C. 553(b). Unless public notice or a hearing is specifically required by statute, however, the APA also provides exceptions ''for interpretative rules'' and ''when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public

[1] The administrative stay was issued in connection with two lawsuits, filed by organizations representing mortgage loan originators, challenging the Board's authority to issue the September 2010 final rule. Both lawsuits were subsequently dismissed.

procedure thereon are impracticable, unnecessary, or contrary to the public interest.'' 5 U.S.C. 553(b)(A) and (B). The APA also requires that rules generally be published not less than 30 days before their effective date. *See* 5 U.S.C. 553(d). As with the notice and comment requirement, however, the APA provides an exception when ''otherwise provided by the agency for good cause found and published with the rule.'' 5 U.S.C. 553(d)(3).

TILA does not require Board to provide notice or a hearing with respect to this rulemaking. *See* TILA Section 105(a), 15 U.S.C. 1604(a). The revisions made to the commentary by this final rule are interpretative and merely explain that the April 1, 2011, mandatory compliance date that was specified in September 2010 was subsequently changed as a result of the Court's issuance of a temporary administrative stay. The Board finds that there is good cause to conclude that providing notice and an opportunity to comment before issuing this final rule is unnecessary and that there is good cause for the final rule to be effective immediately. The change that is noted in this final rule has already occurred as a result of the Court's prior order. The final rule merely makes conforming changes so that the commentary accurately reflects the effect that the Court's order had on mandatory compliance date.

List of Subjects in 12 CFR Part 226

Advertising, Consumer protection, Federal Reserve System, Mortgages, Reporting and recordkeeping requirements, Truth in lending.

Text of Final Revisions

For the reasons set forth in the preamble, the Board amends Regulation Z, 12 CFR part 226, as set forth below:

PART 226—TRUTH IN LENDING (REGULATION Z)

■ 1. The authority citation for part 226 continues to read as follows:

Authority: 12 U.S.C. 3806; 15 U.S.C. 1604, 1637(c)(5), and 1639(l); Pub. L. 111–24 § 2, 123 Stat. 1734; Pub. L. 111–203, 124 Stat. 1376.

■ 2. In Supplement I to part 226, in Subpart E, under *Section 226.36—Prohibited Acts or Practices in Connection With Credit Secured by a Dwelling,* revise paragraph 2 to read as follows:

Supplement I To Part 226—Official Staff Interpretations

* * * * *

Subpart E—Special Rules for Certain Home Mortgage Transactions

* * * * *

Section 226.36—Prohibited Acts or Practices in Connection with Credit Secured by a Dwelling

* * * * *

2. *Mandatory compliance date for §§ 226.36(d) and (e).* The final rules on loan originator compensation in § 226.36 apply to transactions for which the creditor receives an application on or after the effective date. For example, assume a mortgage broker takes an application on March 10, 2011, which the creditor receives on March 25, 2011. This transaction is not covered. If, however, the creditor does not receive the application until April 8, 2011, the transaction is covered.

* * * * *

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, July 14, 2011.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2011–18215 Filed 7–19–11; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 187

[Docket No.: FAA–2010–0326; Amendment No. 187–35]

RIN 2120–AJ68

Update of August 2001 Overflight Fees

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This final rule updates existing Overflight Fees using more current FAA cost accounting data and air traffic activity data. Overflight Fees are charges for aircraft flights that transit U.S.-controlled airspace, but neither land in nor depart from the United States. These fees have not been updated in nearly a decade and are based upon 1999 cost accounting and activity data. This action is necessary because operational costs have increased steadily since the fees were last updated. This adjustment of Overflight Fees will result in an increased level of cost recovery for the services being provided.

DATES: Effective October 1, 2011.

FOR FURTHER INFORMATION CONTACT: For technical questions concerning this final rule, contact David Rickard, Office of Financial Controls, Financial Analysis Division (AFC 300), Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 493–5480; e-mail to *david.rickard@FAA.gov.*

For legal questions concerning this final rule contact Michael Chase, AGC–240, Office of Chief Counsel, Regulations Division, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267–3110; e-mail to *michael.chase@faa.gov.*

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to establish these fees is found in Title 49 of the United States Code. This rulemaking has been conducted under the authority described in Chapter 453, Section 45301 *et seq.* Under that Chapter, the FAA is charged with prescribing regulations for the collection of fees for air traffic control and related services provided to aircraft, other than military and civilian aircraft of the United States Government or a foreign government, that transit U.S.-controlled airspace, but neither take off from nor land in the United States (''Overflights''). This final rule is within the scope of that authority.

Background

The FAA's Overflight Fees were initially authorized in the Federal Aviation Reauthorization Act of 1996 (Pub. L. 104–264, enacted October 9, 1996). Following enactment of the initial fee authority, and as mandated by that authority, the FAA issued an Interim Final Rule (IFR), ''Fees for Air Traffic Services for Certain Flights through U.S.-Controlled Airspace'' (62 FR 13496), on March 20, 1997. Under the terms of the IFR, the FAA sought public comment on the IFR while concurrently beginning to assess Overflight Fees 60 days after its publication, on May 19, 1997.

On July 17, 1997, petitions for judicial review of the IFR were filed in the U.S. Court of Appeals for the District of Columbia (the Court) by the Air Transport Association of Canada (ATAC) and seven foreign air carriers. Those petitions were consolidated into a single case (*Asiana Airlines* v. *FAA,* 134 F.3d 393 (DC Cir. 1998)). The litigation proceeded throughout the remainder of 1997 while the FAA continued to collect fees pursuant to the statute.

On January 30, 1998, the Court issued a decision, upholding the FAA on three process and procedure issues, but vacating the Rule because the Court found that the methodology the FAA used to allocate costs did not conform to the statute. The FAA immediately suspended billing operations, and eventually refunded nearly $40 million in fees that had been collected.

Although the 1997 IFR (62 FR 13496) had been set aside by the Court, the statutory requirement that the FAA establish Overflight Fees through an IFR remained in effect. One of the principal criticisms the FAA had received in the public comments on its 1997 IFR concerned the quality of the cost information upon which the Overflight Fees were based. The FAA had already begun developing a new Cost Accounting System (CAS) in 1996. Early data from the new CAS was becoming available in 1998. Thus, when the FAA decided, following the initial litigation, to issue a new IFR, a key element of that decision was that the fees would be derived from cost data from the new CAS.

A new IFR was published in the **Federal Register** on June 6, 2000 (65 FR 36002), with fees scheduled to go into effect on August 1, 2000. This new IFR was challenged in court by the ATAC and a slightly different group of seven foreign air carriers. The FAA began assessing and collecting the new Overflight Fees as scheduled on August 1, 2000, while public comments were still being received by the FAA on its second IFR. The litigation proceeded concurrently, with oral arguments held on May 14, 2001.

On July 13, 2001, the Court again vacated the FAA's IFR, this time because the Court believed the FAA had failed to explain a key assumption in its costing methodology. (*Air Transport Association of Canada* vs. *FAA;* 00–1344, July 13, 2001). Under the Court's order, there were 45 days before the IFR was to be vacated. As noted above, the FAA had solicited public comment on the IFR at the time it was published. The FAA had received many comments on the several issues raised in the litigation. At the time the Court's decision was issued, the FAA was nearing completion of a Final Rule that would address these issues in the disposition of public comments section of the Rule.

The FAA therefore proceeded on two fronts. It successfully petitioned the Court not to vacate the IFR while it proceeded concurrently with issuance of the Final Rule (''Fees for FAA Services for Certain Flights,'' 66 FR 43680) on August 20, 2001, with revised fees effective immediately. In addition to addressing the public comments received on the IFR, the Final Rule reduced fees by about 15 percent due to adjustments in the original cost data. A new challenge to the revised fees was brought after the issuance of the Final Rule by ATAC and the same group of air carriers. The two cases, one challenging the IFR (65 FR 36002) issued in 2000 and the other challenging the Final Rule (66 FR 43680) issued in 2001, were combined by the Court into a single case.

While the litigation was still pending, on November 19, 2001, Congress enacted the Aviation and Transportation Security Act (ATSA), which included a provision that amended the Overflight Fee authorization: (1) To require that the fees be ''reasonably'' (rather than ''directly'') related to costs; (2) to clarify that the Administrator has sole authority to determine the costs upon which the fees are based; and (3) to state explicitly that such cost determinations by the Administrator are not subject to judicial review. Meanwhile, the litigation proceeded into 2003, with the FAA continuing to collect the fees as required by statute.

On April 8, 2003, the Court issued a decision setting aside the Final Rule and remanding it back to the FAA, finding that the agency had not adequately explained its handling of controller labor costs in deriving the fees. (*Air Transport Association of Canada* v. *FAA,* 323 F.3d 1093 (DC Cir. 2003)). The Court also found that the Overflight Fees amendments in the ATSA statute were inapplicable because of a generic ''savings'' provision in the ATSA legislation that stated that nothing enacted in ATSA was applicable to any litigation ongoing prior to the date of enactment of ATSA. Fee collections were immediately suspended.

On December 12, 2003, Congress enacted VISION 100—CENTURY OF AVIATION REAUTHORIZATION ACT, (Vision 100). Section 229 of that Act explicitly ''adopted, legalized, and confirmed'' both the IFR published in 2000 and the Final Rule published in 2001. In addition, the FAA was directed to hold a consultation meeting with users (those who pay the Overflight Fees to the FAA) and to submit a report to Congress addressing the issues that had been in dispute in the litigation before resuming the billing and collection of the Overflight Fees.

Because there were ambiguous and potentially conflicting provisions in Vision 100 concerning Overflight Fees, the Administrator issued an Order on July 21, 2004, that set forth her interpretation of the language of the statute and, based on that interpretation, made determinations as to the ultimate disposition of Overflight Fees collected by the FAA under both the 2000 IFR and the 2001 Final Rule. The FAA retained a portion of the funds collected under the Final Rule, while either refunding or providing credits to the airlines for all of the fees collected under the IFR and a portion of the fees collected under the Final Rule. A copy of that Order, ''Order Directing the Disposition of Certain Fees Collected by the Federal Aviation Administration Pursuant to 49 USC Section 45301,'' was published in the **Federal Register** on August 4, 2004 (69 FR 47201).

The FAA met with users in September 2004 and submitted a report to Congress at the same time, as mandated by the Vision 100 statute. This cleared the way for the FAA to resume the billing and collection of Overflight Fees. In most cases, amounts previously collected by the FAA under the IFR and under the Final Rule up until the date of the ATSA enactment were provided as credits to frequent payers. These amounts were, in most cases, roughly offset by amounts owed by the carriers and other users for the 1-year period from March 2003 through February 2004. The carriers had not been billed for this period while the litigation was ongoing, but were ultimately determined by the Administrator to be liable for those fees.

Since that time, the FAA has followed the normal process of issuing monthly bills for the services provided to Overflights. The fees currently being charged were derived from cost and activity data for FY 1999. This Final Rule updates the existing fees by using cost and activity data for FY 2008 to derive the fees. The cost methodology applied in this Final Rule is applied in the same manner as in 2001, except that overhead has been included in the cost base for the fees this time as a direct result of the ATSA amendment that changed the previous statutory requirement that fees be ''directly'' related to costs to a less stringent requirement that the fees be ''reasonably'' related to costs.

The FAA's CAS has been evolving and improving over time. The CAS has always relied on the best available data, and as new systems and techniques have evolved, the quality and accuracy of the data has improved. There are areas, such as the reporting of labor costs, where costs were allocated or assigned in the past based on estimates, but today are determined by actual data. This is not a difference in how the data are gathered, but rather an improvement in the quality and accuracy of the basic data. A detailed explanation of how the CAS data were assembled can be found in the ''Costing Methodology Report, FY

2008,'' which has been placed in the docket for this rulemaking.

The evolution and improvement of the FAA's financial management practices over time, including its cost accounting, is worth noting. Following several years in the early days of the CAS, in which the FAA's auditors reported material weaknesses in areas including cost accounting information and accounting for property, plant, and equipment, the FAA received unqualified audit opinions on its financial statements in 9 of the last 10 years (FYs 2001–2010). The auditor's opinion for FY 2006 was initially qualified due to untimely processing of transactions and accounting for construction in progress, but was revised the following year to an unqualified audit opinion after the FAA corrected and restated its FY 2006 financial statements. Thus, following the restatement and revised auditor's opinion, the FAA's financial statements have been unqualified for 10 years. It is also significant that, in 5 of those 10 years, including the last 3, those unqualified opinions were ''with no material weaknesses.''

This continuing improvement in the quality and transparency of the FAA's financial statements is a significant contributing factor to the fact that the Association of Government Accountants has awarded the Certificate of Excellence in Accountability Reporting (CEAR) to the FAA for its Performance and Accountability Reports in 7 of the last 8 years (FYs 2003–2010). The CEAR is considered the highest form of recognition for Federal Government financial management reporting.

Overflight Fees Aviation Rulemaking Committees (ARC)

In 2004, the FAA established an Overflight Fees ARC. That Committee held two meetings in early 2005, but never issued a report or made a recommendation to the FAA before its Charter expired. Subsequently, on December 17, 2008, the FAA issued a new Charter for an Overflight Fees ARC to advise and make recommendations to the FAA on the updating of its Overflight Fees. At the same time, the FAA initiated a rulemaking project to update the Overflight Fees, with the expectation that the activities and the end product(s) of the ARC deliberations would likely become an integral part of this rulemaking. The Overflight Fees ARC met several times in 2009 and issued its report and recommendations to the FAA on August 26, 2009. A copy of this report has been placed in the docket. The report contains three principal recommendations: (1) That the FAA pursue the updating of its Overflight Fees through the normal notice and comment type of rulemaking, rather than through the interim final rule process previously mandated by Congress; (2) that, in updating the fees, the FAA abide by the policies of the International Civil Aviation Organization (ICAO), whereby the principle of gradualism is applied so that any substantial fee increase (as in this case where a 9-year update is involved) is spread over several years; and (3) that, in this instance, the specific increases be accomplished over 4 increments, on October 1st of each year from 2011 through 2014, with annual increases of 14% for Enroute and 8% for Oceanic.

After a careful and thorough review by the FAA of the ARC report and recommendations, the FAA concluded that the ARC recommendations provide a reasonable and workable framework for moving forward on a consensus basis to update the Overflight Fees. Thus, the FAA proceeded to draft a notice of proposed rulemaking (NPRM) to update the fees by implementing the three recommendations of the ARC.

Summary of the Notice of Proposed Rulemaking (NPRM)

The NPRM laid out an explicit plan to update the Overflight Fees by implementing the three ARC recommendations. This would be accomplished by increasing the fees in four annual increments to the amounts that would have produced full cost recovery in FY 2008. The fee levels that would eventually be achieved reflect increases above current levels of 69% in the Enroute environment and 36% in Oceanic. This would be accomplished by increasing the fees on October 1 in each of the years 2011 through 2014 at annual compounded rates of 14% for Enroute and 8% for Oceanic. The actual dollar amounts of each fee as of each of the four October 1st fee revision dates would be as follows:

Fee revision date	Enroute (per 100 nautical miles)	Oceanic (per 100 nautical miles)
October 1, 2011	$38.44	$17.22
October 1, 2012	43.82	18.60
October 1, 2013	49.95	20.09
October 1, 2014	56.86	21.63

The NPRM was published in the **Federal Register** on September 28, 2010, with public comments due in 90 days, on December 27, 2010 (75 FR 59661). A more detailed discussion of the specifics of the fee update proposal can be found in that document.

Disposition of Comments

The FAA received only one letter of comment on the NPRM. That letter was from Lufthansa German Airlines, and was signed by the individual who had served as the Lufthansa representative on the aforementioned ARC on Overflight Fees. While the letter stated clearly that Lufthansa supports the ARC process and the recommendations of the ARC, it nevertheless went on to identify four topics that it believed should be further examined by the FAA before proceeding with any increase of the existing Overflight Fees. Those four topics are listed below, followed in each case by the FAA's response to the comment.

1. Enroute Costs for Air Traffic Control (ATC) Services in Lower Airspace

Noting that there are low activity airports and airfields that are not served by a terminal radar approach control (TRACON) or an air traffic control tower and that, in these instances, ATC services are provided by Enroute controllers, Lufthansa asserts that the costs of these Enroute controllers should be removed from the Enroute (and thus the Overflight Fee) cost base.

The FAA does not agree with Lufthansa's assertion. The FAA notes that while there are low activity airports and airfields where traffic is controlled by Enroute controllers, the level of such activity is low enough that it does not require increased staffing and thus the costs of such services are *de minimis.* This issue was addressed by the FAA's cost accounting team at the time the Cost Accounting System was being developed. This information was derived from conversations between the cost accounting team and the Air Route Traffic Control Center (ARTCC) managers. The team determined that there was not a significant amount of Enroute controller time spent on aircraft in lower airspace.

The FAA's Air Traffic Organization (ATO) costs do not vary with the altitude of an aircraft. The infrastructure costs are mostly fixed (*e.g.,* the building is there, the radars are operational, the communication lines are open, the automation system processes the radar targets, and the environmental systems are operational). The costs of controllers in the short term are also fixed. They are paid based on the volume and complexity of the work at the facility to which they are assigned, whether they work a single aircraft or numerous aircraft in a given period of time, and whether those aircraft are in straight and level flight or are in transition. The fact that the job may be more complex at the moment because of crossing traffic or transitioning traffic does not drive their costs. The workload is very dynamic in the radar environment, but a controller costs the same to the ATO whether he or she is working a complex sector at a busy time of day or a less busy sector after the push of traffic is over.

2. Costs of Flow Control

Lufthansa states that there are controllers in most, and possibly all, FAA Centers who are working ''flow control'' and that the work of these controllers does not benefit the overflight traffic and should therefore be removed from the Enroute (and thus the Overflight Fee) cost base.

The FAA disagrees. As discussed at some length in the Introduction, Overview, and Background sections of the current Final Rule on Overflight Fees (66 FR 43680–43681), the FAA air traffic control system is a large, complex, integrated system with many components, all of which must work together for the benefit of all users, whether they be overflights or non-overflights. Flow control is a small but important and integral part of that system, and benefits all users, including overflights. For example, when weather conditions necessitate changes in the routing and management of air traffic, it is all traffic, overflights and non-overflights, that are affected. There is no rational reason for excluding flow control costs from the Enroute cost base. Moreover, the costs of air traffic flow management are an explicitly allowable item of cost for cost recovery purposes under the International Civil Aviation Organization's (ICAO) Policies on Charges for Airports and Air Navigation Services (*See ICAO Document 9082*).

3. Overhead Costs

Lufthansa notes that the FAA is a large, multi-faceted organization, and suggests, for that reason, it is difficult to properly allocate the correct amount of overhead to the air navigation activity, and suggests that FAA the ''only allocate overhead using a marginal cost approach.''

The FAA does not agree with Lufthansa's suggestion. The FAA believes the allocation of FAA overhead costs is in accordance with generally accepted accounting practices. The Lufthansa comments on this topic suggest a possible misunderstanding of how FAA overhead is allocated and assigned, although it was discussed in meetings of the ARC and was addressed in a set of questions given to the FAA by the ARC and answered by the FAA. For example, Lufthansa appears to believe that the presence of other aviation related activities, such as Airport Grants and Standards and Aviation Safety, results in the assignment of some of their costs to the air traffic control activity. That is not the case. Both Airports and Aviation Safety are separate FAA Lines of Business (LOB) that are themselves the recipient of their own shares of overhead, and their costs are kept separate and are not allocated or assigned to the air traffic cost pool. The specific details of how FAA overhead is allocated and assigned to the Air Traffic LOB are set forth in the next several paragraphs, and all of this is explained in greater detail in the Costing Methodology Report that has been placed in the docket for this rulemaking.

The FAA overhead allocation can be described in two steps: (1) FAA Headquarters and Regional Overhead; and (2) ATO Overhead.

(1) *FAA Headquarters and Regional Overhead.* A series of *pro rata* allocations are performed in the Cost Accounting System (CAS) to assign the FAA headquarters indirect costs to projects, service delivery points (SDPs), and services within each LOB and other Regional and Center Operations. Then, a series of *pro rata* allocations are made to assign the Aeronautical Center (AMC) indirect costs to projects, SDPs, and services within each LOB located at the Aeronautical Center. Note that not all LOBs track costs at a service and/or SDP level. In these cases, costs are assigned at the project level.

The FAA Headquarters Overhead (excluding human resources) is assigned to projects, SDPs, and services within each LOB based on a percentage of total direct cost. Human resources services indirect costs are assigned to projects, SDPs, and services within each LOB based on the percentage of direct labor cost. The portion of the AMC cost assigned to each LOB is based on the percentage of total cost assigned to each LOB.

FAA Regional Overhead costs represent the indirect cost of FAA general and administrative services provided to the lines of business by personnel residing at FAA regional headquarters offices. A series of *pro rata* allocations are performed in the CAS to assign the FAA regional overhead costs to projects, SDPs, and services based on a percentage of total direct cost within the regions.

(2) *ATO Overhead.* The ATO overhead allocation can be described in three kinds of allocation steps: (i) Service Area Indirect, (ii) Service Unit Indirect and (iii) ATO Indirect.

(i) Service Area Indirect. A *pro rata* allocation is performed in the CAS to assign each Service Area's indirect costs to the direct projects, SDPs, and services that they support. The portion of the cost that is assigned to each project, SDP, and service is determined based on the percentage of total direct cost that is assigned to each project, SDP, and service for that Service Area.

(ii) Service Unit Indirect. A *pro rata* allocation is performed in the CAS to assign each Service Unit's Headquarters' indirect costs to the direct projects, SDPs, and services that they support. The portion of the cost that is assigned to each project, SDP, and service is determined based on the percentage of total direct cost that is assigned to each project, SDP, and service for that Service Unit.

(iii) ATO Indirect. A *pro rata* allocation is performed in the CAS to assign each of ATO's staff offices' indirect costs to the projects, SDPs, and services of all Service Units. The portion of the cost that is assigned to each project, SDP, and service is determined based on the percentage of total direct cost that is assigned to each project, SDP, and service of each Service Unit.

As a final point on the subject of inclusion of overhead in the cost base for Overflight Fees, it should be noted that all overhead costs were excluded from the cost base for the previous Final Rule because the applicable statutory standard at that time required that the fees be ''directly related'' to the costs of the ATC services provided or made available. Congress has since changed that statutory standard to ''reasonably related.'' In light of this change, the FAA believes it is reasonable to include overhead in the cost base. That is in accordance with generally accepted accounting practices as well as with guidance on fee setting issued by ICAO (Policies on Charges for Airports and Air Navigation Services, Document 9082).

4. Overflight Fees and the "Fairness" of the International Aviation Tax

Lufthansa asserts that, based on its own analysis of its international trans-Atlantic flights to and from the United States (non-overflights), the passengers on those flights are "overpaying" taxes into the Airport & Airway Trust Fund by at least a factor of four. For that reason, they argue that charging an "increased overflight fee renders the system even more unfair."

The FAA believes this comment is beyond the scope of this rulemaking. The "fairness" of the international aviation taxes has nothing to do with the validity of, or justification for, an increase in Overflight Fees. The two are unrelated. Aviation tax levels are set by the U.S. Congress and are beyond the control of the FAA. Similarly, Congress has directed the FAA to establish cost-based Overflight Fees. Therefore, to retain the cost-based relationship, the FAA must periodically review and revise its Overflight Fees. Fairness of the aviation taxes notwithstanding, the FAA is obliged to update its Overflight Fees.

In conclusion, the FAA does not believe any of the four points raised by Lufthansa and discussed in this section require any change in the process and specificity of the Overflight Fee update proposed in the NPRM. Accordingly, the FAA is adopting the amendment to Appendix B to Part 187—Fees for FAA Services for Certain Flights as proposed in the NPRM without change.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires that the FAA consider the impact of paperwork and other information collection burdens imposed on the public. The FAA has determined that there is no new requirement for information collection associated with this final rule. The information used to track overflights (including the information collection necessary to implement this final rule) can be accessed from the flight plans filed with the FAA. The collection of information from the Domestic and International Flight Plans is approved under OMB Collection Control #2120–0026.

International Compatibility

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

Regulatory Evaluation, Regulatory Flexibility Determination, International Trade Impact Assessment, and Unfunded Mandates Assessment

Changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 and Executive Order 13563 direct that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 (Pub. L. 96–354) requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or Tribal governments, in the aggregate, or by the private sector, of $100 million or more annually (adjusted for inflation with base year of 1995). This portion of the preamble summarizes the FAA's analysis of the economic impacts of this proposed rule.

Department of Transportation Order DOT 2100.5 prescribes policies and procedures for simplification, analysis, and review of regulations. If the expected cost impact is so minimal that a proposed or final rule does not warrant a full evaluation, this order permits a statement to that effect and the basis for it to be included in the preamble if a full regulatory evaluation of the cost and benefits is not prepared. Such a determination has been made for this final rule. The reasoning for this determination follows:

Benefit

The benefit of this final rule will be that the overflight fees will be more closely related to the actual costs of providing FAA's services for these flights.

Costs

Taxes and government fees are transfer payments, and, by OMB directive, transfers are not considered a societal cost. Therefore, this rule imposes no costs. We do provide an estimate of the transfers. There will be a 4-year phase-in of fees with yearly increases (14% Enroute and 8% Oceanic). Increases would begin in 2011 and end in 2014. We have determined that approximately 80% of Overflight Fees for domestic operators will be Enroute and 20% will be Oceanic (see Table 1).

Most of the transfers from this final rule will be borne by foreign operators. The estimated transfers from this final rule from foreign operators to the FAA are about $73 million ($52 million, present value). See Table 2.

The FAA estimates that the total transfers resulting from this final rule from U.S. entities to the FAA over 5 years will be about $1.1 million ($0.8 million, present value). Again, government fees and taxes are considered transfers and not societal costs, so this final rule does not increase society's costs.

Table 1. Domestic Operators' Overflight Fees

Oceanic	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015	FY 2011-2015
Current Fees (20%)	$152,612	$152,612	$152,612	$152,612	$152,612	$763,059
Proposal	$152,612	$164,821	$178,006	$192,247	$207,627	$895,312
Incremental Transfer	$0	$12,209	$25,395	$39,635	$55,015	$132,254
EnRoute	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015	FY 2011-2015
Current Fees (80%)	$610,447	$610,447	$610,447	$610,447	$610,447	$3,052,236
Proposal	$610,447	$695,910	$793,337	$904,404	$1,031,021	$4,035,119
Incremental Transfer	$0	$85,463	$182,890	$293,957	$420,574	$982,883
Total Incremental Transfers	$0	$97,672	$208,285	$333,592	$475,589	$1,115,137
PV Transfers	$0	$79,729	$158,899	$237,847	$316,905	$793,380

Table 2. Foreign Operators' Overflight Fees

Oceanic	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015	FY 2011-2015
Current Fees	$21,640,240	$21,640,240	$21,640,240	$21,640,240	$21,640,240	$108,201,200
Proposal	$21,640,240	$23,371,459	$25,241,176	$27,260,470	$29,441,308	$126,954,653
Incremental Transfer	$0	$1,731,219	$3,600,936	$5,620,230	$7,801,068	$18,753,453
EnRoute	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015	FY 2011-2015
Current Fees	$33,784,067	$33,784,067	$33,784,067	$33,784,067	$33,784,067	$168,920,335
Proposal	$33,784,067	$38,513,836	$43,905,773	$50,052,582	$57,059,943	$223,316,202
Incremental Transfer	$0	$4,729,769	$10,121,706	$16,268,515	$23,275,876	$54,395,867
Total Incremental Transfers	$0	$6,460,989	$13,722,642	$21,888,745	$31,076,944	$73,149,320
PV Transfers	$0	$5,274,091	$10,468,938	$15,606,373	$20,707,880	$52,057,282

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

Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (RFA) establishes ''as a principle of regulatory issuance that agencies shall endeavor, consistent with the objective of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the business, organizations, and governmental jurisdictions subject to regulation.'' To achieve that principle, the RFA requires agencies to solicit and consider flexible regulatory proposals and to explain the rationale for their actions. The RFA covers a wide-range of small entities, including small businesses, not-for-profit organizations and small governmental jurisdictions.

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

The FAA ranked in descending order all domestic entities based on their Overflight Fees. Then we identified 5 small entities having publicly-available financial information (using a size standard of 1,500 or fewer employees) in the top 20 percent of the ranking. We retrieved their annual revenue from World Aviation Directory and compared it to their annualized compliance costs. Of these 5 entities, all of them have annualized compliance costs as a percentage of annual revenues lower than 0.1 percent. We believe this economic impact is not significant. Furthermore, we received no comments from small entities in response to the NPRM. Consequently, as the FAA Administrator, I certify that the final rule will not have a significant economic impact on a substantial number of small entities.

International Trade Impact 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 standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Pursuant to these Acts, the establishment of standards is not considered an unnecessary obstacle to the foreign commerce of the United States, so long as the standard has a legitimate domestic objective, such as the protection of safety, and does not operate in a manner that excludes imports that meet this objective. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. The FAA has assessed the potential effect of this final rule and determined that it will primarily affect foreign users, generally commercial operators. Foreign operators are charged a fee only if they overfly (do not land in) the United States. The FAA believes it is highly unlikely that foreign commercial users will alter their behavior to avoid paying the fees. We believe that the final rule could enhance the competitiveness of domestic commercial operators relative to international carriers.

Unfunded Mandates Assessment

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of $100 million or more (in 1995 dollars) in any one year by State, local, and Tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a ''significant regulatory action.'' The FAA currently uses an inflation-adjusted value of $140.8 million in lieu of $100 million. This final rule does not contain such a mandate; therefore, the requirements of Title II of the Act do not apply.

Executive Order 13132, Federalism

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

Environmental Analysis

FAA Order 1050.1E identifies FAA actions that are categorically excluded from preparation of an environmental assessment or environmental impact statement under the National Environmental Policy Act in the absence of extraordinary circumstances. The FAA has determined this rulemaking action qualifies for the categorical exclusion identified in paragraph 312d and involves no extraordinary circumstances.

Regulations That Significantly Affect Energy Supply, Distribution, or Use

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

Availability of Rulemaking Documents

You can get an electronic copy of rulemaking documents 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 notice, amendment, or docket number of this rulemaking.

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, *etc.*). You may review DOT's complete Privacy Act statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or you may visit *http://DocketsInfo.dot.gov.*

Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 requires FAA to comply with small entity requests for information or advice about compliance with statutes and regulations within its jurisdiction. If you are a small entity and you have a question regarding this document, you may contact your local FAA official, or the person listed under the **FOR FURTHER INFORMATION CONTACT** heading at the beginning of the preamble. You can find out more about SBREFA on the Internet at *http://www.faa.gov/regulations_policies/rulemaking/sbre_act/.*

List of Subjects in 14 CFR Part 187

Administrative practice and procedure, and Air transportation.

The Amendment

In consideration of the foregoing, the Federal Aviation Administration amends Chapter I of Title 14, Code of Federal Regulations, as follows:

PART 187—FEES

■ 1. The authority citation for part 187 continues to read as follows:

Authority: 31 U.S.C. 9701, 49 U.S.C. 106(g), 49 U.S.C. 106(l)(6), 40104–401–5, 40109, 40113–40114, 44702.

■ 2. In part 187, Appendix B is amended by revising paragraph (e)(2) to read as follows:

Appendix B to Part 187—Fees for FAA Services for Certain Flights

* * * * *

(e) * * *

(2) A User (operator of an Overflight) is assessed a fee for each 100 nautical miles (or portion thereof) flown in each segment and type of U.S.-controlled airspace. Separate calculations are made for transiting Enroute and Oceanic airspace. The total fee charged for an Overflight between any entry and exit point is equal to the sum of these two charges. This relationship is summarized as:

$R_{ij} = X^*DE_{ij} + Y^*DO_{ij}$,

Where:

R_{ij} = the fee charged to aircraft flying between entry point i and exit point j,

DE_{ij} = total great circle distance traveled in each segment of U.S.-controlled Enroute airspace expressed in hundreds of nautical miles for aircraft flying between entry point i and exit point j for each segment of Enroute airspace.

DO_{ij} = total great circle distance traveled in each segment of U.S.-controlled Oceanic airspace expressed in hundreds of nautical miles for aircraft flying between entry point i and exit point j for each segment of Oceanic airspace.

X and Y = the values respectively set forth in the following schedule:

Time period	X (enroute)	Y (oceanic)
Through September 30, 2011	$33.72	$15.94
October 1, 2011 through September 30, 2012	38.44	17.22
October 1, 2012 through September 30, 2013	43.82	18.60
October 1, 2013 through September 30, 2014	49.95	20.09
October 1, 2014 and beyond	56.86	21.63

* * * * *

Issued in Washington, DC, on July 13, 2011.

J. Randolph Babbitt,

Administrator.

[FR Doc. 2011–18285 Filed 7–19–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 878

[Docket No. FDA–2011–N–0499]

Medical Devices; General and Plastic Surgery Devices; Classification of the Focused Ultrasound Stimulator System for Aesthetic Use

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is classifying the focused ultrasound stimulator system for aesthetic use into class II (special controls). The special control(s) that will apply to the device is the guidance document entitled ''Class II Special Controls Guidance Document: Focused Ultrasound Stimulator System for Aesthetic Use.'' The Agency is classifying the device into class II (special controls) in order to provide a reasonable assurance of safety and effectiveness of the device.

DATES: This rule is effective August 19, 2011. The classification was effective on September 11, 2009.

FOR FURTHER INFORMATION CONTACT: Richard Felten, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 1436, Silver Spring, MD 20993–0002, 301–796–6392.

SUPPLEMENTARY INFORMATION:

I. Background

In accordance with section 513(f)(1) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 360c(f)(1)), devices that were not in commercial distribution before May 28, 1976 (the date of enactment of the Medical Device Amendments of 1976), generally referred to as postamendments devices, are classified automatically by statute into class III without any FDA rulemaking process. These devices remain in class III and require premarket approval, unless and until the device is classified or reclassified into class I or II, or FDA issues an order finding the device to be substantially equivalent, in accordance with section 513(i) of the FD&C Act, to a predicate device that does not require premarket approval. The Agency determines whether new devices are substantially equivalent to predicate devices by means of premarket notification procedures in section 510(k) of the FD&C Act (21 U.S.C. 360(k)) and part 807 of the regulations (21 CFR part 807).

Section 513(f)(2) of the FD&C Act provides that any person who submits a premarket notification under section 510(k) of the FD&C Act for a device that has not previously been classified may, within 30 days after receiving an order classifying the device into class III under section 513(f)(1) of the FD&C Act, request FDA to classify the device under the criteria set forth in section 513(a)(1) of the FD&C Act. FDA will, within 60 days of receiving this request, classify the device by written order. This classification will be the initial classification of the device. Within 30 days after the issuance of an order classifying the device, FDA must publish a notice in the **Federal Register** announcing this classification.

In accordance with section 513(f)(1) of the FD&C Act, FDA issued an order on March 14, 2008 classifying the Ulthera™ Focused Ultrasound Stimulator System for Aesthetic Use into class III, because it was not substantially equivalent to a device that was introduced or delivered for introduction into interstate commerce for commercial distribution before May 28, 1976, or a device which was subsequently reclassified into class I or class II. On April 11, 2008, Ulthera, Inc. submitted a petition requesting classification of the Ulthera™ Focused Ultrasound Stimulator System for Aesthetic Use under section 513(f)(2) of the FD&C Act. The manufacturer recommended that the device be classified into class II (Ref. 1).

In accordance with section 513(f)(2) of the FD&C Act, FDA reviewed the petition in order to classify the device under the criteria for classification set forth in section 513(a)(1) of the FD&C Act. FDA classifies devices into class II if general controls by themselves are insufficient to provide reasonable assurance of safety and effectiveness, but there is sufficient information to establish special controls to provide reasonable assurance of the safety and effectiveness of the device for its intended use. After review of the information submitted in the petition, FDA determined that the device can be classified into class II with the establishment of special controls. FDA believes these special controls will provide reasonable assurance of the safety and effectiveness of the device.

The device is assigned the generic name Focused Ultrasound Stimulator System for Aesthetic Use and it is identified as a device using focused ultrasound to produce localized, mechanical motion within tissues and cells for the purpose of producing either localized heating for tissue coagulation or for mechanical cellular membrane disruption intended for noninvasive aesthetic use.

FDA has identified the following risks to health associated specifically with this type of device and the recommended measures to mitigate these risks.

- Thermal injury from focused ultrasound exposure (thermal damage), such as erythema, edema, pigmentary changes, and pain. These are commonly seen risks associated with any energy delivery system that creates tissue heating. This risk is addressed by recommended treatment parameters that have been shown to be safe with little or no adverse effects. In addition, the recommended labeling includes warnings related to patient reaction in terms of pain and information to user in terms of observable skin reactions that are known to be precursors to the potential thermal adverse effects.
- Mechanical injury from focused ultrasound exposure (mechanical damage) induced by either cavitation or noncavitation means. Notable effects are pain and petechial hemorrhage (red spots). Further, skin contour changes due to scar formation are possible. This risk is addressed by recommended treatment parameters that have been shown to be safe with little or no adverse effects.
- Ocular injury represents a potentially unique serious risk from inadvertent ultrasound exposure. The mitigation of this risk is addressed by labeling recommendations to warn the user not to expose the eye to ultrasound radiation, as well as specific directions intended to ensure complete handpiece skin contact, which further reduces the risk of scattered ultrasound energy reaching the eye.
- Electrical shock is addressed by recommended testing of the device according to recognized U.S. and International Standards specifically designed to determine and measure potential electrical safety. Again, the recommended device labeling also includes specific warnings for the user in terms of device placement, appropriate electrical wiring needs, reminders to periodically check device wiring and accessories for damage, and avoidance of use of the device in

environments where electrical shock is possible.

- Inflammation/foreign body response relates to possible issues that can occur following any type of therapeutic process in which tissue injury could occur. This risk is typical for any surgical procedure and is addressed by the recommendations to follow routine standard of care for any surgical patient that could include posttreatment skin care including use of moisturizers, antibacterial creams, and avoidance of potential risks such as use of perfumes, facial creams, and sunlight.
- Use error represents those risks to the patient that can occur from improper use of the device. In order to address this potential risk, we recommend the manufacturer provide a detailed operator manual which contains information on possible risks and hazards and how these should be avoided and clear recommended safe treatment procedures that include information on device settings for treatment, clear information on how the device is to be used during treatment, and recommended posttreatment care.

TABLE 1—RISKS TO HEALTH AND MITIGATION MEASURES

Identified risk	Recommended mitigation measures
Thermal Injury from Focused Ultrasound Exposure (Thermal Damage)	Section 6. Bench Testing. Section 7: Software Validation. Section 8. Animal Testing. Section 9. Clinical Testing. Section 13. Labeling.
Mechanical Injury from Focused Ultrasound Exposure (Cavitation or other Mechanical Damage).	Section 6. Bench Testing. Section 7. Software Validation. Section 8. Animal Testing. Section 9. Clinical Testing. Section 13. Labeling.
Ocular Injury	Section 13. Labeling.
Electrical Shock	Section 12. Electrical and Mechanical Safety Performance Testing.
Inflammation/Foreign Body Response	Section 10. Biocompatibility.
Use Error (Eye Injury)	Section 13. Labeling.

FDA believes that the special controls guidance document, ‘‘Class II Special Controls Guidance Document: Focused Ultrasound Stimulator System for Aesthetic Use,’’ in addition to general controls, addresses the risks to health and provides reasonable assurance of the safety and effectiveness of the device. Therefore, on September 11, 2009, FDA issued an order to the petitioner classifying the device into class II. FDA is codifying the classification of the device by adding § 878.4590.

Following the effective date of this final classification rule, any firm submitting a 510(k) premarket notification for focused ultrasound stimulator system for aesthetic use will need to address the issues covered in the special controls guidance. However, the firm need only show that its device meets the recommendations of the guidance or in some other way provides equivalent assurance of safety and effectiveness.

Section 510(m) of the FD&C Act provides that FDA may exempt a class II device from the premarket notification requirements under section 510(k) of the FD&C Act, if FDA determines that premarket notification is not necessary to provide reasonable assurance of the safety and effectiveness of the device. For this type of device, FDA has determined that premarket notification is necessary to provide reasonable assurance of the safety and effectiveness of the device. Therefore, this device type is not exempt from premarket notification requirements. Persons who intend to market this type of device must submit to FDA a premarket notification, prior to marketing the device, which contains information about the focused ultrasound stimulator system for aesthetic use they intend to market.

Elsewhere in this issue of the **Federal Register**, FDA is issuing a notice announcing the availability of the guidance document entitled ‘‘Class II Special Controls Guidance Document: Focused Ultrasound Stimulator System for Aesthetic Use’’ that will serve as the special control for this device.

II. Environmental Impact

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

III. Analysis of Impacts

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

The Regulatory Flexibility Act requires Agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. Because reclassification of this device from class III to class II will relieve manufacturers of the device of the cost of complying with the premarket approval requirements of section 515 of the FD&C Act (21 U.S.C. 360e), and may permit small potential competitors to enter the marketplace by lowering their costs, the Agency certifies that the final rule will not have a significant economic impact on a substantial number of small entities.

Section 202(a) of the Unfunded Mandates Reform Act of 1995 requires that Agencies prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing ‘‘any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any one year.’’ The current threshold after adjustment for inflation is $136 million, using the most current (2010) Implicit Price Deflator for the Gross

Domestic Product. FDA does not expect this final rule to result in any 1-year expenditure that would meet or exceed this amount.

IV. Federalism

FDA has analyzed this final rule in accordance with the principles set forth in Executive Order 13132. Section 4(a) of the Executive order requires Agencies to ''construe * * * a Federal statute to preempt State law only where the statute contains an express preemption provision or there is some other clear evidence that the Congress intended preemption of State law, or where the exercise of State authority conflicts with the exercise of Federal authority under the Federal statute.'' Federal law includes an express preemption provision that preempts certain state requirements ''different from or in addition to'' certain federal requirements applicable to devices. 21 U.S.C. 360k; See *Medtronic Inc.,* v. *Lohr,* 518 U.S. 470 (1996); and *Riegel* v. *Medtronic, Inc.,* 552 U.S. 312 (2008). The special controls established by this final rule create ''requirements'' for specific medical devices under 21 U.S.C. 360k, even though product sponsors have some flexibility in how they meet those requirements. Cf. *Papike* v. *Tambrands, Inc.,* 107 F.3d 737, 740–742 (9th Cir. 1991).

V. Paperwork Reduction Act of 1995

FDA concludes that this final rule contains no new collections of information. Therefore, clearance by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520) is not required. This final rule establishes as special controls a guidance document that refers to previously approved collections of information found in other FDA regulations. These collections of information are subject to review by OMB under the PRA.

VI. References

The following reference has been placed on display in the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday.

1. Petition from Ulthera, Inc., April 11, 2008.

List of Subjects in 21 CFR Part 878

Medical devices.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 878 is amended as follows:

PART 878—GENERAL AND PLASTIC SURGERY DEVICES

■ 1. The authority citation for 21 CFR part 878 continues to read as follows:

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

■ 2. Section 878.4590 is added to subpart E to read as follows:

§ 878.4590 Focused ultrasound stimulator system for aesthetic use.

(a) *Identification.* A Focused Ultrasound Stimulator System for Aesthetic Use is a device using focused ultrasound to produce localized, mechanical motion within tissues and cells for the purpose of producing either localized heating for tissue coagulation or for mechanical cellular membrane disruption intended for noninvasive aesthetic use.

(b) *Classification.* Class II (special controls). The special control for this device is FDA's ''Class II Special Controls Guidance Document: Focused Ultrasound Stimulator System for Aesthetic Use.'' See § 878.1(e) for the availability of this guidance document.

Dated: July 15, 2011.

Nancy K. Stade,

Deputy Director for Policy, Center for Devices and Radiological Health.

[FR Doc. 2011–18278 Filed 7–19–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 41

[TD 9537]

RIN 1545–BK36

Highway Use Tax; Filing and Payment for Taxable Period Beginning July 1, 2011

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final and temporary regulations.

SUMMARY: This document contains final and temporary regulations that provide guidance on the filing of Form 2290 (''Heavy Highway Vehicle Use Tax Return'') and payment of the associated highway use tax for the taxable period beginning July 1, 2011. The regulations affect owners and operators of highway motor vehicles with a taxable gross weight of 55,000 pounds or more. The text of the temporary regulations also serves as the text of the proposed regulations on this subject in the Proposed Rules section in this issue of the **Federal Register**.

DATES: *Effective Date:* These regulations are effective on July 20, 2011.

Applicability Date: For dates of applicability, see §§ 41.6001–2T(d), 41.6071(a)–1T(c)(3), and 41.6151(a)–1T(b).

FOR FURTHER INFORMATION CONTACT: Natalie Payne, (202) 622–3130 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document amends the Highway Use Tax Regulations (26 CFR Part 41) under section 4481 of the Internal Revenue Code (Code).

Section 4481 imposes a tax on the use in any taxable period of a highway motor vehicle with a taxable gross weight of 55,000 pounds or more. The person in whose name the vehicle is registered at the time of the first use must pay the tax. The rate of tax is based on the weight of the vehicle with a maximum of $550 per vehicle per taxable period (the standard amount).

Generally, a ''taxable period'' is the year that begins on July 1 and ends on the following June 30. For the taxable period beginning on July 1, 2011, however, section 4482(c)(4) of present law provides that the taxable period ends at the close of September 30, 2011. For this three month period, the tax rate is a reduced amount that is 25 percent of the tax rate for a 12-month period.

Section 41.6011(a)–1(a)(1) requires each person that is liable for the tax imposed by section 4481 to file a return for each taxable period and § 41.6011(a)–1(b) provides that the return is Form 2290, ''Heavy Highway Vehicle Use Tax Return.''

The due date for filing Form 2290 is not prescribed by statute and section 6071 provides that when the Code does not set the time for filing a return, the Secretary is to prescribe such time by regulations. Under § 41.6071(a)–1(a), Form 2290 generally must be filed by the last day of the month following the month in which a person becomes liable for tax. For most taxpayers, their first use of a vehicle in a taxable period occurs in July and thus their return is due by August 31.

Section 41.6001–2(b) provides, generally, that a State that receives an application to register a highway motor vehicle must receive from the applicant ''proof of payment'' of the tax imposed by section 4481(a). Section 41.6001–2(c) specifies that this proof of payment generally consists of a receipted

Schedule 1 (Form 2290) that is returned by the IRS to a taxpayer that files Form 2290 and pays the amount of tax due with the return. The taxpayer generally must present proof of payment for the taxable period that includes the date on which the application for registration is filed, but in the case of an application filed in July, August, or September proof of payment for the preceding taxable period may be used.

The tax imposed under section 4481 will expire on September 30, 2011, unless Congress changes the law. Under existing regulations, the person liable for the highway use tax must file a Form 2290 by the last day of the month following the month in which the person becomes liable for the tax. Therefore, under current statutory and regulatory provisions, the person liable for the tax will be required to file a Form 2290 for taxable use during the period of July 1, 2011, through September 30, 2011 (the ''2011 short taxable period''). Further, if Congress extends the tax past September 30, 2011, a person who filed Form 2290 for the 2011 short taxable period would have to file a second Form 2290 covering the period after September 30, 2011, through the earlier of the expiration date of the extension or June 30, 2012.

Explanation of Provisions

For purposes of efficient tax administration and alleviating taxpayers' potential administrative burden, the temporary regulations postpone the due date of Form 2290 for the 2011 short taxable period until November 30, 2011. If Congress does not extend the tax past September 30, 2011, taxpayers will file one Form 2290 and will pay the reduced amount for the 2011 short taxable period by November 30; if Congress does extend the tax past September 30, 2011, and substitutes a longer taxable period for the 2011 short taxable period, taxpayers who become liable for the highway use tax after June 30, 2011, and before November 1, 2011, also will file a Form 2290 for the period July 1, 2011—June 30, 2012 (or the end of the new taxable period, if earlier), by November 30, 2011. In either case, most taxpayers will have to file only one return for the taxable period beginning July 1, 2011. But for the change made by the temporary regulations, most taxpayers would have to file two returns if Congress extends the tax past September 30.

Further, the temporary regulations state that taxpayers should file a Form 2290 no earlier than November 1, 2011, for taxable use during the 2011 short taxable period. The IRS will not provide a receipted Schedule 1 for a return and associated payment for the taxable period beginning July 1, 2011, before November 1, 2011. Because taxpayers will not be able to receive a receipted Schedule 1 for filing a Form 2290 and paying the tax for the taxable period beginning July 1, 2011, until November 1, 2011, the temporary regulations provide that the receipted Schedule 1 for the taxable period ending June 30, 2010, must be accepted by a State as a substitute proof of payment for registration applications filed during the period of July 1, 2011, through November 30, 2011.

Section 41.6001–2(b)(1) provides that a State may register a highway motor vehicle without proof of payment if the person registering the vehicle presents the original or a photocopy of a bill of sale (or other document evidencing transfer) indicating that the vehicle was purchased by the owner either as a new or used vehicle during the preceding 60 days before the date that the State receives the application for registration of such vehicle. Because taxpayers will not be able to obtain proof of payment during the period between July 1, 2011, and November 1, 2011, the temporary regulations provide that between July 1, 2011, and November 30, 2011, a State must register a highway motor vehicle without proof of payment if the person registering the vehicle presents the original or a photocopy of a bill of sale (or other document evidencing the sale) that demonstrates that the owner purchased the vehicle, either as a new or used vehicle, within 150 days of the date that the State receives the application for registration, and the vehicle has not been registered in any State since the purchase date.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13563. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to this regulation. For applicability of the Regulatory Flexibility Act (5 U.S.C. chapter 6), please refer to the Special Analysis section in the preamble to the cross-referenced notice of proposed rulemaking in the Proposed Rules section in this issue of the **Federal Register**. Pursuant to section 7805(f) of the Code, this final and temporary regulation 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 Natalie Payne, Office of the Associate Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS and the Treasury Department participated in their development.

List of Subjects in 26 CFR Part 41

Excise taxes, Motor vehicles, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 41 is amended as follows:

PART 41—EXCISE TAX ON USE OF CERTAIN HIGHWAY MOTOR VEHICLES

■ **Paragraph 1.** The authority citation for part 41 is amended to read in part as follows:

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

Section 41.6001–2T also issued under 26 U.S.C. 6001. * * *

Section 41.6071(a)–1T also issued under 26 U.S.C. 6071(a). * * *

Section 41.6151(a)–1T also issued under 26 U.S.C. 6151(a). * * *

■ **Par. 2.** Section 41.6001–2 is amended by:

■ 1. Redesignating paragraph (b)(1) as paragraph (b)(1)(i) and adding a paragraph heading to newly designated paragraph (b)(1)(i).

■ 2. Adding paragraph (b)(1)(ii).

■ 3. Redesignating paragraph (b)(4) as paragraph (b)(4)(i) and adding a paragraph heading to newly designated paragraph (b)(4)(i).

■ 4. Adding paragraph (b)(4)(ii).

■ 5. Redesignating paragraph (c)(2) as paragraph (c)(2)(i), adding a paragraph heading to newly designated paragraph (c)(2)(i) and adding paragraph (c)(2)(ii).

The additions read as follows:

§ 41.6001–2 Proof of payment for State registration purposes.

* * * * *

(b) * * *

(1) * * *

(i) *Registration generally.* * * *

(ii) [Reserved]. For further guidance, see § 41.6001–2T(b)(1)(ii).

* * * * *

(4) * * *

(i) *General rule.* * * *

(ii) [Reserved]. For further guidance, see § 41.6001–2T(b)(4)(ii).

* * * * *

(c) * * *

(2) * * *

(i) *General rule.* * * *

(ii) [Reserved]. For further guidance, see § 41.6001–2T(c)(2)(ii).

* * * * *

■ **Par. 3.** Section 41.6001–2T is added to read as follows:

§ 41.6001–2T Proof of payment for State registration purposes (temporary).

(a) [Reserved]. For further guidance, see § 41.6001–2(a) .

(b)(1)(i) [Reserved]. For further guidance, see § 41.6001–2(b)(1)(i).

(ii) *Special rule for registration after June 30, 2011, and before December 1, 2011.* Between July 1, 2011, and November 30, 2011, a State must register a highway motor vehicle without proof of payment if the person registering the vehicle presents the original or a photocopy of a bill of sale (or other document evidencing transfer) indicating that the vehicle was purchased by the owner either as a new or used vehicle during the preceding 150 days before the date that the State receives the application for registration of the vehicle, and the vehicle has not been registered in any state subsequent to such date of purchase.

(b)(2) through (b)(4)(i) [Reserved]. For further guidance, see § 41.6001–2(b)(2) through (b)(4)(i).

(ii) *Special rule for registration after June 30, 2011, and before December 1, 2011.* In the case of a highway motor vehicle subject to tax under section 4481(a) for which a State receives an application for registration during the months of July, August, September, October, or November of 2011, a State shall accept proof of payment for the taxable period of July 1, 2010, through June 30, 2011, to verify payment of the tax imposed by section 4481(a).

(c) introductory text through (c)(2)(i) [Reserved]. For further guidance, see § 41.6001–2(c) through (c)(2)(i).

(ii) *Substitute proof of payment for the taxable period beginning July 1, 2011.* For purposes of this section and § 41.6001–2, in the case of a highway motor vehicle for which a State receives an application for registration during the period of July 1, 2011, through November 30, 2011, a State shall accept as a substitute for proof of payment, proof of payment for the taxable period of July 1, 2010, through June 30, 2011.

(iii) *Cross reference.* For provisions relating to the use of proof of payment for the taxable period of July 1, 2010, through June 30, 2011, to verify payment of the tax imposed by section 4481(a), see § 41.6001–2T(b)(4)(ii).

(d) *Effective/applicability date.* Paragraphs (b)(1)(ii), (b)(4)(ii), (c)(2)(ii) and (c)(2)(iii) of this section apply on and after July 20, 2011.

(e) *Expiration date.* The applicability of this section expires on or before July 15, 2014.

■ **Par. 4.** Section 41.6071(a)–1 is amended as follows:

■ 1. In paragraph (a) introductory text, the phrase ''Except as provided in paragraph (b) of this section'' is removed and ''Except as provided in paragraph (b) or paragraph (c) of this section'' is added in its place.

■ 2. Add paragraph (c).

The addition reads as follows:

§ 41.6071(a)–1 Time for filing returns.

* * * * *

(c) [Reserved]. For further guidance, see § 41.6071(a)–1T(c) through (c)(3).

■ **Par. 5.** Section 41.6071(a)–1T is added to read as follows:

§ 41.6071(a)–1T Time for filing returns (temporary).

(a) through (b) [Reserved]. For further guidance, see § 41.6071(a)–1(a) through (b).

(c) *Special rule for highway motor vehicles for which a taxable use occurs during the period July 1, 2011, through September 30, 2011*—(1) *Date for filing returns.* In the case of a highway motor vehicle for which a taxable use occurs during the period July 1, 2011, through September 30, 2011, the person liable for the tax must file a return described in § 41.6011(a)–1 no later than November 30, 2011. The return should be filed no earlier than November 1, 2011. If the return is filed and payment is submitted before November 1, 2011, the IRS will not provide a receipted Schedule 1 (Form 2290, ''Heavy Highway Vehicle Use Tax Return'') as proof of payment until after November 1, 2011, and will provide such receipted Schedule 1 only if the full amount of the tax for the 2011 taxable period (determined under the law in effect as of November 1, 2011) has been paid.

(2) *Cross reference.* For provisions relating to time and place for paying the tax imposed under section 4481, see § 41.6151(a)–1.

(3) *Effective/applicability date.* This paragraph (c) applies on and after July 20, 2011.

(4) *Expiration date.* The applicability of this section expires on or before July 15, 2014.

■ **Par. 6.** Section 41.6151(a)–1 is revised to read as follows:

§ 41.6151(a)–1 Time and place for paying tax.

[Reserved]. For further guidance, see § 41.6071(a)–1T(a) and (b).

■ **Par. 7.** Section 41.6151(a)–1T is added to read as follows:

§ 41.6151(a)–1T Time and place for paying tax (temporary).

(a) *In general.* The tax must be paid at the time prescribed in § 41.6071(a)–1 (or § 41.6071(a)–1T, as appropriate) for filing the return and at the place prescribed in § 41.6091–1 for filing the return.

(b) *Effective/applicability date.* This section applies on and after July 20, 2011.

(c) *Expiration date.* The applicability of this section expires on or before July 15, 2014.

Steven T. Miller,

Deputy Commissioner for Services and Enforcement.

Approved: July 13, 2011.

Emily S. McMahon,

Acting Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2011–18244 Filed 7–15–11; 4:15 pm]

BILLING CODE 4830–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2011–0597]

Drawbridge Operation Regulations; Cheesequake Creek, Morgan, NJ

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: The Commander, First Coast Guard District, has issued a temporary deviation from the regulation governing the operation of the Route 35 Bridge, mile 0.0, across Cheesequake Creek at Morgan, New Jersey. The deviation is necessary to facilitate a public event. This deviation allows the bridge to remain in the closed position for an hour and a half to facilitate a public event.

DATES: This deviation is effective between 11:30 a.m. and 1 p.m. on September 18, 2011.

ADDRESSES: Documents mentioned in this preamble as being available in the docket are part of docket USCG–2011–0597 and are available online at *http://www.regulations.gov,* inserting USCG–2011–0597 in the ''Keyword'' 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 rule, call or e-mail Mr. Joe Arca, Project Officer, First Coast Guard District, *joe.m.arca@uscg.mil,* telephone (212) 668–7165. If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION: The Route 35 Bridge, across Cheesequake Creek, mile 0.0, at Morgan, New Jersey, has a vertical clearance in the closed position of 25 feet at mean high water and 30 feet at mean low water. The drawbridge operation regulations are listed at 33 CFR 117.709(a).

The waterway is predominantly used by recreational vessels on a seasonal basis.

The owner of the bridge, the New Jersey Department of Transportation, requested a temporary deviation from the regulations to facilitate a public event, the Rolling Thunder Freedom Ride. The bridge must remain in the closed position to facilitate the above public event.

Under this temporary deviation the Route 35 Bridge may remain in the closed position between 11:30 a.m. and 1 p.m. on September 18, 2011. Vessels that can pass under the bridge in the closed position may do so at any time.

In accordance with 33 CFR 117.35(e), the bridge must return to its regular operating schedule immediately at the end of the designated time period. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: June 27, 2011.

Gary Kassof,

Bridge Program Manager, First Coast Guard District.

[FR Doc. 2011–18224 Filed 7–19–11; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2011–0565]

RIN 1625–AA00; 1625–AA08

Safety Zones; July Fireworks Displays and Swim Events in the Captain of the Port New York Zone

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing nine temporary safety zones for marine events within the Coast Guard Captain of the Port (COTP) New York Zone for fireworks displays and swim events. This action is necessary to provide for the safety of life on navigable waters during the events. Entry into, transit through, mooring or anchoring within these zones is prohibited unless authorized by the COTP New York.

DATES: This rule is effective from July 20, 2011 until July 30, 2011. These regulations have been enforced with actual notice since July 1, 2011.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2011–0565 and are available online by going to *http://www.regulations.gov,* inserting USCG–2011–0565 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 or e-mail LT Eunice James, Coast Guard Sector New York Waterways Management Division; 718–354–4163, e-mail *Eunice.A.James@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 any delay encountered in this regulation's effective date by publishing a NPRM would be contrary to public interest, since immediate action is needed to provide for the safety of life and property on navigable waters from the hazards associated with fireworks including unexpected detonation and burning debris; also immediate action is needed to provide for the safety of life and property on navigable waters from the hazards associated with swimmers in the water in or near navigable channels. We spoke with each event sponsor and each indicated they were unable and unwilling to move their event date to a later time. Sponsors for the Fort Hamilton Independence Day Celebration Fireworks Display; Rumson, NJ Fireworks Display; the City of Poughkeepsie Fireworks Display; Larchmont Yacht Club Fireworks Display; City of New Rochelle Fireworks Display; and Keyport Firemen's Fair Fireworks Display stated they are unwilling to reschedule these events because they are being held in conjunction with various Independence Day celebrations. Many community members have made holiday plans based on these fireworks events and changing the date would cause numerous cancelations and hurt small businesses. Rescheduling would not be a viable option because most event venues, entertainers, and venders have fully booked summer schedules making rescheduling nearly impossible. Sponsors for the Brooklyn Bridge Swim, Swim Across America, and Hudson Valley Triathlon stated they are unwilling to reschedule these events because the dates of each swim event were chosen based on optimal tide, current, and weather conditions needed to promote the safety of swim participants. In addition, any change to the dates of the events would cause economic hardship on the marine event sponsors, negatively impacting other activities being held in conjunction with these events and creating unsafe event conditions.

Additionally, due to the dangers posed by the pyrotechnics used in fireworks displays and the hazards associated with swim events, the safety zones are necessary to provide for the safety of event participants, spectator crafts, and other vessels operating near the event areas. For the safety concerns noted, it is in the public interest to have this regulation in effect during these events.

These fireworks displays and swim events are all reoccurring marine events with a proposed permanent rule currently in a public comment period under docket number USCG–2010–1001 titled, Special Local Regulations and Safety Zones; Recurring Events in Captain of the Port New York Sound Zone. Additionally, the Coast Guard has ordered safety zones or special local regulations for all of these areas for past events and has not received public comments or concerns regarding establishment of waterways restrictions.

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**. The rule must become effective on the dates specified in Table 1 and 2 in order to provide for the safety of the public including spectators and vessels operating in the area near these events. Delaying the effective date of this rule until after 30 days have elapsed after publication is impractical and would expose spectators, vessels, and other property to the hazards associated with these marine events.

Basis and Purpose

The legal basis for the temporary rule is 33 U.S.C. 1226, 1231, 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; Pub. L. 107–295, 116 Stat. 2064; and Department of Homeland Security Delegation No. 0170.1, which collectively authorize the Coast Guard to define safety zones.

These fireworks displays and swim events are being held during the month of July on the navigable waters within the COTP New York Zone. In the past, the Coast Guard has established special local regulations, regulated areas, and safety zones for these events on a case by case basis to ensure the protection of the maritime public and event participants from the hazards associated with these events. The Coast Guard has not received public comments or concerns regarding the impact to waterway traffic from these events.

This temporary final rule will apprise the public in a timely manner through publication in the **Federal Register**.

These events pose significant risk to participants, spectators and the maritime public because of hazardous conditions associated with fireworks displays and swim events. These temporary safety zones are necessary to ensure the safety of participants, spectators and vessels.

Discussion of Rule

This rule establishes temporary safety zones on the waters of the COTP New York zone. These temporary safety zones will encompass various locations, listed in Table 1 and Table 2 below.

All persons and vessels shall comply with the instructions of the COTP New York or the designated on-scene representative. Entry into, transiting, or anchoring within the temporary safety zones are prohibited unless authorized by the COTP New York, or the designated representative. The COTP New York or the designated representative may be reached on VFH Channel 16.

Because large numbers of spectator vessels are expected to congregate around the location of these events, the regulated areas are needed to protect both spectators and participants from the safety hazards created by fireworks displays and swimmers in the water. During the enforcement period of the regulated areas, persons and vessels are prohibited from entering, transiting through, remaining, anchoring or mooring within the zone unless specifically authorized by the COTP or the designated representatives. The Coast Guard may be assisted by other federal, state and local agencies in the enforcement of these regulated areas.

The Coast Guard determined that these regulated areas will not have a significant impact on vessel traffic due to their temporary nature and limited size and the fact that vessels are allowed to transit the navigable waters outside of the regulated areas. Additionally, the Coast Guard has ordered safety zones for all of these nine areas for past events and has not received public comments or concerns regarding the impact to waterway traffic from events.

Advanced public notifications will also be made to the local maritime community by the Local Notice to Mariners as well as Broadcast Notice to Mariners.

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, as supplemented by Executive Order 13563, 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.

The Coast Guard's implementation of these temporary special local regulations and safety zones will be of short duration and designed to minimize the impact to vessel traffic on the navigable waters. These safety zones will only be enforced for a short duration. Furthermore, vessels may be authorized to transit the zones with permission of the COTP New York or the designated on-scene representative.

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.

This rule will affect the following entities, some of which may be small entities: The owners and operators of vessels intending to transit or anchor in a portion of the navigable waterway in the vicinity of these marine events during the effective period.

This rule will not have a significant economic impact on a substantial number of small entities for the following reasons: Vessel traffic can safely transit around the zone. Before the effective period, we will issue maritime advisories widely available to users of the waterway. This rule will be in effect for a short duration at various times from July 02, 2011 until July 30, 2011.

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 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 023–01 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 the establishment of temporary 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, 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; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 165.T01–0565 to read as follows:

§ 165.T01–0565 Safety Zones; July Fireworks Displays and Swim Events in the Captain of the Port New York Zone.

(a) *Regulations.* The general regulations contained in 33 CFR 165.23 as well as the following regulations apply to the fireworks displays and swim events listed in Table 1 and Table 2 of § 165.T01–0565. These regulations will be enforced for the duration of each event. Notifications of exact dates and times of the enforcement period will be made to the local maritime community through the Local Notice to Mariners, and Broadcast Notice to Mariners. First Coast Guard District Local Notice to Mariners can be found at *http://www.navcen.uscg.gov/.*

(b) *Definitions.* The following definitions apply to this section:

(1) *Designated Representative.* A ''designated representative'' is any Coast Guard commissioned, warrant or petty officer of the U.S. Coast Guard who has been designated by the COTP, Sector New York to act on his or her behalf. The designated representative may be on an official patrol vessel or may be on shore and will communicate with vessels via VHF–FM radio or loudhailer. In addition, members of the Coast Guard Auxiliary may be present to inform vessel operators of this regulation.

(2) *Official Patrol Vessels.* Official patrol vessels may consist of any Coast Guard, Coast Guard Auxiliary, state, or local law enforcement vessels assigned or approved by the COTP.

(3) *Spectators.* All persons and vessels not registered with the event sponsor as participants or official patrol vessels.

(c) Vessel operators desiring to enter or operate within the regulated areas shall contact the COTP or the designated representative via VHF channel 16 or 718–354–4353 (Sector New York command center) to obtain permission to do so.

(d) Spectators or other vessels shall not anchor, block, loiter, or impede the transit of event participants or official patrol vessels in the regulated areas during the effective dates and times, or dates and times as modified through the Local Notice to Mariners, unless authorized by COTP or designated on-scene representative.

(e) Upon being hailed by a U.S. Coast Guard vessel or the designated representative, by siren, radio, flashing light or other means, the operator of the vessel shall proceed as directed. Failure to comply with a lawful direction may result in expulsion from the area, citation for failure to comply, or both.

(f) The COTP or the designated representative may delay or terminate any marine event in this subpart at any time it is deemed necessary to ensure the safety of life or property.

(g) The regulated area for all fireworks displays listed in Table 1 is that area of navigable waters within a 360 yard radius of the launch platform or launch site for each fireworks display, unless otherwise noted in Table 1 or modified in USCG First District Local Notice to Mariners at: *http://www.navcen.uscg.gov/*.

(h) Fireworks barges used in these locations will also have a sign on their port and starboard side labeled ''FIREWORKS—STAY AWAY''. This sign will consist of 10 inch high by 1.5 inch wide red lettering on a white background. Shore sites used in these locations will display a sign labeled ''FIREWORKS—STAY AWAY'' with the same dimensions.

TABLE 1 OF § 165.T01–0565

1.0	New York Harbor
1.1 Fort Hamilton Independence Day Celebration Fireworks Display	• Date: July 2, 2011. • Rain Date: July 3, 2011. • Time: 9:15 p.m. to 10:15 p.m. • Launch site: A barge located in approximate position 40°36′02.5″ N, 074°01′36.6″ W (NAD 1983), approximately 1400 yards southeast of the Verrazano-Narrows Bridge. This Safety Zone is a 240-yard radius from the barge.
2.0	Navesink River
2.1 Rumson, NJ, Fireworks Display	• Date: July 3, 2011. • Rain Date: July 4, 2011. • Time: 8:45 p.m. to 10:15 p.m. • Launch site: A barge located in approximate position 40°22′42″ N 074°01′07″ W (NAD 1983), approximately 550 yards south of the Oceanic Bridge. This Safety Zone is a 300-yard radius from the barge.
3.0	Hudson River
3.1 City of Poughkeepsie, Fireworks Display	• Date: July 4, 2011. • Rain Date: July 5, 2011. • Time: 9 p.m. to 10:30 p.m. • Launch site: A barge located in approximate position 41°42′24.50″ N 073°56′44.16″ W (NAD 1983), approximately 420 yards north of the Mid Hudson Bridge. This Safety Zone is a 300-yard radius from the barge.
4.0	Western Long Island Sound
4.1 Larchmont Yacht Club Fireworks Display	• Date: July 4, 2011. • Rain Date: July 5, 2011. • Time: 9 p.m. to 10:20 p.m. • Launch site: A barge located in approximate position 40°55′17.3″ N, 073°44′13.8″ W (NAD 1983), approximately 620 yards northwest of Umbrella Point. This Safety Zone is a 240-yard radius from the barge.
4.2 City of Rochelle, NY, Echo Bay Harbor Fireworks Display	• Date: July 4, 2011. • Rain Date: July 5, 2011. • Time: 9 p.m. to 10:20 p.m. • Launch site: A shore launch located in approximate position 40°54′34.4″ N, 073°45′56.6″ W (NAD 1983). This Safety Zone is a 180-yard radius from the launch site.
5.0	Raritan Bay
5.1 Keyport Firemen's Fair Fireworks Display	• Date: July 23, 2011. • Rain Date: July 24, 2011. • Time: 10:30 p.m. to 12 a.m. • Launch site: A barge located in approximate position 40°26′24″ N. 074°12′18″ W (NAD 1983), approximately 200 yards north of Keyport, NJ shoreline. This Safety Zone is a 150-yard radius from the barge.

TABLE 2 TO § 165.T01–0565

1.0	East River
1.1 Brooklyn Bridge Swim	• Event Type: Swim Event. • Date: July 30, 2011. • Rain Date: July 31, 2011. • Time: 9 a.m. to 12 p.m. • Location: Participants will swim between Brooklyn and Manhattan, New York crossing the East River along the Brooklyn Bridge. • Rain Date: July 31, 2011. • Time: 10:05 a.m. to 11:55 a.m.
2.0	Western Long Island Sound
2.1 Swim Across America	• Event Type: Swim Event. • Date: July 30, 2011. • Rain Date: NA. • Time: 5:30 a.m. to 10:30 a.m. • Location: Participants will swim between Glen Cove and Larchmont, New York and an area of Hempstead Harbor between Glen Cove and the vicinity of Umbrella Point.
3.0	Hudson River
3.1 Hudson Valley Triathlon	• Event Type: Swim Event. • Date: July 24, 2011. • Rain Date: NA. • Time: 5 a.m to 11 a.m. • The following area is a safety zone: All waters of the Hudson River in the vicinity of Ulster Landing, Bound by the following points: 42°00′03.7″ N, 073°56′43.1″ W; thence to 41°59′52.5″ N, 073°56′34.2″ W; thence to 42°00′15.1″ N, 073°56′25.2″ W • thence to 42°00′05.4″ N, 073°56′41.9″ W; thence along the shoreline to the point of beginning.

Dated: July 1, 2011.

L.L. Fagan,

Captain, U.S. Coast Guard, Captain of the Port New York.

[FR Doc. 2011–18284 Filed 7–19–11; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2010–1013–201128; FRL–9438–1]

Approval and Promulgation of Air Quality Implementation Plan; Alabama; Disapproval of Interstate Transport Submission for the 2006 24-Hour $PM_{2.5}$ Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is taking final action to disapprove the portion of Alabama's September 23, 2009, submission which was intended to meet the requirement to address interstate transport for the 2006 24-hour fine particulate matter ($PM_{2.5}$) national ambient air quality standards (NAAQS). Additionally, EPA is responding to comments received on EPA's January 26, 2011, proposed disapproval of the aforementioned portion of Alabama's September 23, 2009, submission. On September 23, 2009, the State of Alabama, through the Alabama Department of Environmental Management (ADEM), provided a letter to EPA certifying that the Alabama state implementation plan (SIP) meets the interstate transport requirements with regard to the 2006 24-hour $PM_{2.5}$ NAAQS. Specifically, the interstate transport requirements under the Clean Air Act (CAA or Act) prohibit a state's emissions from significantly contributing to nonattainment or interfering with the maintenance of the NAAQS in any other state. The effect of today's action will be the promulgation of a Federal Implementation Plan (FIP) for Alabama no later than two years from the date of disapproval. The proposed Transport Rule, when final, is the FIP that EPA intends to implement for Alabama.

DATES: *Effective Date:* This rule will be effective August 19, 2011.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R04–OAR–2010–1013. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, i.e., Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m. excluding federal holidays.

FOR FURTHER INFORMATION CONTACT: For information regarding the Alabama SIP, contact Mr. Zuri Farngalo, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. Mr. Farngalo's telephone number is (404) 562–9152; *e-mail address:*

farngalo.zuri@epa.gov. For information regarding the $PM_{2.5}$ interstate transport requirements under section 110(a)(2)(D)(i), contact Mr. Steven Scofield, Regulatory Development Section, at the same address above. Mr. Scofield's telephone number is (404) 562–9034; *e-mail address: scofield.steve@epa.gov.*

SUPPLEMENTARY INFORMATION:

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I. Background

Upon promulgation of a new or revised NAAQS, sections 110(a)(1) and (2) of the CAA require states to address basic SIP requirements, including emissions inventories, monitoring, and modeling to assure attainment and maintenance for that NAAQS. On December 18, 2006, EPA revised the 24-hour average $PM_{2.5}$ primary and secondary NAAQS from 65 micrograms per cubic meter ($\mu g/m^3$) to 35 $\mu g/m^3$, thus states were required to provide submissions to address section 110(a)(1) and (2) of the CAA (infrastructure SIPs) for this revised NAAQS. Alabama provided its infrastructure submission for the 2006 $PM_{2.5}$ NAAQS on September 23, 2009. On January 26, 2011, EPA proposed to disapprove the portion of Alabama's September 23, 2009, infrastructure submission related to interstate transport (*i.e.,* 110(a)(2)(D)(i)(I)) for the 2006 $PM_{2.5}$ NAAQS. *See* 76 FR 4588. A summary of the background for this final action is provided below.

Section 110(a)(2) lists the elements that infrastructure SIPs must address, as applicable, including section 110(a)(2)(D)(i), which pertains to interstate transport of certain emissions. States were required to provide submissions to address the applicable 110(a)(2) infrastructure requirements, including section 110(a)(2)(D)(i), by September 21, 2009.[1]

On September 25, 2009, EPA issued a guidance entitled ''Guidance on SIP Elements Required Under Sections 110(a)(1) and (2) for the 2006 24-Hour Fine Particle ($PM_{2.5}$) National Ambient Air Quality Standards (NAAQS)'' (hereinafter referred to as ''EPA's 2009 Guidance''). EPA developed the EPA's 2009 Guidance to make additional recommendations to states for making submissions to meet the requirements of section 110, including 110(a)(2)(D)(i) for the revised 2006 24-hour $PM_{2.5}$ NAAQS.

As identified in the EPA's 2009 Guidance, the ''good neighbor'' provisions in section 110(a)(2)(D)(i) require each state to submit a SIP that prohibits emissions that adversely affect another state in the ways contemplated in the CAA. Section 110(a)(2)(D)(i) contains four distinct requirements related to the impacts of interstate transport. Specifically, the SIP must prevent sources in the state from emitting pollutants in amounts which will: (1) Contribute significantly to nonattainment of the NAAQS in other states; (2) interfere with maintenance of the NAAQS in other states; (3) interfere with provisions to prevent significant deterioration of air quality in other states; or (4) interfere with efforts to protect visibility in other states.

In the EPA's 2009 Guidance, EPA explained that submissions from states pertaining to the ''significant contribution'' and ''interfere with maintenance'' requirements in section 110(a)(2)(D)(i)(I) must contain adequate provisions to prohibit air pollutant emissions from within the state that contribute significantly to nonattainment or interfere with maintenance of the NAAQS in any other state. EPA described a number of considerations for states for providing an adequate demonstration to address interstate transport requirements in the EPA's 2009 Guidance. First, EPA noted that the state's submission should explain whether or not emissions from the state contribute significantly to nonattainment or interfere with maintenance of the NAAQS in any other state and, if so, address the impact. EPA stated that the state's conclusion should be supported by an adequate technical analysis. Second, EPA recommended the various types of information that could be relevant to support the state's submission, such as information concerning emissions in the state, meteorological conditions in the state and the potentially impacted states, monitored ambient concentrations in the state, and air quality modeling. Third, EPA explained that states should address the ''interfere with maintenance'' requirement independently which requires an evaluation of impacts on areas of other states that are meeting the 2006 24-hour $PM_{2.5}$ NAAQS, not merely areas designated nonattainment. Lastly, EPA explained that states could not rely on the Clean Air Interstate Rule (CAIR) to comply with CAA section 110(a)(2)(D)(i) requirements for the 2006 24-hour $PM_{2.5}$ NAAQS because CAIR does not address this NAAQS. CAIR, promulgated by EPA on May 12, 2005 (See 70 FR 25162), required states to reduce emissions of sulfur dioxide and nitrogen oxides that significantly contribute to, and interfere with maintenance of the 1997 $PM_{2.5}$ NAAQS and/or ozone in any downwind state. CAIR was intended to provide states covered by the rule with a mechanism to satisfy their CAA section 110(a)(2)(D)(i)(I) obligations to address significant contribution to downwind nonattainment and interference with maintenance in another state with respect to the 1997 ozone and $PM_{2.5}$ NAAQS. Many states adopted the CAIR provisions and submitted SIPs to EPA to demonstrate compliance with the CAIR requirements in satisfaction of their 110(a)(2)(D)(i)(I) obligations for those two pollutants.

EPA was sued by a number of parties on various aspects of CAIR, and on July 11, 2008, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit or Court) issued its decision to vacate and remand both CAIR and the associated CAIR FIPs in their entirety. *North Carolina* v. *EPA,* 531 F.3d 836 (D.C. Circuit, July 11, 2008). However, in response to EPA's petition for rehearing, the Court issued an order remanding CAIR to EPA without vacating either CAIR or the CAIR FIPs. *North Carolin*a v. *EPA,* 550 F.3d 1176 (D.C. Circuit, December 23, 2008). The Court thereby left CAIR in place in order to ''temporarily preserve the environmental values covered by CAIR'' until EPA replaces it with a rule consistent with the Court's opinion. *Id.* at 1178. The Court directed EPA to ''remedy CAIR's flaws'' consistent with its July 11, 2008, opinion, but declined to impose a schedule on EPA for completing that action. *Id.*

In order to address the judicial remand of CAIR, EPA has proposed a new rule to address interstate transport pursuant to section 110(a)(2)(D)(i), the ''Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone'' (Transport Rule).[2] As part of the proposed Transport Rule, EPA specifically examined the section 110(a)(2)(D)(i) requirements that emissions from sources in a state must not ''significantly contribute to nonattainment'' and ''interfere with maintenance'' of the 2006 24-hour $PM_{2.5}$ NAAQS by other states. The modeling

[1] The rule for the revised $PM_{2.5}$ NAAQS was signed by the Administrator and publically disseminated on September 21, 2006. Because EPA did not prescribe a shorter period for 110(a) SIP submittals, the submittals for the 2006 24-hour NAAQS were due on September 21, 2009, three years from the September 21, 2006, signature date.

[2] See ''Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone; Proposed Rule,'' 75 FR 45210 (August 2, 2010).

performed for the proposed Transport Rule shows that Alabama significantly contributes to nonattainment or interferes with maintenance of the 2006 24-hour $PM_{2.5}$ NAAQS in downwind areas. EPA has now completed the modeling for the final Transport Rule and, as indicated by the technical support documents for this action, Alabama in fact contributes to downwind nonattainment in another state or interferes with maintenance of the 2006 24-hour $PM_{2.5}$ NAAQS in another state.

On September 23, 2009, the State of Alabama, through ADEM, provided a letter to EPA certifying that the Alabama SIP meets the interstate transport requirements with regard to the 2006 24-hour $PM_{2.5}$ NAAQS.[3] Specifically, Alabama certified that its current SIP adequately addresses the elements of CAA section 110(a)(2)(D)(i)(I) for the 2006 24-hour $PM_{2.5}$ NAAQS. CAA section 110(a)(2)(D)(i)(I) requires that implementation plans for each state contain adequate provisions to prohibit air pollutant emissions from sources within a state from significantly contributing to nonattainment in or interfering with maintenance of the NAAQS (in this case the 2006 24-hour $PM_{2.5}$ NAAQS) in any other state. On January 26, 2011, EPA proposed to disapprove the portion of Alabama's September 23, 2009, submission related to interstate transport for the 2006 24-hour $PM_{2.5}$ NAAQS because EPA made the preliminary determination that Alabama's September 23, 2009, submission does not meet the requirements of section 110(a)(2)(D)(i)(I) of the CAA for this NAAQS. This action is finalizing EPA's disapproval of Alabama's September 23, 2009, submission with regard to section 110(a)(2)(D)(i)(I) of the CAA for the 2006 24-hour $PM_{2.5}$ NAAQS. *See* EPA's January 26, 2011, proposed disapproval rulemaking at 76 FR 4588 for further information on EPA's rationale for this final action.

II. EPA's Responses to Comments

EPA received three sets of adverse comments on the January 26, 2011, proposed rulemaking to disapprove the portion of Alabama's September 23, 2009, infrastructure submission on the interstate transport requirements of sections 110(a)(2)(D)(i)(I) of the CAA for the 2006 24-hour $PM_{2.5}$ NAAQS. A full set of the comments provided by ADEM, the North Carolina Department of Environment and Natural Resources, and the Georgia Environmental Protection Division (hereinafter referred to as ''the Commenters'') are provided in the docket for this final action. As a general matter, the comments overlapped on some issues, and as a result, EPA has organized the response to comments by issue. In addition, EPA acknowledges Georgia's comments regarding SIP processing in general. As Georgia is aware, EPA is considering improvements to the SIP process and appreciates Georgia's comments in that regard.

For the most part, the Commenters oppose EPA's proposed disapproval action for the interstate portion of Alabama's September 23, 2009, infrastructure submission for the 2006 24-hour $PM_{2.5}$ NAAQS. The comments fall generally into the following categories: (1) Infrastructure SIPs being treated as control strategy SIPs; (2) states' inability to rely on CAIR to satisfy the 110(a)(2)(D)(i)(I) requirements for the 2006 24-hour $PM_{2.5}$ NAAQS; (3) apparent lack of guidance from EPA on how states should meet the requirements; (4) concerns regarding the procedure of taking action to disapprove Alabama's submittal; (5) acknowledgement of states' efforts and air quality conditions; and (6) concerns related to the Transport Rule. A summary of the comments and EPA's responses are provided below.

Infrastructure SIPs Being Treated as Control Strategy SIPs

Comment 1: One Commenter states that ''Recently, it appears that EPA has undertaken the practice of treating infrastructure SIPs as if they are the control strategy SIPs required under CAA Section 110(a)(2), in that EPA requires states to certify that actual rules are in place to meet each CAA Section 110(a)(2) element.'' The Commenter goes on to state that ''CAA Section 172(b) establishes a separate schedule for submittal of plans meeting the requirements of CAA Section 110(a)(2).'' The Commenter concludes by stating that ''[t]hese plans are required no later than 3 years after the designation of an area as nonattainment.''

Response 1: EPA disagrees with the Commenter's assertion that EPA is treating the infrastructure SIPs as if they are control strategy SIPs. EPA agrees with the Commenter's assertion that the requirements for SIP submissions under section 110(a)(1) and section 172(b) of the CAA are distinct and separate requirements. Section 172(b) provides the criteria for SIP submissions related to nonattainment areas, whereas section 110(a)(1) provides the requirements for states to provide a SIP submission for all areas within the state. Today's final action only relates to section 110(a)(1) requirements, and an evaluation of whether Alabama's September 23, 2009, submission meets the requirements of section 110(a)(2)(D)(i)(I) for the 2006 24-hour $PM_{2.5}$ NAAQS. Specifically, section 110(a)(2)(D)(i)(I) (the subject of this disapproval action) requires that the state's submission must explain whether or not the state's SIP contains adequate provisions to prohibit emissions from the state that significantly contribute to nonattainment of or interfere with maintenance of the NAAQS in any other state and, if so, address the impact. The state's conclusion must be supported by an adequate technical analysis, including, but not limited to, information concerning emissions in the state, meteorological conditions in the state and the potentially impacted states, monitored ambient concentrations in the state and the potentially impacted states, the distance to the nearest area that is not attaining the NAAQS in another state, and air quality modeling. EPA has concluded that Alabama's September 23, 2009, submission does not meet the requirements of section 110(a)(2)(D)(i)(I) for the 2006 24-hour $PM_{2.5}$ NAAQS. Further information regarding EPA's rationale for this disapproval can be found in EPA's proposed action to disapprove Alabama's September 23, 2009, submission with regard to meeting the requirements of section 110(a)(2)(D)(i)(I) for the 2006 24-hour $PM_{2.5}$ NAAQS. See 76 FR 4588. Please also see EPA's 2009 Guidance for additional clarification on section 110(a)(2) requirements.

States' Inability To Rely on CAIR To Satisfy the 110(a)(2)(D)(i)(I) Requirements for the 2006 24-hour $PM_{2.5}$ NAAQS

Comment 2: All Commenters express concern with EPA's proposed disapproval and assert that states should be able to rely on CAIR to address the transport requirements in section 110(a)(2)(D)(i)(I) for the 2006 24-hour $PM_{2.5}$ NAAQS. The Commenters explain that the Court left CAIR in place and opine that states should be able to rely on emissions reductions from CAIR to address transport. One Commenter also mentions that ''[t]he Court did not impose a schedule on EPA for completing the Transport Rule; therefore, states have no assurances that

[3] Alabama's September 23, 2009, certification letter also explained that Alabama's current SIP sufficiently addresses other requirements of section 110(a)(2) for the 2006 24-hour $PM_{2.5}$ NAAQS; however, today's final rulemaking only relates to the section 110(a)(2)(D)(i)(I) requirements for the 2006 24-hour $PM_{2.5}$ NAAQS. EPA will address the other section 110(a)(2) requirements for the 2006 24-hour $PM_{2.5}$ NAAQS in relation to Alabama's SIP in a rulemaking separate from today's final rulemaking.

EPA will ever replace the CAIR rule. Since there is no guarantee that the Transport Rule will be promulgated in a timely manner, states cannot rely on the reductions in the proposed Transport Rule and must rely on the CAIR reductions, which are permanent and enforceable.''

Response 2: As discussed in EPA's 2009 Guidance, states cannot rely on the CAIR rule for the submission for the 2006 24-hour $PM_{2.5}$ NAAQS because CAIR does not address this NAAQS, and was never intended to address this NAAQS. CAIR was originally put in place to address the 1997 8-hour ozone and $PM_{2.5}$ NAAQS. In order to adequately address the requirements of section 110(a)(2)(D)(i)(I), states can only rely on permanent emission reductions to address transport for the 2006 24-hour $PM_{2.5}$ NAAQS, and must include an appropriate technical demonstration.

Comments Regarding Guidance From EPA on How States Should Meet the Requirements

Comment 3: Two Commenters note that that 110(a)(2) infrastructure SIPs for the 24-hour $PM_{2.5}$ NAAQS were due September 21, 2009, but EPA's guidance was not released to the states until September 25, 2009.

Response 3: While EPA's 2009 Guidance regarding the 110(a)(2) infrastructure SIPs for the 2006 24-hour $PM_{2.5}$ NAAQS was released on September 25, 2009, this guidance did not establish new requirements beyond those already required by section 110(a)(2)(D)(i)(I) of the CAA. Relevant portions of section 110(a)(2) require, as follows, ''Each [implementation plan submitted by a State under this chapter] shall * * * contain adequate provisions—(i) Prohibiting, consistent with the provisions of this subchapter, any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will—contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard * * *'' States are statutorily obligated to address the requirements of section 110(a)(2)(D)(i)(I) for the 2006 24-hour $PM_{2.5}$ NAAQS. This above-quoted provision provides States with the requirement.

Comment 4: Two Commenters express concern about communication in the SIP process. The Commenters go on to say that ''[e]ven though EPA's guidance was released only a short time later, EPA Region 4 gave absolutely no indication to its co-regulators that there would be a fatal flaw with the submittal.'' The commenter further states that, ''it wasn't until a year later that states were informed via an e-mail on August 27, 2010, that 'All Region 4 states submitted complete infrastructure SIPs for the 2006 $PM_{2.5}$ NAAQS, and our intention is to disapprove the 110(a)(2)(D)(i)(I) portion of those unless it is withdrawn by the state.'''

Response 4: EPA disagrees with the Commenters' assertion that they were initially notified in an August 27, 2010, e-mail about EPA's expectations and concerns with states' submissions reliance on CAIR to meet the requirements for section 110(a)(2)(D)(i)(I) for the 2006 24-hour $PM_{2.5}$ NAAQS. As was explained above, Alabama's obligation stems from the CAA. As is EPA's practice, EPA reminded the States on a number of occasions of the interstate transport obligations in 110(a)(2)(D)(i)(I). In addition to the informal reminders (via e-mail and teleconferences, among other avenues), EPA's January 2011 proposal served as a formal, legal notification and provided for a formal opportunity for public comment.

Although EPA reminded states of EPA's expectations and concerns with states' reliance on CAIR to meet the requirements for section 110(a)(2)(D)(i)(I) for the 2006 24-hour $PM_{2.5}$ NAAQS in an August 27, 2010, e-mail, EPA formally notified states of the expectations and concerns in the EPA's 2009 Guidance. Specifically, EPA noted that SIP submissions that relied on CAIR for satisfying the 110(a)(2)(D)(i)(I) requirements for the 2006 24-hour $PM_{2.5}$ NAAQS would be inadequate, as CAIR did not address this NAAQS. EPA's proposed disapproval of the portion of Alabama's September 23, 2009, submission did not occur until January 2011, which was over a year after EPA's notification (through the release of the EPA's 2009 Guidance) of any states' deficiency for meeting the 110(a)(2)(D)(i)(I) requirement for the 2006 24-hr $PM_{2.5}$ NAAQS had that state relied on CAIR. Thus, Alabama had notification and an opportunity to provide supplemental information between the release of EPA's 2009 Guidance and EPA's proposed disapproval action in January 2011.

Comment 5: One Commenter raises concerns with EPA treating its 2009 Guidance as ''binding'' and suggests that this action is contrary to statements made by EPA in support of EPA and states being ''co-regulators.''

Response 5: EPA disagrees with the Commenter's assertion that the proposed disapproval is contrary to EPA treating the states as co-regulators. As was explained earlier, EPA regular contact with its state co-regulators. With regard to the proposed disapproval action, EPA corresponded with Alabama regarding the September 23, 2009, submittal prior to the proposed disapproval. In the past several months, EPA has corresponded with Alabama on a number of occasions regarding other SIP revisions and EPA's consideration of those revisions—as is EPA's typical practice to support the co-regulator relationship.

Further, EPA notes that the January 26, 2011, proposed disapproval of Alabama's September 23, 2009, submission as it relates to satisfying the 110(a)(2)(D)(i)(I) requirements for the 2006 24-hour $PM_{2.5}$ NAAQS is based on EPA's determination that Alabama did not provide adequate information to demonstrate compliance with the requirements of section 110(a)(2)(D)(i)(I) for the 2006 24-hour $PM_{2.5}$ NAAQS for Alabama. No new requirements were introduced in EPA's 2009 Guidance. This guidance simply provided additional clarifications but the CAA requirements existed long before Alabama's September 21, 2009, deadline for a SIP submission.

Comment 6: One Commenter mentions that ''EPA has not stated the amount of reduction they believe is needed to satisfy the transport requirements. Not only is this a situation where EPA moves the finish line (by releasing guidance AFTER the due date), the finish line isn't even knowable (because EPA refuses to inform the states how much reduction is enough to satisfy the requirements). EPA seems to say that it has to be whatever the final Transport Rule says, even though there is no final Transport Rule.''

Response 6: EPA disagrees with this comment. As was explained earlier, the state obligation stems from the CAA itself. As co-regulators, EPA makes efforts to assist states in submitting approvable revisions—and EPA took such action with EPA's 2009 Guidance. States had an opportunity to conduct their own analyses regarding interstate transport. Section 110(a)(2) requires that the state's submission contain adequate provisions prohibiting emissions from the state that contribute significantly to nonattainment of or interfere with maintenance of the NAAQS in any other state. In order to ensure compliance with the CAA's mandate of ''adequate'' provisions, the state's SIP revision must be supported by an adequate technical analysis, including, but not limited to, information concerning emissions in the state, meteorological conditions in the state and the potentially impacted states, monitored ambient concentrations in the state and the potentially impacted states, the distance to the nearest area that is not attaining the NAAQS in another state, and air quality modeling.

Comment 7: One Commenter notes EPA's statement in the January 26, 2011, proposed disapproval where the Agency states: ''* * *without an adequate technical analysis EPA does not believe that states can sufficiently address the section 110(a)(2)(D)(i)(I) requirement for the 2006 PM2.5 NAAQS.'' The Commenter mentions that they, and possibly other states, were precluded from providing the necessary technical analysis by EPA because EPA did not release the guidance until after the SIP submission deadline. Further, the Commenter notes that EPA did not provide specific criteria for the technical analysis in the EPA's 2009 Guidance, and mentions that ''[h]ad EPA provided adequate criteria for an approvable SIP in a timely manner, it is likely that [the state] would have been able to submit an approvable SIP by the statutory deadline.''

Response 7: EPA does not agree with the Commenter's assertions. As was explained earlier, the SIP submission requirement is identified in the CAA. In addition, States were alerted that a technical analysis that involved modeling and permanent, enforceable emission reductions could be used to make an adequate demonstration to satisfy the 110(a)(2)(D)(i)(I) requirement for the 1997 $PM_{2.5}$ and ozone NAAQS when EPA promulgated CAIR in 2005. Due to the legal status of CAIR, states relying on CAIR as permanent were taking a risk given EPA's proposed Transport Rule and the court decision on CAIR. Further, states were officially informed that the 110(a)(2)(D)(i)(I) requirement for the 2006 24-hour $PM_{2.5}$ NAAQS could not be satisfied by reliance on CAIR (since that rule did not consider the 2006 24-hour $PM_{2.5}$ NAAQS) when EPA released EPA's 2009 Guidance . The submittal by Alabama relied on CAIR and it did not include an adequate technical analysis—despite EPA's efforts to alert states that mere reliance on CAIR, on its own, would not meet the CAA requirements.

Consistent with section 110 of the CAA and implementing regulations at 40 CFR part 51, and as a general matter, ''adequate technical analyses'' are a cornerstone of ensuring that SIP revisions are approvable. EPA has addressed the timing of information in previous comments, but to underscore that point, EPA alerted states formally upon the release of the EPA's 2009 Guidance that CAIR could not be used to meet the 110(a)(2)(D)(i)(I) requirement for the 2006 $PM_{2.5}$ NAAQS. In addition, there are formal SIP revision requirements described in 40 CFR part 51, subpart F. Further information regarding the path forward following today's action is described below.

Upon disapproval of Alabama's submittal, EPA has a legal obligation, pursuant to the Act, to promulgate a FIP. Section 110(a)(1) of the Act requires states to submit SIPs that meet certain requirements within three years of promulgation of a NAAQS. These SIPs are required to contain, among other things, adequate provisions ''prohibiting, consistent with the provisions of this subchapter, any source or other type of emissions activity within the state from emitting any air pollutant in amounts which will—(I) Contribute significantly to nonattainment in, or interfere with maintenance by, any other state with respect to any such national primary or secondary ambient air quality standard.'' Section 110(a)(1) gives the Administrator authority to prescribe a period shorter than three years for the states to adopt and submit such SIPs, but does not give the Administrator authority to lengthen the time allowed for submission.

Section 110(c)(1) of the Act, in turn, requires EPA to promulgate FIPs if EPA has found that the state has failed to make a required submission or if EPA has disapproved a state submission or found it to be incomplete. Specifically, section 110(c)(1) requires EPA to promulgate a FIP within two years after the Administrator ''(A) Finds that a state has failed to make a required submission or finds that the plan or plan revision submitted by the state does not satisfy the minimum criteria established under subsection (k)(1)(A) of this section or (B) disapproves a state implementation plan submission in whole or in part.'' The Act uses mandatory language, finding that EPA shall promulgate a FIPs at any time within 2 years after the actions identified 110(c)(1)(A) or 110(c)(1)(B) have occurred. EPA's legal obligation to promulgate FIPs arises when those actions occur without regard to the underlying reason for the underlying state SIP deficiency. The obligation to promulgate a FIP must be discharged by EPA unless two conditions are met: (1) The state corrects the deficiency; and (2) the Administrator approves the plan or plan revision, before the Administrator promulgates the FIP.

Under this statutory scheme, EPA has authority and an obligation to promulgate a FIP to correct a SIP deficiency if the actions identified in section 110(c)(1)(A) or (B) have been taken, and the two conditions identified in 110(c)(1) have not been met. The question of whether EPA has authority to promulgate any particular FIP, therefore, must be considered on a state specific basis.

EPA disagrees with the Commenter's suggestion that the rule is inconsistent with the CAA because it does not give states time to develop, submit and receive EPA approval of SIPs before the FIP goes into effect. Section 110(a)(2) calls on states to submit SIPs that contain adequate provisions prohibiting the emissions proscribed by section 110(a)(2)(D)(i)(I). However, when EPA has not received such SIP submission or has disapproved a SIP submission, it has an obligation created by section 110(c)(1) to promulgate a FIP that meets the requirements of section 110(a)(2)(D)(i)(I). EPA does not believe it has authority to adjust the deadlines established in the Act in order to give states additional time, after promulgation of the Transport Rule, to submit SIPs that comply with section 110(a)(2)(D)(i)(I). EPA does not believe it has authority to alter the statutory requirement that it promulgate FIPs within two years of making a finding of failure to submit. EPA sought to discharge this duty with respect to the states covered by CAIR for the $PM_{2.5}$ NAAQS by promulgating CAIR; however, the Court found that rule unlawful and not sufficiently related to the statutory mandate of section 110(a)(2)(D)(i)(I). For this reason, EPA does not believe it could argue that the CAIR FIPs completely discharged its duty to promulgate FIPs with respect to the states whose section 110(a)(2)(D)(i)(I) SIPs are disapproved.

EPA is following the SIP process established in the statute. The 110(a) SIPs for the 2006 $PM_{2.5}$ standard were due in 2009. In each case, states were given the full 3 years to meet the requirement. The Transport Rule provides the FIP to fulfill the requirement that was unmet by the states through SIPs. EPA is required to promulgate a FIP within 2 years of a state's failure to have an approved SIP. States were in fact given the first chance to fulfill the requirement of Section 100(a)(2)(D)(i)(I). EPA's action is subsequent to the State's opportunity to first fulfill the requirement.

EPA has made every attempt to smooth the transition between the requirements of CAIR and those of the forthcoming Transport Rule. For future requirements, EPA will also make every effort to address transition issues. However, EPA cannot ignore its statutory obligations and therefore cannot ensure that no new requirements will be placed on the sources being regulated by this action. Every time a NAAQS is revised, there is a statutory obligation for states to submit SIPs to address certain CAA requirements. If states fail to meet the deadlines or submit incomplete or inadequate SIPs, EPA must act to ensure that the requirements are put into place.

Even though EPA is issuing a FIP, the State still has the opportunity to submit a SIP that can tailor requirements to the specific needs and concerns of the State in order to meet the applicable state budgets. Prior to this action, states had ample time under the provisions of the CAA to develop and submit approvable SIPs and did not. No state affected by the Transport Rule has submitted a SIP to replace the emission reductions that were required by CAIR, despite the *North Carolina* opinion issued in December 2008 that clearly said CAIR did not adequately address 110(a)(2)(D)(i)(I). While the remand left CAIR in place and states and sources were required to continue to comply with it, states had the opportunity to develop replacement measures to ensure that 110(a)(2)(D)(i)(I) components of their SIPs would continue to be fulfilled in the future.

Objection to the Use of Disapproval Actions for States' Implementation Plans

Comment 8: Two Commenters express concerns about EPA's proposed disapproval and indicate that EPA had an obligation to use section 110(k)(5) of the CAA. One Commenter states: ''EPA continues to be resistant to exploring a legislative approach to fixing some of the SIP issues, yet the correct process under the existing Clean Air Act to appropriately address this issue is not being used.'' The Commenter goes on to state: ''Section 110(k) requires that when EPA finds a plan to be inadequate, EPA shall (1) Require the state to revise the plan, (2) notify the state of the inadequacy, and (3) may establish reasonable deadlines not to exceed 18 months.'' Additionally, the Commenter mentions that in their opinion, ''The proposed disapproval completely ignores #1 and #3 and only partially satisfies #2. Regarding #2, the EPA proposal simply states EPA's position that the SIP is inadequate, but fails to notify us 'of the inadequacy.' '' The Commenter asserts that ''* * * EPA still has failed to provide any specificity on what is required of a state to submit an approvable SIP,'' and mentions that ''These Clean Air Act requirements are not discretionary, and that 'EPA must comply with the provisions of Section 110(k)(5) by providing a reasonable period of time to allow [the state] to satisfy the inadequacy and sufficient and timely instructions on what is required to revise the plan instead of relying on a theoretical FIP as the sole remedy.' '' The Commenter concludes by stating that ''EPA may not take final action on this proposal until it complies with Section 110(k)(5) of the Clean Air Act.''

Response 8: The issues raised in this comment are also addressed by Response 7, above. To further clarify what is included in Response 7, Alabama's September 23, 2009, submission relating to section 110(a)(2)(D)(i)(I) for the 2006 $PM_{2.5}$ NAAQS is being disapproved pursuant to sections 110(k)(2) and (3) of the CAA, not section 110(k)(5). Section 110(k)(5) is applicable to SIPs that have been federally-approved, and are subsequently found to be substantially inadequate. This is not the case for Alabama's September 23, 2009, submission relating to section 110(a)(2)(D)(i)(I) for the 2006 $PM_{2.5}$ NAAQS as the September 23, 2009, submission was provided to EPA for a new requirement that was triggered by the promulgation of the 24-hour $PM_{2.5}$ NAAQS in 2006. EPA is required under section 110(k)(3) to act upon a state submittal with an approval or disapproval, within the time period designated under section 110(k)(2). With this action, EPA is disapproving Alabama's September 23, 2009, submission relating to section 110(a)(2)(D)(i)(I), because EPA has made the determination that the Alabama SIP does not satisfy these requirements for the 2006 $PM_{2.5}$ NAAQS. Alabama's submission is inadequate for its failure to meet the statutory requirements of 110(a)(2)(D)(i)(I) as noted above. The State can correct the deficiency by submitting a transport SIP that meets the provisions of the forthcoming Transport Rule or otherwise eliminates significant contribution and interference with maintenance. *See* Response to Comment 7.

Comment 9: One Commenter expresses concern about EPA's statement in the January 26, 2011, proposed disapprovals regarding the Agency not taking action on some elements of the states' 2006 24-hour $PM_{2.5}$ infrastructure submissions, and notes the Agency's statutory timeframe for taking action on SIP submissions. Specifically, the Commenter cites the following statement from EPA's January 26, 2011, proposed rule: ''[t]herefore, EPA is proposing to disapprove those provisions which relate to the 110(a)(2)(D)(i)(I) demonstration and to take no action on the remainder of the demonstration at this time.'' The Commenter mentions that EPA is ''clearly in violation of Clean Air Act Section 110(k)(2)'' by not taking action on the remainder of the states' submissions.

Response 9: In this action, EPA is disapproving certain elements of the State's submission related to the requirements under section 110(a)(2)(D)(i)(I). EPA has also determined that these elements are severable from the rest of the submission. Comments on elements that are not being addressed here are not relevant to this action. As noted herein, EPA intends to act on those elements in a subsequent action. *See* Response to Comment 7 for additional information.

Comment 10: One Commenter indicates that EPA could use section 110(k)(4) to conditionally approve the states' implementation plans for the transport requirements related to the 2006 24-hour $PM_{2.5}$ NAAQS in anticipation of the promulgation of the final Transport Rule, ''[a]ssuming EPA adequately addresses modeling and emissions inventory concerns raised during the comment period* * *''

Response 10: EPA does not agree that the use of 110(k)(4) for a conditional approval is appropriate in this circumstance. Conditional approvals may be used to approve a plan revision based on a written commitment of the State to adopt specific enforceable measures by a date certain, but not later than 1 year after the date of approval of the plan revision. If the State does not adopt specific enforceable measures within a year, the conditional approval automatically converts to a disapproval. The forthcoming Transport Rule is an action that is being promulgated from EPA and not the State, so it is unclear what ''condition'' the State would be responsible for satisfying by relying on the final promulgation of the Transport Rule. Further, as the Commenter implies, use of 110(k)(4) is optional. See Response to Comment 7 for additional information.

Acknowledgement of States' Efforts and Air Quality Conditions

Comment 11: Two Commenters mention innovative air pollution control strategies that states have implemented to reduce emissions, and seem to indicate that the adoption of those strategies, in-and-of itself, complies with the interstate transport provisions of section 110(a)(2)(D)(i)(I) for the 2006 24-hour $PM_{2.5}$ NAAQS. The Commenters opine that state laws and rules have resulted in enormous reductions of pollutants that are key pollutants to interstate transport.

Response 11: EPA agrees that states have implemented innovative air pollution control strategies that have provided significant reductions in emissions, and the Agency commends states for their efforts. However, today's action relates to whether Alabama has provided an adequate technical analysis and emissions reductions to show compliance with the 110(a)(2)(D)(i)(I) requirements for the 2006 24-hour $PM_{2.5}$ NAAQS for Alabama. It is EPA's final determination that Alabama's September 23, 2009, submission does not provide an adequate technical analysis and emissions reductions for this determination and thus EPA is disapproving the portion of Alabama's September 23, 2009, submission as it relates to the 110(a)(2)(D)(i)(I) requirements for the 2006 24-hour $PM_{2.5}$ NAAQS for Alabama.

Concerns Related to the Transport Rule

Comment 12: One Commenter expresses concern regarding EPA's statement in the January 26, 2011, proposed disapproval regarding the modeling used to support the proposed Transport Rule, and the findings in relation to whether states significantly contribute to nonattainment or interfere with maintenance of the 2006 24-hour $PM_{2.5}$ NAAQS in downwind areas. The Commenter states that ''based on 2007–2009 monitoring data, all of these areas are currently meeting the 2006 24-hour $PM_{2.5}$ NAAQS'' and expresses concern that EPA did not note the area's status with regard to the 2006 24-hour $PM_{2.5}$ NAAQS in the proposal. The Commenter goes on to say ''we noted in our official comments on the proposed Transport Rule, EPA had numerous errors in the modeling inputs and failed to ensure that the model performance was acceptable. This may explain the disparity between EPA's modeling results and the real world monitors.''

Response 12: Today's action relates to whether the State provided an adequate technical analysis and emissions reductions to show compliance with the 110(a)(2)(D)(i)(I) requirements for the 2006 24-hour $PM_{2.5}$ NAAQS for Alabama, and is not based on the attainment status of Alabama areas. Alabama did not provide an adequate technical analysis to EPA to demonstrate compliance with the 110(a)(2)(D)(i)(I) requirements for the 2006 24-hour $PM_{2.5}$ NAAQS. With regard to the Commenter's concern about the forthcoming Transport Rule, EPA notes that the Agency received numerous comments on the proposed Transport Rule and is considering those comments as it works toward promulgation of a final Transport Rule. All comments on the Transport Rule will be addressed in that context.

Comment 13: Two Commenters assert that EPA's proposed finding of significant contribution for the proposed Transport Rule is based on an inaccurate emissions inventory, fails to take into account all of the reductions required by the state rules already in effect, and contains numerous other errors that only compound these problems.

Response 13: EPA received numerous comments on the proposed Transport Rule and is considering those comments as it works toward promulgation of a final Transport Rule. All comments on the Transport Rule will be addressed in that context.

III. Final Action

EPA is taking final action to disapprove the portion of Alabama's September 23, 2009, submission, relating to section 110(a)(2)(D)(i)(I), because EPA has made the determination that Alabama's SIP does not satisfy the requirements for the 2006 24-hour $PM_{2.5}$ NAAQS. Although EPA is taking final action to disapprove the portion of Alabama's September 23, 2009, submission relating to section 110(a)(2)(D)(i)(I), EPA acknowledges the State's efforts to address this requirement in its September 23, 2009, submission. Unfortunately, the submittal relies on CAIR and without an adequate technical analysis EPA does not believe that states can adequately address the section 110(a)(2)(D)(i)(I) requirement for the 2006 $PM_{2.5}$ NAAQS. The purpose of the Transport Rule that EPA is developing and has proposed is to respond to the remand of CAIR by the Court and address the section 110(a)(2)(D)(i)(I) requirements for the 2006 24-hour $PM_{2.5}$ NAAQS for the affected states. In today's action, EPA is not taking any disapproval action on the remaining elements of the submission, including other section 110(a)(2) infrastructure elements, and specifically the section 110(a)(2)(D)(i)(II) portion regarding interference with measures required in the applicable SIP for another state designed to prevent significant deterioration of air quality and protect visibility but instead will act on those provisions in a separate rulemaking.

Under section 179(a) of the CAA, final disapproval of a submittal that addresses a requirement of a Part D Plan (42 U.S.C. sections 7501–7515) or is required in response to a finding of substantial inadequacy as described in section 7410(k)(5) (SIP call) starts a sanctions clock. Section 110(a)(2)(D)(i)(I) provisions (the provisions being disapproved in today's notice) were not submitted to meet requirements for Part D, and therefore, no sanctions will be triggered. This final action triggers the requirement under section 110(c) that EPA promulgate a FIP no later than 2 years from the date of the disapproval unless the State corrects the deficiency, and the Administrator approves the plan or plan revision before the Administrator promulgates such FIP. The proposed Transport Rule, when final, is the FIP that EPA intends to implement to satisfy the 110(a)(2)(D)(i)(I) requirement for Alabama for the 2006 24-hr $PM_{2.5}$ NAAQS.

IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to act on state law as meeting federal requirements and does not impose additional requirements beyond those imposed by state law.

A. Executive Order 12866, Regulatory Planning and Review

This action is not a ''significant regulatory action'' under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under the Executive Order.

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq,* because this SIP disapproval under section 110 and subchapter I, part D of the CAA will not in-and-of itself create any new information collection burdens but simply disapproves certain state requirements for inclusion into the SIP. Burden is defined at 5 CFR 1320.3(b).

C. Regulatory Flexibility Act (RFA)

The RFA generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions. For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's final rule on small entities, I certify that this action will not have a significant impact on a substantial number of small entities. This rule does not impose any requirements or create impacts on small entities. This SIP disapproval under section 110 and subchapter I, part D of the CAA will not in-and-of itself create any new requirements but simply disapproves certain state requirements for inclusion into the SIP. Accordingly, it affords no opportunity for EPA to fashion for small entities less burdensome compliance or reporting requirements or timetables or exemptions from all or part of the rule. The fact that the CAA prescribes that various consequences (*e.g.,* higher offset requirements) may or will flow from this disapproval does not mean that EPA either can or must conduct a regulatory flexibility analysis for this action. Therefore, this action will not have a significant economic impact on a substantial number of small entities. EPA continues to be interested in the potential impacts of this proposed rule on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

This action contains no Federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 for state, local, or tribal governments or the private sector. EPA has determined that the disapproval action does not include a federal mandate that may result in estimated costs of $100 million or more to either state, local, or tribal governments in the aggregate, or to the private sector. This action disapproves pre-existing requirements under state or local law, and imposes no new requirements. Accordingly, no additional costs to state, local, or tribal governments, or to the private sector, result from this action.

E. Executive Order 13132, Federalism

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.''

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, because it merely disapproves certain state requirements for inclusion into the SIP and does not alter the relationship or the distribution of power and responsibilities established in the CAA. Thus, Executive Order 13132 does not apply to this action.

F. Executive Order 13175, Coordination With Indian Tribal Governments

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

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

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997). This SIP disapproval under section 110 and subchapter I, part D of the CAA will not in-and-of itself create any new regulations but simply disapproves certain state requirements for inclusion into the SIP.

H. Executive Order 13211, Actions That Significantly Affect Energy Supply, Distribution or Use

This action is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act (NTTAA)

Section 12(d) of the NTTAA, Public Law 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through the Office of Management and Budget, explanations when the Agency decides not to use available and applicable voluntary consensus standards. EPA believes that this action is not subject to requirements of Section 12(d) of NTTAA because application of those requirements would be inconsistent with the CAA.

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

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

EPA lacks the discretionary authority to address environmental justice in this proposed action. In reviewing SIP submissions, EPA's role is to approve or disapprove state choices, based on the criteria of the CAA. Accordingly, this action merely proposes to disapprove certain state requirements for inclusion into the SIP under section 110 and subchapter I, part D of the CAA and will not in-and-of itself create any new requirements. Accordingly, it does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898.

K. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by September 19, 2011. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Particulate matter, Reporting and recordkeeping requirements.

Dated: June 28, 2011.

A. Stanley Meiburg

Acting Regional Administrator, Region 4.

40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

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

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

Subpart B—Alabama

■ 2. Section 52.62 is amended by adding paragraph (d), to read as follows:

§ 52.62 Control strategy: Sulfur oxides and particulate matter.

* * * * *

(d) *Disapproval.* EPA is disapproving portions of Alabama's Infrastructure SIP for the 2006 24-hour $PM_{2.5}$ NAAQS addressing interstate transport, specifically with respect to section 110(a)(2)(D)(i)(I).

[FR Doc. 2011–17985 Filed 7–19–11; 8:45 am]

BILLING CODE 6560–50–P?≤

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2010–1014–201127; FRL–9437–9]

Approval and Promulgation of Air Quality Implementation Plan; Kentucky; Disapproval of Interstate Transport Submission for the 2006 24-hour $PM_{2.5}$ Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is taking final action to disapprove the portion of Kentucky's September 8, 2009, submission which was intended to meet the requirement to address interstate transport for the 2006 24-hour fine particulate matter ($PM_{2.5}$) national ambient air quality standards (NAAQS). Additionally, EPA is responding to comments received on EPA's January 26, 2011, proposed disapproval of the aforementioned portion of Kentucky's September 8, 2009, submission. On September 8, 2009, the Commonwealth of Kentucky, through the Kentucky Division for Air Quality (KDAQ), provided a letter to EPA with certification that Kentucky's state implementation plan (SIP) meets the interstate transport requirements with regard to the 2006 24-hour $PM_{2.5}$ NAAQS. Specifically, the interstate transport requirements under the Clean Air Act (CAA or Act) prohibit a state's emissions from significantly contributing to nonattainment or interfering with the maintenance of the NAAQS in any other state. The effect of today's action will be the promulgation of a Federal Implementation Plan (FIP) for Kentucky no later than two years from the date of disapproval. The proposed Transport Rule, when final, is the FIP that EPA intends to implement for Kentucky.

DATES: *Effective Date:* This rule will be effective August 19, 2011.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R04–OAR–2010–1014. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, i.e., Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30 excluding federal holidays.

FOR FURTHER INFORMATION CONTACT: For information regarding the Kentucky SIP, contact Mr. Zuri Farngalo, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. Mr. Farngalo's telephone number is (404) 562–9152; *e-mail address: farngalo.zuri@epa.gov*. For information regarding the $PM_{2.5}$ interstate transport requirements under section 110(a)(2)(D)(i), contact Mr. Steven Scofield, Regulatory Development Section, at the same address above. Mr. Scofield's telephone number is (404) 562–9034; *e-mail address: scofield.steve@epa.gov*.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background

Upon promulgation of a new or revised NAAQS, sections 110(a)(1) and (2) of the CAA require states to address basic SIP requirements, including emissions inventories, monitoring, and modeling to assure attainment and maintenance for that NAAQS. On December 18, 2006, EPA revised the 24-hour average $PM_{2.5}$ primary and secondary NAAQS from 65 micrograms per cubic meter ($\mu g/m^3$) to 35 $\mu g/m^3$, thus states were required to provide submissions to address section 110(a)(1) and (2) of the CAA (infrastructure SIPs) for this revised NAAQS. Kentucky provided its infrastructure submission for the 2006 $PM_{2.5}$ NAAQS on September 8, 2009. On January 26, 2011, EPA proposed to disapprove the portion of Kentucky's September 8, 2009, infrastructure submission related to interstate transport (i.e., 110(a)(2)(D)(i)(I)) for the 2006 $PM_{2.5}$ NAAQS. *See* 76 FR 4597. A summary of the background for this final action is provided below.

Section 110(a)(2) lists the elements that infrastructure SIPs must address, as applicable, including section 110(a)(2)(D)(i), which pertains to interstate transport of certain emissions. States were required to provide submissions to address the applicable 110(a)(2) infrastructure requirements, including section 110(a)(2)(D)(i), by September 21, 2009.[1]

On September 25, 2009, EPA issued a guidance entitled ''Guidance on SIP Elements Required Under Sections 110(a)(1) and (2) for the 2006 24-Hour Fine Particle ($PM_{2.5}$) National Ambient Air Quality Standards (NAAQS)'' (hereinafter referred to as ''EPA's 2009 Guidance''). EPA developed the EPA's 2009 Guidance to make additional recommendations to states for making submissions to meet the requirements of section 110, including 110(a)(2)(D)(i) for the revised 2006 24-hour $PM_{2.5}$ NAAQS.

As identified in the EPA's 2009 Guidance, the ''good neighbor'' provisions in section 110(a)(2)(D)(i) require each state to submit a SIP that prohibits emissions that adversely affect another state in the ways contemplated in the CAA. Section 110(a)(2)(D)(i) contains four distinct requirements related to the impacts of interstate transport. Specifically, the SIP must prevent sources in the state from emitting pollutants in amounts which will: (1) Contribute significantly to nonattainment of the NAAQS in other states; (2) interfere with maintenance of the NAAQS in other states; (3) interfere with provisions to prevent significant deterioration of air quality in other states; or (4) interfere with efforts to protect visibility in other states.

In the EPA's 2009 Guidance, EPA explained that submissions from states pertaining to the ''significant contribution'' and ''interfere with maintenance'' requirements in section 110(a)(2)(D)(i)(I) must contain adequate provisions to prohibit air pollutant emissions from within the state that contribute significantly to nonattainment or interfere with maintenance of the NAAQS in any other state. EPA described a number of considerations for states for providing an adequate demonstration to address interstate transport requirements in the EPA's 2009 Guidance. First, EPA noted that the state's submission should explain whether or not emissions from the state contribute significantly to nonattainment or interfere with maintenance of the NAAQS in any other state and, if so, address the impact. EPA stated that the state's conclusion should be supported by an adequate technical analysis. Second, EPA recommended the various types of information that could be relevant to support the state's submission, such as information concerning emissions in the state, meteorological conditions in the state and the potentially impacted states, monitored ambient concentrations in the state, and air quality modeling. Third, EPA explained that states should address the ''interfere with maintenance'' requirement independently which requires an evaluation of impacts on areas of other states that are meeting the 2006 24-hour $PM_{2.5}$ NAAQS, not merely areas designated nonattainment. Lastly, EPA explained that states could not rely on the Clean Air Interstate Rule (CAIR) to comply with CAA section 110(a)(2)(D)(i) requirements for the 2006 24-hour $PM_{2.5}$ NAAQS because CAIR does not address this NAAQS. CAIR, promulgated by EPA on May 12, 2005 (see 70 FR 25162), required states to reduce emissions of sulfur dioxide and nitrogen oxides that significantly contribute to, and interfere with maintenance of the 1997 $PM_{2.5}$ NAAQS and/or ozone in any downwind state. CAIR was intended to provide states covered by the rule with a mechanism to satisfy their CAA section 110(a)(2)(D)(i)(I) obligations to address significant contribution to downwind nonattainment and interference with maintenance in another state with respect to the 1997 ozone and $PM_{2.5}$ NAAQS. Many states adopted the CAIR provisions and submitted SIPs to EPA to demonstrate compliance with the CAIR requirements in satisfaction of their 110(a)(2)(D)(i)(I) obligations for those two pollutants.

EPA was sued by a number of parties on various aspects of CAIR, and on July 11, 2008, the U.S. Court of Appeals for the District of Columbia Circuit (DC Circuit or Court) issued its decision to vacate and remand both CAIR and the associated CAIR FIPs in their entirety. *North Carolina* v. *EPA,* 531 F.3d 836 (DC Circuit, July 11, 2008). However, in response to EPA's petition for rehearing, the Court issued an order remanding CAIR to EPA without vacating either CAIR or the CAIR FIPs. *North Carolina* v. *EPA,* 550 F.3d 1176 (DC Circuit, December 23, 2008). The Court thereby left CAIR in place in order to ''temporarily preserve the environmental values covered by CAIR'' until EPA replaces it with a rule consistent with the Court's opinion. *Id.* at 1178. The Court directed EPA to ''remedy CAIR's flaws'' consistent with its July 11, 2008, opinion, but declined to impose a schedule on EPA for completing that action. *Id.*

In order to address the judicial remand of CAIR, EPA has proposed a new rule to address interstate transport pursuant to section 110(a)(2)(D)(i), the ''Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone'' (Transport Rule).[2] As part of the proposed Transport Rule, EPA specifically examined the section 110(a)(2)(D)(i) requirements that emissions from sources in a state must not ''significantly contribute to nonattainment'' and ''interfere with maintenance'' of the 2006 24-hour $PM_{2.5}$ NAAQS by other states. The modeling performed for the proposed Transport Rule shows that Kentucky significantly contributes to nonattainment or interferes with maintenance of the 2006 24-hour $PM_{2.5}$ NAAQS in downwind areas. EPA has now completed the modeling for the final Transport Rule and, as indicated by the technical support documents for this action, Kentucky in fact contributes to downwind nonattainment in another state or interferes with maintenance of the 2006 24-hour $PM_{2.5}$ NAAQS in another state.

On September 8, 2009, the Commonwealth of Kentucky, through KDAQ, provided a letter to EPA certifying that the Kentucky SIP meets the interstate transport requirements with regard to the 2006 24-hour $PM_{2.5}$ NAAQS.[3] Specifically, Kentucky certified that its current SIP adequately addresses the elements of CAA section 110(a)(2)(D)(i)(I) for the 2006 24-hour $PM_{2.5}$ NAAQS. CAA section 110(a)(2)(D)(i)(I) requires that implementation plans for each state contain adequate provisions to prohibit air pollutant emissions from sources within a state from significantly contributing to nonattainment in or interfering with maintenance of the

[1] The rule for the revised $PM_{2.5}$ NAAQS was signed by the Administrator and publically disseminated on September 21, 2006. Because EPA did not prescribe a shorter period for 110(a) SIP submittals, the submittals for the 2006 24-hour NAAQS were due on September 21, 2009, three years from the September 21, 2006, signature date.

[2] See ''Federal Implementation Plans To Reduce Interstate Transport of Fine Particulate Matter and Ozone; Proposed Rule,'' 75 FR 45210 (August 2, 2010).

[3] Kentucky's September 8, 2009, certification letter also explained that Kentucky's current SIP sufficiently addresses other requirements of section 110(a)(2) for the 2006 24-hour $PM_{2.5}$ NAAQS; however, today's final rulemaking only relates to the section 110(a)(2)(D)(i)(I) requirements for the 2006 24-hour $PM_{2.5}$ NAAQS. EPA will address the other section 110(a)(2) requirements for the 2006 24-hour $PM_{2.5}$ NAAQS in relation to Kentucky's SIP in a rulemaking separate from today's final rulemaking.

NAAQS (in this case the 2006 24-hour $PM_{2.5}$ NAAQS) in any other state. On January 26, 2011, EPA proposed to disapprove the portion of Kentucky's September 8, 2009, submission related to interstate transport for the 2006 24-hour $PM_{2.5}$ NAAQS because EPA made the preliminary determination that Kentucky's September 8, 2009, submission does not meet the requirements of section 110(a)(2)(D)(i)(I) of the CAA for this NAAQS. This action is finalizing EPA's disapproval of Kentucky's September 8, 2009, submission with regard to section 110(a)(2)(D)(i)(I) of the CAA for the 2006 24-hour $PM_{2.5}$ NAAQS. *See* EPA's January 26, 2011, proposed disapproval rulemaking at 76 FR 4597 for further information on EPA's rationale for this final action.

II. EPA's Responses to Comments

EPA received three sets of adverse comments on the January 26, 2011, proposed rulemaking to disapprove the portion of Kentucky's September 8, 2009, infrastructure submission on the interstate transport requirements of sections 110(a)(2)(D)(i)(I) of the CAA for the 2006 24-hour $PM_{2.5}$ NAAQS. A full set of the comments provided by KDAQ, the North Carolina Department of Environment and Natural Resources, and the Georgia Environmental Protection Division (hereinafter referred to as ''the Commenters'') are provided in the docket for this final action. As a general matter, the comments overlapped on some issues, and as a result, EPA has organized the response to comments by issue. In addition, EPA acknowledges Georgia's comments regarding SIP processing in general. As Georgia is aware, EPA is considering improvements to the SIP process and appreciates Georgia's comments in that regard.

For the most part, the Commenters oppose EPA's proposed disapproval action for the interstate portion of Kentucky's September 8, 2009, infrastructure submission for the 2006 24-hour $PM_{2.5}$ NAAQS. The comments fall generally into the following categories: (1) States' inability to rely on CAIR to satisfy the 110(a)(2)(D)(i)(I) requirements for the 2006 24-hour $PM_{2.5}$ NAAQS; (2) apparent lack of guidance from EPA on how states should meet the requirements; (3) concerns regarding the procedure of taking action to disapprove Kentucky's submittal; (4) acknowledgement of states' efforts and air quality conditions; and (5) concerns related to the Transport Rule. A summary of the comments and EPA's responses are provided below.

States' Inability To Rely on CAIR To Satisfy the 110(a)(2)(D)(i)(I) Requirements for the 2006 24-hour $PM_{2.5}$ NAAQS

Comment 1: The Commenters express concern with EPA's proposed disapproval and assert that states should be able to rely on CAIR to address the transport requirements in section 110(a)(2)(D)(i)(I) for the 2006 24-hour $PM_{2.5}$ NAAQS. The Commenters explain that the Court left CAIR in place and opine that states should be able to rely on emissions reductions from CAIR to address transport. One Commenter also mentions that ''[t]he Court did not impose a schedule on EPA for completing the Transport Rule; therefore, states have no assurances that EPA will ever replace the CAIR rule. Since there is no guarantee that the Transport Rule will be promulgated in a timely manner, states cannot rely on the reductions in the proposed Transport Rule and must rely on the CAIR reductions, which are permanent and enforceable.''

Response 1: As discussed in EPA's 2009 Guidance, states cannot rely on the CAIR rule for the submission for the 2006 24-hour $PM_{2.5}$ NAAQS because CAIR does not address this NAAQS, and was never intended to address this NAAQS. CAIR was originally put in place to address the 1997 8-hour ozone and $PM_{2.5}$ NAAQS. In order to adequately address the requirements of section 110(a)(2)(D)(i)(I), states can only rely on permanent emission reductions to address transport for the *2006 24-hour $PM_{2.5}$ NAAQS,* and must include an appropriate technical demonstration.

Apparent Lack of Guidance From EPA on How States Should Meet the Requirements

Comment 2: Two Commenters note that that 110(a)(2) infrastructure SIPs for the 24-hour $PM_{2.5}$ NAAQS were due September 21, 2009, but EPA's guidance was not released to the states until September 25, 2009.

Response 2: While EPA's 2009 Guidance regarding the 110(a)(2) infrastructure SIPs for the 2006 24-hour $PM_{2.5}$ NAAQS was released on September 25, 2009, this guidance did not establish new requirements beyond those already required by section 110(a)(2)(D)(i)(I) of the CAA. Relevant portions of section 110(a)(2) require, as follows, ''Each [implementation plan submitted by a State under this chapter] shall * * * contain adequate provisions—(i) prohibiting, consistent with the provisions of this subchapter, any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will—contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard * * *'' States are statutorily obligated to address the requirements of section 110(a)(2)(D)(i)(I) for the 2006 24-hour $PM_{2.5}$ NAAQS. This above-quoted provision provides States with the requirement.

Comment 3: Two Commenters express concern about communication in the SIP process. The Commenters go on to say that ''[e]ven though EPA's guidance was released only a short time later, EPA Region 4 gave absolutely no indication to its co-regulators that there would be a fatal flaw with the submittal.'' The commenter further states that, ''it wasn't until a year later that states were informed via an e-mail on August 27, 2010, that 'All Region 4 states submitted complete infrastructure SIPs for the 2006 $PM_{2.5}$ NAAQS, and our intention is to disapprove the 110(a)(2)(D)(i)(I) portion of those unless it is withdrawn by the state.' ''

Response 3: EPA disagrees with the Commenters' assertion that they were initially notified in an August 27, 2010, e-mail about EPA's expectations and concerns with states' submissions reliance on CAIR to meet the requirements for section 110(a)(2)(D)(i)(I) for the 2006 24-hour $PM_{2.5}$ NAAQS. As was explained above, Kentucky's obligation stems from the CAA. As is EPA's practice, EPA reminded the States on a number of occasions of the interstate transport obligations in 110(a)(2)(D)(i)(I). In addition to the informal reminders (via e-mail and teleconferences, among other avenues), EPA's January 2011 proposal served as a formal, legal notification and provided for a formal opportunity for public comment.

Although EPA reminded states of EPA's expectations and concerns with states' reliance on CAIR to meet the requirements for section 110(a)(2)(D)(i)(I) for the 2006 24-hour $PM_{2.5}$ NAAQS in an August 27, 2010, e-mail, EPA formally notified states of the expectations and concerns in the EPA's 2009 Guidance. Specifically, EPA noted that SIP submissions that relied on CAIR for satisfying the 110(a)(2)(D)(i)(I) requirements for the 2006 24-hour $PM_{2.5}$ NAAQS would be inadequate, as CAIR did not address this NAAQS. EPA's proposed disapproval of the portion of Kentucky's September 8, 2009, submission did not occur until January 2011, which was over a year after EPA's notification (through the release of the EPA's 2009 Guidance) of any states' deficiency for meeting the 110(a)(2)(D)(i)(I) requirement for the 2006 24-hr $PM_{2.5}$ NAAQS had that state relied on CAIR. Thus, Kentucky had notification and an opportunity to provide supplemental information between the release of EPA's 2009 Guidance and EPA's proposed disapproval action in January 2011.

Comment 4: One Commenter raises concerns with EPA treating its 2009 Guidance as ''binding'' and suggests that this action is contrary to statements made by EPA in support of EPA and states being ''co-regulators.''

Response 4: EPA disagrees with the Commenter's assertion that the proposed disapproval is contrary to EPA treating the states as co-regulators. As was explained earlier, EPA has regular contact with its state co-regulators. With regard to the proposed disapproval action, EPA corresponded with Kentucky regarding the September 8, 2009, submittal prior to the proposed disapproval. In the past several months, EPA has corresponded with Kentucky on a number of occasions regarding other SIP revisions and EPA's consideration of those revisions—as is EPA's typical practice to support the co-regulator relationship.

Further, EPA notes that the January 26, 2011, proposed disapproval of Kentucky's September 8, 2009, submission as it relates to satisfying the 110(a)(2)(D)(i)(I) requirements for the 2006 24-hour $PM_{2.5}$ NAAQS is based on EPA's determination that Kentucky did not provide adequate information to demonstrate compliance with the requirements of section 110(a)(2)(D)(i)(I) for the 2006 24-hour $PM_{2.5}$ NAAQS for Kentucky. No new requirements were introduced in EPA's 2009 Guidance. This guidance simply provided additional clarifications but the CAA requirements existed long before Kentucky's September 21, 2009, deadline for a SIP submission.

Comment 5: One Commenter mentions that ''EPA has not stated the amount of reduction they believe is needed to satisfy the transport requirements. Not only is this a situation where EPA moves the finish line (by releasing guidance AFTER the due date), the finish line isn't even knowable (because EPA refuses to inform the states how much reduction is enough to satisfy the requirements). EPA seems to say that it has to be whatever the final Transport Rule says, even though there is no final Transport Rule.''

Response 5: EPA disagrees with this comment. As was explained earlier, the state obligation stems from the CAA itself. As co-regulators, EPA makes efforts to assist states in submitting approvable revisions—and EPA took such action with EPA's 2009 Guidance. States had an opportunity to conduct their own analyses regarding interstate transport. Section 110(a)(2) requires that the state's submission contain adequate provisions prohibiting emissions from the state that contribute significantly to nonattainment of or interfere with maintenance of the NAAQS in any other state. In order to ensure compliance with the CAA's mandate of ''adequate'' provisions, the state's SIP revision must be supported by an adequate technical analysis, including, but not limited to, information concerning emissions in the state, meteorological conditions in the state and the potentially impacted states, monitored ambient concentrations in the state and the potentially impacted states, the distance to the nearest area that is not attaining the NAAQS in another state, and air quality modeling. EPA appreciates that Kentucky has initiated the process of such an analysis (which is included in Kentucky's comment letter).

Comment 6: One Commenter notes EPA's statement in the January 26, 2011, proposed disapproval where the Agency states: ''* * * without an adequate technical analysis EPA does not believe that states can sufficiently address the section 110(a)(2)(D)(i)(I) requirement for the 2006 $PM_{2.5}$ NAAQS.'' The Commenter mentions that they, and possibly other states, were precluded from providing the necessary technical analysis by EPA because EPA did not release the guidance until after the SIP submission deadline. Further, the Commenter notes that EPA did not provide specific criteria for the technical analysis in the EPA's 2009 Guidance, and mentions that ''[h]ad EPA provided adequate criteria for an approvable SIP in a timely manner, it is likely that [the state] would have been able to submit an approvable SIP by the statutory deadline.'' The Commenter included a technical analysis as part of their comments on the proposal.

Response 6: EPA does not agree with the Commenter's assertions. As was explained earlier, the SIP submission requirement is identified in the CAA. In addition, States were alerted that a technical analysis that involved modeling and permanent, enforceable emission reductions could be used to make an adequate demonstration to satisfy the 110(a)(2)(D)(i)(I) requirement for the 1997 $PM_{2.5}$ and ozone NAAQS when EPA promulgated CAIR in 2005. Due to the legal status of CAIR, states relying on CAIR as permanent were taking a risk given EPA's proposed Transport Rule and the court decision on CAIR. Further, states were officially informed that the 110(a)(2)(D)(i)(I) requirement for the 2006 24-hour $PM_{2.5}$ NAAQS could not be satisfied by reliance on CAIR (since that rule did not consider the 2006 24-hour $PM_{2.5}$ NAAQS) when EPA released EPA's 2009 Guidance. The submittal by Kentucky relied on CAIR and it did not include an adequate technical analysis—despite EPA's efforts to alert states that mere reliance on CAIR, on its own, would not meet the CAA requirements.

Consistent with section 110 of the CAA and implementing regulations at 40 CFR part 51, and as a general matter, ''adequate technical analyses'' are a cornerstone of ensuring that SIP revisions are approvable. EPA has addressed the timing of information in previous comments, but to underscore that point, EPA alerted states formally upon the release of the EPA's 2009 Guidance that CAIR could not be used to meet the 110(a)(2)(D)(i)(I) requirement for the 2006 $PM_{2.5}$ NAAQS. In addition, there are formal SIP revision requirements described in 40 CFR part 51, subpart F. EPA does not agree that Kentucky's comments on the January 2011 disapproval proposal may be considered a ''SIP revision;'' nonetheless, EPA did review the comments as was described above. Further information regarding the path forward following today's action is described below.

Upon disapproval of Kentucky's submittal, EPA has a legal obligation, pursuant to the Act, to promulgate a FIP. Section 110(a)(1) of the Act requires states to submit SIPs that meet certain requirements within three years of promulgation of a NAAQS. These SIPs are required to contain, among other things, adequate provisions ''prohibiting, consistent with the provisions of this subchapter, any source or other type of emissions activity within the state from emitting any air pollutant in amounts which will—(I) contribute significantly to nonattainment in, or interfere with maintenance by, any other state with respect to any such national primary or secondary ambient air quality standard.'' Section 110(a)(1) gives the Administrator authority to prescribe a period shorter than three years for the states to adopt and submit such SIPs, but does not give the Administrator authority to lengthen the time allowed for submission.

Section 110(c)(1) of the Act, in turn, requires EPA to promulgate FIPs if EPA has found that the state has failed to make a required submission or if EPA has disapproved a state submission our found it to be incomplete. Specifically, section 110(c)(1) requires EPA to promulgate a FIP within two years after the Administrator ''(A) finds that a state has failed to make a required submission or finds that the plan or plan revision submitted by the state does not satisfy the minimum criteria established under subsection (k)(1)(A) of this section or (B) disapproves a state implementation plan submission in whole or in part.'' The Act uses mandatory language, finding that EPA shall promulgate a FIPs at any time within 2 years after the actions identified 110(c)(1)(A) or 110(c)(1)(B) have occurred. EPA's legal obligation to promulgate FIPs arises when those actions occur without regard to the underlying reason for the underlying state SIP deficiency. The obligation to promulgate a FIP must be discharged by EPA unless two conditions are met: (1) The state corrects the deficiency; and (2) the Administrator approves the plan or plan revision, before the Administrator promulgates the FIP.

Under this statutory scheme, EPA has authority and an obligation to promulgate a FIP to correct a SIP deficiency if the actions identified in section 110(c)(1)(A) or (B) have been taken, and the two conditions identified in 110(c)(1) have not been met. The question of whether EPA has authority to promulgate any particular FIP, therefore, must be considered on a state specific basis.

EPA disagrees with the Commenter's suggestion that the rule is inconsistent with the CAA because it does not give states time to develop, submit and receive EPA approval of SIPs before the FIP goes into effect. Section 110(a)(2) calls on states to submit SIPs that contain adequate provisions prohibiting the emissions proscribed by section 110(a)(2)(D)(i)(I). However, when EPA has not received such SIP submission or has disapproved a SIP submission, it has an obligation created by section 110(c)(1) to promulgate a FIP that meets the requirements of section 110(a)(2)(D)(i)(I). EPA does not believe it has authority to adjust the deadlines established in the Act in order to give states additional time, after promulgation of the Transport Rule, to submit SIPs that comply with section 110(a)(2)(D)(i)(I). EPA does not believe it has authority to alter the statutory requirement that it promulgate FIPs within two years of making a finding of failure to submit. EPA sought to discharge this duty with respect to the states covered by CAIR for the $PM_{2.5}$ NAAQS by promulgating CAIR; however, the Court found that rule unlawful and not sufficiently related to the statutory mandate of section 110(a)(2)(D)(i)(I). For this reason, EPA does not believe it could argue that the CAIR FIPs completely discharged its duty to promulgate FIPs with respect to the states whose section 110(a)(2)(D)(i)(I) SIPs are disapproved.

EPA is following the SIP process established in the statute. The 110(a) SIPs for the 2006 $PM_{2.5}$ standard were due in 2009. In each case, states were given the full 3 years to meet the requirement. The Transport Rule provides the FIP to fulfill the requirement that was unmet by the states through SIPs. EPA is required to promulgate a FIP within 2 years of a state's failure to have an approved SIP. States were in fact given the first chance to fulfill the requirement of Section 100(a)(2)(D)(i)(I). EPA's action is subsequent to the State's opportunity to first fulfill the requirement.

EPA has made every attempt to smooth the transition between the requirements of CAIR and those of the forthcoming Transport Rule. For future requirements, EPA will also make every effort to address transition issues. However, EPA cannot ignore its statutory obligations and therefore cannot ensure that no new requirements will be placed on the sources being regulated by this action. Every time a NAAQS is revised, there is a statutory obligation for states to submit SIPs to address certain CAA requirements. If states fail to meet the deadlines or submit incomplete or inadequate SIPs, EPA must act to ensure that the requirements are put into place.

Even though EPA is issuing a FIP, the State still has the opportunity to submit a SIP that can tailor requirements to the specific needs and concerns of the State in order to meet the applicable state budgets. Prior to this action, states had ample time under the provisions of the CAA to develop and submit approvable SIPs and did not. No state affected by the Transport Rule has submitted a SIP to replace the emission reductions that were required by CAIR, despite the *North Carolina* opinion issued in December 2008 that clearly said CAIR did not adequately address 110(a)(2)(D)(i)(I). While the remand left CAIR in place and states and sources were required to continue to comply with it, states had the opportunity to develop replacement measures to ensure that 110(a)(2)(D)(i)(I) components of their SIPs would continue to be fulfilled in the future.

Objection to the Use of Disapproval Actions for States' Implementation Plans

Comment 7: Two Commenters express concerns about EPA's proposed disapproval and indicate that EPA had an obligation to use section 110(k)(5) of the CAA. One Commenter states: ''EPA continues to be resistant to exploring a legislative approach to fixing some of the SIP issues, yet the correct process under the existing Clean Air Act to appropriately address this issue is not being used.'' The Commenter goes on to state: ''Section 110(k) requires that when EPA finds a plan to be inadequate, EPA shall (1) require the state to revise the plan, (2) notify the state of the inadequacy, and (3) may establish reasonable deadlines not to exceed 18 months.'' Additionally, the Commenter mentions that in their opinion, ''The proposed disapproval completely ignores #1 and #3 and only partially satisfies #2. Regarding #2, the EPA proposal simply states EPA's position that the SIP is inadequate, but fails to notify us 'of the inadequacy.' '' The Commenter asserts that ''* * * EPA still has failed to provide any specificity on what is required of a state to submit an approvable SIP,'' and mentions that ''These Clean Air Act requirements are not discretionary, and that 'EPA must comply with the provisions of Section 110(k)(5) by providing a reasonable period of time to allow [the state] to satisfy the inadequacy and sufficient and timely instructions on what is required to revise the plan instead of relying on a theoretical FIP as the sole remedy.' '' The Commenter concludes by stating that ''EPA may not take final action on this proposal until it complies with Section 110(k)(5) of the Clean Air Act.''

Response 7: The issues raised in this comment are also addressed by Response 6, above. To further clarify what is included in Response 6, Kentucky's September 8, 2009, submission relating to section 110(a)(2)(D)(i)(I) for the 2006 $PM_{2.5}$ NAAQS is being disapproved pursuant to sections 110(k)(2) and (3) of the CAA, not section 110(k)(5). Section 110(k)(5) is applicable to SIPs that have been federally-approved, and are subsequently found to be substantially inadequate. This is not the case for Kentucky's September 8, 2009, submission relating to section 110(a)(2)(D)(i)(I) for the 2006 $PM_{2.5}$ NAAQS as the September 8, 2009, submission was provided to EPA for a new requirement that was triggered by the promulgation of the 24-hour $PM_{2.5}$ NAAQS in 2006. EPA is required under section 110(k)(3) to act upon a state submittal with an approval or disapproval, within the time period designated under section 110(k)(2). With this action, EPA is disapproving Kentucky's September 8, 2009, submission relating to section 110(a)(2)(D)(i)(I), because EPA has made the determination that the Kentucky SIP does not satisfy these requirements for the 2006 $PM_{2.5}$ NAAQS. Kentucky's submission is inadequate for its failure to meet the statutory requirements of 110(a)(2)(D)(i)(I) as noted above. The Commonwealth can correct the deficiency by submitting a transport SIP that meets the provisions of the forthcoming Transport Rule or otherwise eliminates significant contribution and interference with maintenance. *See* Response to Comment 6.

Comment 8: One Commenter expresses concern about EPA's statement in the January 26, 2011, proposed disapprovals regarding the Agency not taking action on some elements of the states' 2006 24-hour $PM_{2.5}$ infrastructure submissions, and notes the Agency's statutory timeframe for taking action on SIP submissions. Specifically, the Commenter cites the following statement from EPA's January 26, 2011, proposed rule: ''[t]herefore, EPA is proposing to disapprove those provisions which relate to the 110(a)(2)(D)(i)(I) demonstration and to take no action on the remainder of the demonstration at this time.'' The Commenter mentions that EPA is ''clearly in violation of Clean Air Act Section 110(k)(2)'' by not taking action on the remainder of the states' submissions.

Response 8: In this action, EPA is disapproving certain elements of the State's submission related to the requirements under section 110(a)(2)(D)(i)(I). EPA has also determined that these elements are severable from the rest of the submission. Comments on elements that are not being addressed here are not relevant to this action. As noted herein, EPA intends to act on those elements in a subsequent action. *See* Response to Comment 6 for additional information.

Comment 9: One Commenter indicates that EPA could use section 110(k)(4) to conditionally approve the states' implementation plans for the transport requirements related to the 2006 24-hour $PM_{2.5}$ NAAQS in anticipation of the promulgation of the final Transport Rule, ''[a]ssuming EPA adequately addresses modeling and emissions inventory concerns raised during the comment period * * *''

Response 9: EPA does not agree that the use of 110(k)(4) for a conditional approval is appropriate in this circumstance. Conditional approvals may be used to approve a plan revision based on a written commitment of the State to adopt specific enforceable measures by a date certain, but not later than 1 year after the date of approval of the plan revision. If the State does not adopt specific enforceable measures within a year, the conditional approval automatically converts to a disapproval. The forthcoming Transport Rule is an action that is being promulgated from EPA and not the State, so it is unclear what ''condition'' the State would be responsible for satisfying by relying on the final promulgation of the Transport Rule. Further, as the Commenter implies, use of 110(k)(4) is optional. *See* Response to Comment 6 for additional information.

Acknowledgement of States' Efforts and Air Quality Conditions

Comment 10: Two Commenters mention innovative air pollution control strategies that states have implemented to reduce emissions, and seem to indicate that the adoption of those strategies, in-and-of itself, complies with the interstate transport provisions of section 110(a)(2)(D)(i)(I) for the 2006 24-hour $PM_{2.5}$ NAAQS. The Commenters opine that state laws and rules have resulted in enormous reductions of pollutants that are key pollutants to interstate transport.

Response 10: EPA agrees that states have implemented innovative air pollution control strategies that have provided significant reductions in emissions, and the Agency commends states for their efforts. However, today's action relates to whether Kentucky has provided an adequate technical analysis and emissions reductions to show compliance with the 110(a)(2)(D)(i)(I) requirements for the 2006 24-hour $PM_{2.5}$ NAAQS for Kentucky. It is EPA's final determination that Kentucky's September 8, 2009, submission does not provide an adequate technical analysis and emissions reductions for this determination and thus EPA is disapproving the portion of Kentucky's September 8, 2009, submission as it relates to the 110(a)(2)(D)(i)(I) requirements for the 2006 24-hour $PM_{2.5}$ NAAQS for Kentucky.

Concerns Related to the Transport Rule

Comment 11: Two Commenters expresses concern regarding EPA's statement in the January 26, 2011, proposed disapproval regarding the modeling used to support the proposed Transport Rule, and the findings in relation to whether states significantly contribute to nonattainment or interfere with maintenance of the 2006 24-hour $PM_{2.5}$ NAAQS in downwind areas. The Commenters state that ''based on 2007–2009 monitoring data, all of these areas are currently meeting the 2006 24-hour $PM_{2.5}$ NAAQS'' and express concern that EPA did not note the area's status with regard to the 2006 24-hour $PM_{2.5}$ NAAQS in the proposal. The Commenters go on to say ''we noted in our official comments on the proposed Transport Rule, EPA had numerous errors in the modeling inputs and failed to ensure that the model performance was acceptable. This may explain the disparity between EPA's modeling results and the real world monitors.''

Response 11: Today's action relates to whether the Commonwealth provided an adequate technical analysis and emissions reductions to show compliance with the 110(a)(2)(D)(i)(I) requirements for the 2006 24-hour $PM_{2.5}$ NAAQS for Kentucky, and is not based on the attainment status of Kentucky areas. Kentucky did not provide an adequate technical analysis to EPA to demonstrate compliance with the 110(a)(2)(D)(i)(I) requirements for the 2006 24-hour $PM_{2.5}$ NAAQS. With regard to the Commenters' concern about the forthcoming Transport Rule, EPA notes that the Agency received numerous comments on the proposed Transport Rule and is considering those comments as it works toward promulgation of a final Transport Rule. All comments on the Transport Rule will be addressed in that context.

Comment 12: Both Commenters assert that EPA's proposed finding of significant contribution for the proposed Transport Rule is based on an inaccurate emissions inventory, fails to take into account all of the reductions required by the state rules already in effect, and contains numerous other errors that only compound these problems.

Response 12: EPA received numerous comments on the proposed Transport Rule and is considering those comments as it works toward promulgation of a final Transport Rule. All comments on the Transport Rule will be addressed in that context.

III. Final Action

EPA is taking final action to disapprove the portion of the Commonwealth of Kentucky's September 8, 2009, submission, relating to section 110(a)(2)(D)(i)(I), because EPA has made the determination that the Kentucky SIP does not satisfy the requirements for the 2006 24-hour $PM_{2.5}$ NAAQS. Although EPA is taking final action to disapprove the portion of Kentucky's September 8, 2009, submission relating to section 110(a)(2)(D)(i)(I), EPA acknowledges the Commonwealth's efforts to address this requirement in its September 8, 2009, submission. Unfortunately, the submittal relies on CAIR and without an adequate technical analysis EPA does not believe that states can adequately address the section 110(a)(2)(D)(i)(I) requirement for the 2006 24-hour $PM_{2.5}$ NAAQS. The purpose of the Transport Rule that EPA is developing and has proposed is to respond to the remand of CAIR by the Court and address the section 110(a)(2)(D)(i)(I) requirements for the 2006 24-hour $PM_{2.5}$ NAAQS for the affected states. In today's action, EPA is not taking any disapproval action on the remaining elements of the submission, including other section 110(a)(2) infrastructure elements, and specifically the section 110(a)(2)(D)(i)(II) portion regarding interference with measures required in the applicable SIP for another state designed to prevent significant deterioration of air quality and protect visibility but instead will act on those provisions in a separate rulemaking.

Under section 179(a) of the CAA, final disapproval of a submittal that addresses a requirement of a Part D Plan (42 U.S.C. sections 7501–7515) or is required in response to a finding of substantial inadequacy as described in section 7410(k)(5) (SIP call) starts a sanctions clock. Section 110(a)(2)(D)(i)(I) provisions (the provisions being disapproved in today's notice) were not submitted to meet requirements for Part D, and therefore, no sanctions will be triggered. This final action triggers the requirement under section 110(c) that EPA promulgate a FIP no later than 2 years from the date of the disapproval unless the State corrects the deficiency, and the Administrator approves the plan or plan revision before the Administrator promulgates such FIP. The proposed Transport Rule, when final, is the FIP that EPA intends to implement to satisfy the 110(a)(2)(D)(i)(I) requirement for Kentucky for the 2006 24-hr $PM_{2.5}$ NAAQS.

IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to act on state law as meeting federal requirements and does not impose additional requirements beyond those imposed by state law.

A. Executive Order 12866, Regulatory Planning and Review

This action is not a ''significant regulatory action'' under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under the Executive Order.

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.,* because this SIP disapproval under section 110 and subchapter I, part D of the CAA will not in-and-of itself create any new information collection burdens but simply disapproves certain state requirements for inclusion into the SIP. Burden is defined at 5 CFR 1320.3(b).

C. Regulatory Flexibility Act (RFA)

The RFA generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions. For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's final rule on small entities, I certify that this action will not have a significant impact on a substantial number of small entities. This rule does not impose any requirements or create impacts on small entities. This SIP disapproval under section 110 and subchapter I, part D of the CAA will not in-and-of itself create any new requirements but simply disapproves certain state requirements for inclusion into the SIP. Accordingly, it affords no opportunity for EPA to fashion for small entities less burdensome compliance or reporting requirements or timetables or exemptions from all or part of the rule. The fact that the CAA prescribes that various consequences (e.g., higher offset requirements) may or will flow from this disapproval does not mean that EPA either can or must conduct a regulatory flexibility analysis for this action. Therefore, this action will not have a significant economic impact on a substantial number of small entities. EPA continues to be interested in the potential impacts of this proposed rule on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

This action contains no Federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 for state, local, or tribal governments or the private sector. EPA has determined that the disapproval action does not include a federal mandate that may result in estimated costs of $100 million or more to either state, local, or tribal governments in the aggregate, or to the private sector. This action disapproves pre-existing requirements under state or local law, and imposes no new requirements. Accordingly, no additional costs to state, local, or tribal governments, or to the private sector, result from this action.

E. Executive Order 13132, Federalism

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.''

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, because it merely disapproves certain state requirements for inclusion into the SIP and does not alter the relationship or the distribution of power and responsibilities established in the CAA. Thus, Executive Order 13132 does not apply to this action.

F. Executive Order 13175, Coordination With Indian Tribal Governments

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

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

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it because it is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997). This SIP disapproval under section 110 and subchapter I, part D of the CAA will not in-and-of itself create any new regulations but simply disapproves certain state requirements for inclusion into the SIP.

H. Executive Order 13211, Actions That Significantly Affect Energy Supply, Distribution or Use

This action is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act (NTTAA)

Section 12(d) of the NTTAA, Public Law 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through the Office of Management and Budget, explanations when the Agency decides not to use available and applicable voluntary consensus standards. EPA believes that this action is not subject to requirements of Section 12(d) of NTTAA because application of those requirements would be inconsistent with the CAA.

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

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

EPA lacks the discretionary authority to address environmental justice in this proposed action. In reviewing SIP submissions, EPA's role is to approve or disapprove state choices, based on the criteria of the CAA. Accordingly, this action merely proposes to disapprove certain state requirements for inclusion into the SIP under section 110 and subchapter I, part D of the CAA and will not in-and-of itself create any new requirements. Accordingly, it does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898.

K. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by September 19, 2011. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Particulate matter, Reporting and recordkeeping requirements.

Dated: June 28, 2011.

A. Stanley Meiburg,

Acting Regional Administrator, Region 4.

40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

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

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

Subpart S—Kentucky

■ 2. Section 52.933 is amended by adding paragraph (c), to read as follows:

§ 52.933 Control strategy: Sulfur oxides and particulate matter.

* * * * *

(c) *Disapproval.* EPA is disapproving portions of Kentucky's Infrastructure SIP for the 2006 24-hour $PM_{2.5}$ NAAQS addressing interstate transport, specifically with respect to section 110(a)(2)(D)(i)(I).

[FR Doc. 2011–17996 Filed 7–19–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R07–OAR–2011–0279; FRL–9436–1]

Approval and Promulgation of Air Quality Implementation Plan; Kansas; Final Disapproval of Interstate Transport State Implementation Plan Revision for the 2006 24-hour $PM_{2.5}$ NAAQS

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: Pursuant to our authority under the Clean Air Act (CAA or Act), the Environmental Protection Agency (EPA) is taking final action to disapprove the portion of the ''Infrastructure'' State Implementation Plan (SIP) submittal from the State of Kansas intended to address the CAA section relating to the ''interstate transport'' requirements for the 2006 24-hour fine particle ($PM_{2.5}$) National Ambient Air Quality Standards (NAAQS) that prohibit a state from significantly contributing to nonattainment or interfering with maintenance of the NAAQS in any other state. This final action to disapprove the ''interstate transport'' portion of the Kansas SIP submittal, received by EPA on April 12, 2010, only relates to those provisions and does not address the other portions of Kansas' April 12, 2010, submission. The rationale for this action and additional detail on this disapproval was described in EPA's proposed rulemaking published in the **Federal Register** on the March 18, 2011. The effect of this action will be the

promulgation of a Federal Implementation Plan (FIP) for Kansas no later than two years from the date of disapproval. The proposed Transport Rule, when final, is the FIP that EPA intends to implement for Kansas.

DATES: *Effective Date:* This rule is effective on August 19, 2011.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R07–OAR–2011–0279. All documents in the docket are listed on the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *i.e.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the U.S. Environmental Protection Agency, Region 7, in the Air Planning and Development Branch of the Air and Waste Management Division, 901 North 5th Street, Kansas City, Kansas 66101. EPA requests that, if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The interested persons wanting to examine these documents should make an appointment with the office at least 24 hours in advance. The Regional Office official hours of business are Monday through Friday, 8 to 4:30, excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Ms. Elizabeth Kramer, Environmental Scientist, Air Planning and Development Branch, U.S. Environmental Protection Agency, Region 7, 901 North 5th Street, Kansas City, Kansas 66101; *telephone number:* (913) 551–7186; *fax number:* (913) 551–7844; *e-mail address: kramer.elizabeth@epa.gov.*

Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by September 19, 2011. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

SUPPLEMENTARY INFORMATION: Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA. These sections provide additional information on this final action:

I. Background

On March 18, 2011 (76 FR 14831–14835), EPA proposed to disapprove a portion of the ''Infrastructure'' SIP (CAA 110(a)(1) and (2)) submittal from the State of Kansas relating to the interstate transport element of infrastructure (CAA section 110(a)(2)(D)(i)(I)). For additional detail on this final action, see the proposed rulemaking.

Section 110(a)(2) of the CAA lists the thirteen required elements that ''infrastructure'' SIPs must address, as applicable, including section 110(a)(2)(D)(i), which pertains to interstate transport of certain emissions. These ''good neighbor'' provisions require each state to submit a SIP that prohibits emissions which adversely affect another state in the ways contemplated in the statute. The section 110(a)(2)(D)(i), portion of Kansas' SIP must prevent sources in the State from emitting pollutants in amounts which will: (I) Contribute significantly to nonattainment of the NAAQS in other states and interfere with maintenance of the NAAQS in other states and (II) interfere with provisions to prevent significant deterioration of air quality in other states or interfere with efforts to protect visibility in other states.

On April 12, 2010, EPA received a SIP revision from the State of Kansas intended to address the requirements of section 110(a)(2) including the requirements of section 110(a)(2)(D)(i) for the 2006 24-hour $PM_{2.5}$ NAAQS. In this final rulemaking, EPA is disapproving only the 110(a)(2)(D)(i)(I) portion of the submittal that pertains to prohibiting sources in Kansas from emitting pollutants that significantly contribute to nonattainment or interfere with maintenance of the 2006 24-hour $PM_{2.5}$ NAAQS in other states. The elements on which we are taking action today are severable portions of the submittal. EPA plans to act on the additional portions of the State's submittal in a subsequent action.

The requirements of section 110(a)(2)(D)(i)(I), as well as EPA's analysis of the State's submission, are explained in detail in the proposal. The reader should refer to the proposal for further explanation of EPA's rationale for the proposed disapproval.

II. EPA's Responses to Comments on the Proposal

Overview of Comments

Formal comments were received from commenters on behalf of two utility companies in Kansas (the Kansas City Board of Public Utilities and Westar Energy) regarding EPA's March 18, 2011 proposed disapproval (76 FR 14831). The commenters submitted identical comments regarding EPA's proposed rulemaking. EPA has summarized the comments and responded to each within this section of this final rulemaking.

1. *Comment:* The commenters argued that EPA's proposed disapproval action did not clearly describe how the State lacked a technical demonstration showing that Kansas sources did not significantly contribute to nonattainment or interfere with maintenance of the 2006 $PM_{2.5}$ NAAQS. The commenters stated that the State's demonstration consisted of the following: (1) Kansas met the demonstration requirement ''by indicating that'' its sources do not significantly interfere with attainment or maintenance in downwind states; and (2) Kansas supported this assertion by stating that Kansas sources had reduced $PM_{2.5}$ precursor emissions (below 2005 National Emissions Inventory levels) by 32 percent for nitrogen oxides (NO_X) and 58 percent for sulfur oxides (SO_x), ''suggesting the State's emissions would not exceed'' the 2006 $PM_{2.5}$ NAAQS.

EPA Response: In the proposal, EPA stated two bases for its proposed disapproval: (1) Absence of a technical demonstration showing that Kansas sources do not significantly contribute to nonattainment or interfere with maintenance of the 2006 24-hour $PM_{2.5}$ NAAQS; and (2) information in the preliminary modeling for EPA's Transport Rule which conflicted with the State's conclusory statement that Kansas sources did not significantly impact downwind nonattainment or interfere with maintenance. The mere ''indication'' that Kansas sources do not significantly contribute to downwind nonattainment or interfere with maintenance is not a demonstration, but rather an unsupported conclusion. A statement regarding decreases in $PM_{2.5}$ precursor emissions compared to a 2005 inventory does not ''suggest,'' much less demonstrate, that the air quality impact of those emissions reductions on downwind concentrations of $PM_{2.5}$ are insignificant.

Kansas included the following information in its attempt to address 110(a)(2)(D)(i) requirements. The submittal described that Kansas has adopted, by reference, the Federal Prevention of Significant Deterioration regulations into the Kansas Air Regulations. In the submission, Kansas articulated its future intent to incorporate the new, 24-hour $PM_{2.5}$ NAAQS into the State air regulations. Kansas also described its Regional Haze SIP to address visibility requirements, which is currently pending EPA review. In addition, the submittal included a summary of the emission reductions (in tons per year) of both NO_X and SO_X anticipated to be achieved from four of the electric generating units (EGUs) in Kansas. Kansas then described the percentage of emission reductions expected from those facilities compared to previous emissions recorded in the National Emissions Inventory from 2005. In the submittal, Kansas described certain projected emissions reductions from EGUs but did not submit any information on the impact of emissions either from the four units discussed in the submittal, or from other sources in the State of Kansas, on downwind nonattainment and maintenance of the 2006 24-hour $PM_{2.5}$ NAAQS in other states. Kansas did not submit an analysis of emissions from Kansas sources on downwind areas. In addition, the Regional Haze SIP submission referenced in the infrastructure SIP submission does not contain such analysis. The submittal lacked the needed information and analysis to address the requirements of CAA section 110(a)(2)(D)(i)(I) to demonstrate that: (1) Kansas does not have a significant contribution on nonattainment of the NAAQS and interference with maintenance of the NAAQS in other states; or (2) that the State has adequate measures in place to eliminate any significant contribution to nonattainment of the NAAQS and interference with maintenance of the NAAQS in other states. There was no demonstration that the requirements of section 110(a)(2)(D)(i)(I) have been met with respect to the 2006 $PM_{2.5}$ NAAQS.

2. *Comment:* The commenters argued that EPA's proposed disapproval action[1] improperly relied on the non-final, preliminary modeling performed for the proposed Transport Rule [2] (which showed that emissions from the State of Kansas significantly contributed to nonattainment and interference with maintenance of the 2006 24-hour $PM_{2.5}$ NAAQS in downwind areas). The commenters posit that, by relying on the modeling results of the proposed Transport Rule (completed after Kansas submitted its SIP), EPA had determined that the proposed Transport Rule modeling ''superseded'' Kansas' submittal, and that Kansas could receive approval of its SIP only if it had anticipated the subsequent modeling and had addressed the modeling in its SIP submittal.

EPA Response: In the proposed disapproval of the Kansas SIP, EPA neither stated nor implied that Kansas could only have avoided a disapproval by addressing the proposed Transport Rule modeling in its original submittal. As stated in response to comment 1 above, in the proposal EPA stated two bases for its proposed disapproval: (1) Absence of a technical demonstration showing that Kansas sources do not significantly contribute to nonattainment or interfere with maintenance of the 2006 24-hour $PM_{2.5}$ NAAQS (discussed in detail in the response to comment 1, above); and (2) information in the preliminary modeling for the Transport Rule which conflicted with the State's conclusory statement that Kansas sources did not significantly impact downwind nonattainment or interfere with maintenance of the 2006 NAAQS. With respect to the latter basis, the modeling for the proposed Transport Rule was not available to Kansas when it submitted the SIP and could not have been considered by Kansas at that time. The proposed disapproval of the Kansas submittal was not based on the fact that Kansas did not address the proposed Transport Rule modeling. However, the modeling was relevant to EPA's proposed disapproval of the Kansas SIP, particularly in light of the fact that Kansas did not provide any technical demonstration at all regarding the interstate contribution issue, as discussed in the response to Comment 1. Commenters had the opportunity, and in fact did, comment on the applicability of the preliminary modeling to EPA's proposed action. EPA has now completed the modeling for the final Transport Rule and, as indicated by the technical support documents (TSDs) for this action, Kansas in fact significantly contributes to downwind nonattainment in another state and interferes with maintenance of the 2006 24-hour $PM_{2.5}$ NAAQS in another state. Please see the TSDs for the final modeling and contribution analysis as they relate to this action.

Nevertheless, the lack of any technical demonstration is sufficient basis to disapprove the SIP for this portion of the infrastructure element. However, as discussed in EPA's proposed disapproval, EPA also noted that we had preliminary information from the modeling performed for the proposed Transport Rule showing that Kansas sources significantly contribute to nonattainment and interfere with maintenance of the 2006 24-hour $PM_{2.5}$ NAAQS in downwind areas.[3] At proposal for this action, it was appropriate for EPA to consider technical information available for the proposed Transport Rule, particularly in light of the complete absence of any air quality analysis in the Kansas submittal regarding downwind impacts of Kansas sources. EPA did not determine, as suggested by the commenters, that the preliminary Transport Rule modeling ''superseded'' the Kansas submittal. The preliminary modeling merely provided an air quality impact analysis that the Kansas submittal lacked, and provided evidence that the mere assertion by Kansas of noncontribution was not only unsupported, but also incorrect. As noted above, the final modeling for the Transport Rule indicates that Kansas in fact significantly contributes to downwind nonattainment in another state and interferes with maintenance of the 2006 24-hour $PM_{2.5}$ NAAQS in another state.

3. *Comment:* Based on language in EPA's 2009 Guidance document,[4] commenters argued that EPA should have issued an incompleteness finding for the interstate transport (section 110(a)(2)(D)(i)(I)) portion of the submittal rather than issuing EPA's proposed disapproval action. The commenters argue that if EPA would have issued an incompleteness finding before the end of EPA's six month statutory time-frame for determining completeness, Kansas could have cured its incomplete SIP submittal by addressing the preliminary modeling for the Transport Rule in preparing the required technical demonstration to

[1] *See* EPA's proposed disapproval on March 18, 2011 (76 FR 14831–14835).

[2] *See* ''Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone; Proposed Rule,'' 75 FR 45210 (August 2, 2010).

[3] *See* Section IV on Defining ''Significant Contribution'' and ''Interference With Maintenance,'' 75 FR 45229 of ''Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone; Proposed Rule,'' 75 FR 45210 (August 2, 2010).

[4] *See* William T. Harnett, Director, Air Quality Policy Division, Office of Air Quality Planning and Standards. ''Guidance on SIP Elements Required Under Sections 110(a)(1) and (2) for the 2006 24-hour Fine Particle ($PM_{2.5}$) National Ambient Air Quality Standards.'' Memorandum to EPA Air Division Directors, Regions I–X (September 25, 2009).

address interstate transport requirements. The commenters further argue that, by choosing the disapproval option rather than the option of finding the submittal incomplete, the only remedial action is the FIP. Commenters assumed that EPA expected the State of Kansas to respond to the preliminary modeling of the proposed Transport Rule but that, as directed by the 2009 Guidance, Kansas was not allowed to wait until the preliminary Transport Rule modeling was issued to develop the SIP submittal.

EPA Response: EPA reiterates the explanation of its rationale for the disapproval described in response to Comments 1 and 2, above. In addition, the commenters' assertion that EPA put the State at an unfair disadvantage by not finding the submittal incomplete instead of issuing a proposed disapproval is incorrect. We note initially that the commenters' implicit conclusion that an incompleteness finding would not have triggered FIP obligations is not correct. Section 110(c)(1) of the CAA provides that the FIP obligation is triggered either upon disapproval of a SIP, or upon a determination that a state has failed to submit a SIP (or has submitted a SIP determined to be incomplete). In fact, an incompleteness finding would have triggered EPA's FIP obligation sooner than a final disapproval of the SIP. An incompleteness finding and a final disapproval each trigger a FIP clock. If EPA found the submittal to be incomplete, it would trigger a FIP obligation as of the date of the finding. Because such a finding is not subject to notice and comment rulemaking, while a disapproval requires such rulemaking, the FIP obligation would have been triggered much sooner.

Therefore, even if relevant to EPA's disapproval action, EPA did not create any unfair disadvantage for the State by its proposal to disapprove the submittal. Moreover, the State of Kansas did not submit any comments on the proposed rulemaking and did not submit any technical analysis in response to the proposed disapproval. The commenters speculate that, if EPA had determined the SIP was incomplete, Kansas would have submitted a supplement to its SIP submittal addressing the proposed Transport Rule modeling. The commenters imply that the proposed disapproval precluded Kansas from curing defects in the original submittal. However, in fact the proposed disapproval solicited comment on the proposed action, and did not foreclose Kansas from submitting the same information and analysis that the commenters argue would have been submitted after an incompleteness finding. Neither the commenters nor Kansas submitted any analysis in response to the proposed disapproval which might be relevant to downwind impacts of Kansas sources on $PM_{2.5}$ concentrations. Therefore, Kansas was not disadvantaged by the proposed disapproval as contrasted with the incompleteness finding option advocated by the commenters.

4. *Comment:* Commenters suggest that at the time of Kansas' submittal, Kansas' emissions had not ''been deemed'' by EPA to contribute to or interfere with downwind nonattainment or maintenance in other areas. The commenters assert that Kansas properly followed EPA's 2009 Guidance by ''indicating'' that ''emissions from the State do not significantly interfere with attainment or maintenance of the 2006 24-hour $PM_{2.5}$ NAAQS in downwind states.'' Furthermore, the commenters state that certain facts (such as NO_X and SO_X percent reductions over the values used in the preliminary Transport Rule modeling) demonstrate that Kansas submitted the required demonstration.

EPA Response: See also EPA's responses to Comment 1, 2 and 3 above. In addition, the CAA section 110(a)(2)(D)(i)(I) requires that states develop SIPs that demonstrate that a SIP is adequate to prohibit sources in the state from significantly contributing to downwind nonattainment or interference with maintenance of a new or revised NAAQS in another state. The CAA places responsibility on the State to show that this requirement is met. Neither the Act nor the 2009 Guidance referenced by the commenters indicate that this requirement can be met by merely concluding that EPA has not found any significant contribution or interference with maintenance. It is also not sufficient to merely ''indicate'' that there is no significant downwind contribution. In addition, as discussed in detail in the response to Comment 1, the mere assertion that emissions from a limited number of Kansas sources are projected to be lower than assumed by EPA in the preliminary Transport Rule modeling is not sufficient to demonstrate that this requirement is met.

Furthermore, statements about emission reductions from certain sources in a state do not inform the entire decision about the air quality impacts of sources in the State to a neighboring state. An analysis showing that source emissions are so low as to be insignificant might be some indication that a source could not reasonably be expected to contribute to downwind air quality problems. But that is not the argument made by the commenter or by Kansas in its SIP submission. Kansas' SIP submission merely stated that four sources will reduce emissions of NO_X (32 percent total reduction) and SO_X (58 percent total reduction), below 2005 National Emissions Inventory levels, ''in the coming years.'' However, there is no indication of the air quality impact of these anticipated reductions. Therefore, and for reasons also detailed in response to comment 1, the Kansas submission does not provide a demonstration that the SIP prohibits Kansas sources from significantly contributing to downwind nonattainment, or from interfering with maintenance of, the 2006 $PM_{2.5}$ NAAQS.

5. *Comment:* The commenters argue that EPA failed to identify a statutory basis for reliance on preliminary modeling from an ongoing rulemaking (Transport Rule) to support disapproval. The commenters state that this reflects a failure to follow the path set out in the CAA section 110(c)(1). Commenters assert that the CAA authorizes the Administrator to impose a FIP only when a current SIP has been found lacking after promulgation of new rules and the State had not acted to cure the resulting deficiency. They stated that EPA ''would have had to promulgate a proposed regulation first and give the State a chance to submit a substitute regulation.'' The commenters cite *Bethlehem Steel Corporation* v. *Gorsuch,* 742 F.2d 1028 (7th Cir. 1984) as their authority for these arguments.

EPA Response: EPA has described in detail above, particularly in response to comments 1 and 2, the basis for its reliance on the proposed Transport Rule modeling in this disapproval action. The statutory basis for EPA's disapproval action is (1) CAA section 110(a)(2)(D)(i)(I), which requires SIPs to address certain contributions to downwind nonattainment and maintenance, as discussed in response to previous comments, and (2) section 110(k)(1) and (2) which require disapproval of portions of plans which do not meet the requirements of the Act, within 1 year of a determination that a SIP submittal is complete. The requirements of section 110(a)(2)(D)(i)(I) are triggered upon promulgation or revision of a NAAQS (see section 110(a)(1) of the CAA). The requirement that the SIP must address this provision is imposed by the statute, not by promulgation by EPA of any separate rule (other than the rule promulgating or revising a NAAQS). Once EPA promulgated the 2006 revisions to the $PM_{2.5}$ standards, all of the applicable requirements of section 110(a)(2) were triggered, including section

110(a)(2)(D)(i)(I). The Kansas submittal was in response to this specific statutory requirement. Because EPA is disapproving the SIP submittal (only as it relates to section 110(a)(2)(D)(i)(I)), EPA's obligation to promulgate a FIP is also triggered, upon disapproval of the SIP submittal, in whole or in part, as required by section 110(c)(1). CAA section 110(c)(1) authorizes EPA to promulgate a FIP ''at any time within 2 years after'' disapproving a SIP submission.

Commenters reliance on *Bethlehem Steel* is also misplaced. That case involved an EPA action approving a portion of a state's emissions regulation, but not approving another portion of the same regulation, thus rendering the regulation less stringent than the state intended. In rejecting EPA's approach, the Court stated: ''No more can the EPA, in the guise of partial approval, remove words of limitation; it must follow the procedures that the Act prescribes for making state regulations stricter.'' (*Bethlehem Steel,* 742 F. 2d at 1036.) The procedures described by the Court for that purpose (*i.e.,* making a state regulation more stringent) are not applicable to the disapproval of the section 110(a)(2)(D)(i)(I) portion of the Kansas SIP submittal. EPA's action has no effect on any Kansas emissions control regulation, and no effect on the stringency of any state requirement. EPA's action merely follows the procedures of the CAA described above.

6. *Comment:* The commenters argue that the rationale for the proposed disapproval was inconsistent with the rationale for the proposed SIP call for Kansas (relating to interstate transport elements for the 1997 ozone NAAQS), in which EPA stated that it would not finalize the SIP Call if the final Transport Rule modeling does not show significant contribution to downwind nonattainment or interference with maintenance of the ozone standard. The commenter also asserts that this action ''reversed the prior findings'' that Kansas does not significantly contribute to nonattainment or interfere with maintenance in downwind areas.

EPA Response: The rationale for the proposed SIP Call is explained in detail in the proposed SIP call rule for Kansas (76 FR 763, January 6, 2011). That action involves a different ambient standard (1997 ozone as compared to 2006 $PM_{2.5}$), and different factual and legal considerations from those relating to this disapproval action. As explained in the proposed SIP Call, EPA had previously determined that Kansas sources did not significantly contribute to downwind nonattainment or interference with maintenance of the 1997 ozone standards (72 FR 10608). Because subsequent information (the proposed Transport Rule modeling) showed that the 2007 determination might be in error, EPA proposed the SIP Call, for the reasons stated in the proposal. However, a final determination of that issue can only be made after EPA finally determines, under the Transport Rule, whether Kansas sources do have downwind contribution to attainment or maintenance of the 1997 ozone standard.

In contrast, this disapproval of the section 110(a)(2)(D)(i)(I) portions of the Kansas 2006 $PM_{2.5}$ SIP, contrary to assertions of the commenters, does not implicate any prior EPA determinations with respect to the specific NAAQS (2006 $PM_{2.5}$). Unlike the Kansas SIP for the 1997 ozone standard, EPA had not previously determined that the SIP is adequate with respect to the 2006 $PM_{2.5}$ standard, to meet the requirements of section 110(a)(2)(D)(i)(I). As described in detail in responses to Comments 1 and 2, this disapproval action is based on the lack of a demonstration by Kansas that the SIP is adequate to meet the requirements of section 110(a)(2)(D)(i)(I). Unlike the Kansas SIP Call for 1997 ozone standard (76 FR 763), this determination is not dependent on the outcome of the final Transport Rule.[5] The rationales for the proposed SIP Call and this action are not inconsistent, but merely address different matters, as discussed above.

7. *Comment:* The commenters argue that the proposed disapproval relating to the 2006 $PM_{2.5}$ NAAQS is inconsistent with the approval of Kansas' demonstration of lack of contribution and noninterference with respect to the ''1997 NAAQS.'' Commenters assert that the ''same type of technical demonstration'' was made for those NAAQS as for the 2006 $PM_{2.5}$ NAAQS, and that EPA is being inconsistent in its treatment of the two submissions.

EPA Response: With respect to the reference to the technical demonstration for the 1997 NAAQS, it is not clear whether the commenter is referencing the demonstration for the ozone or $PM_{2.5}$ standards, or both. With respect to ozone, Kansas made a detailed technical demonstration with respect to its downwind contribution for ozone, based on the information available at the time. The demonstration included emissions analyses, analyses of the proximity of Kansas sources to downwind ozone air quality problems, and back-trajectory analyses. As explained in the proposed SIP Call for the 1997 ozone NAAQS referenced above, EPA has preliminarily determined that more recent analyses made in conjunction with the proposed Transport Rule, contradict the conclusions of noninterference with respect to the 1997 ozone NAAQS. This issue is outside the scope of this rulemaking, but notably, the demonstration provided by Kansas with respect to the 1997 ozone NAAQS contained far more information than the conclusory statements in the 2006 $PM_{2.5}$ SIP submitted (discussed above particularly in the response to Comment (1) Which is the subject of this rulemaking).

With respect to the demonstration made by Kansas for the 1997 $PM_{2.5}$ standards, we note that Kansas relied on the modeling performed for the Clean Air Interstate Rule, which, based on the information available at that time, showed that Kansas did not significantly contribute to downwind nonattainment or interfere with maintenance of the 1997 $PM_{2.5}$ standard. This modeling did not consider and is not relevant to contributions with respect to the 2006 NAAQS, but for the 1997 $PM_{2.5}$ NAAQS, it was adequate at the time to support a demonstration of noncontribution by Kansas.

For the reasons stated above, and as described further in response to Comment 1, we disagree with the commenters' generalized assertion that the State's documentation regarding contribution for the 1997 NAAQS was ''the same type of technical demonstration'' utilized for the 2006 $PM_{2.5}$ NAAQS. As stated above, there was no technical demonstration with respect to the latter NAAQS.

III. Final Action

EPA is taking final action to disapprove a portion of the submission from the State of Kansas intended to demonstrate that Kansas has adequately addressed the elements of CAA section 110(a)(2)(D)(i)(I) that require the Kansas' SIP to include adequate provisions to prohibit air pollutant emissions from sources within the State from significantly contributing to nonattainment in or interference with maintenance of the 2006 24-hour $PM_{2.5}$ NAAQS in any other state. EPA has determined that the Kansas submission does not contain adequate provisions to prohibit air pollutant emissions from within the State that significantly contribute to nonattainment in or interference with maintenance of the 2006 24-hour $PM_{2.5}$ NAAQS in other

[5] We reiterate, however, as stated in response to Comment 2, that the modeling for the final Transport Rule has now been completed.

downwind states. As noted in the Background above, the final modeling for EPA's Transport Rule indicates that Kansas in fact significantly contributes to downwind nonattainment in another state and interferes with maintenance of the 2006 24-hour $PM_{2.5}$ NAAQS in another state.

Any remaining elements of the submittal, including language to address other CAA section 110(a)(2) elements, including section 110(a)(2)(D)(i)(II) regarding interference with measures required in the applicable SIP for another state designed to prevent significant deterioration of air quality and protect visibility, are not addressed in this action. EPA is disapproving only the provisions which relate to the section 110(a)(2)(D)(i)(I) portion of the submittal and intends to act on the remainder of the submittal in a subsequent action.

Also, under section 179(a) of the CAA, final disapproval of a submittal that addresses a requirement of a Part D Plan (42 U.S.C.A. 7501–7515), or is required in response to a finding of substantial inadequacy as described in section 7410(k)(5) (SIP Call), starts a sanctions clock. The provisions in the submittal that we are disapproving were not submitted to meet either of those requirements. Therefore, no sanctions are triggered.

The full or partial disapproval of a SIP revision triggers the requirement under section 110(c) that EPA promulgate a FIP no later than 2 years from the date of the disapproval unless the state corrects the deficiency, and the Administrator approves the plan or plan revision before the Administrator promulgates such FIP.

EPA's final Transport Rule and related FIP, if finalized in the manner proposed, may address these interstate transport requirements of CAA section 110(a)(2)(D)(i)(I) for the State of Kansas for the 2006 24-hour $PM_{2.5}$ NAAQS.

IV. Administrative Requirements

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to act on state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law.

Executive Order 12866, Regulatory Planning and Review

This action is not a ''significant regulatory action'' under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under the Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011).

Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq,* because this SIP disapproval under section 110 of the CAA will not in-and-of itself create any new information collection burdens but simply disapproves certain state requirements for inclusion into the SIP. Burden is defined at 5 CFR 1320.3(b).

Regulatory Flexibility Act

The Regulatory Flexibility Act generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions. For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's rule on small entities, I certify that this action will not have a significant impact on a substantial number of small entities. This rule does not impose any requirements or create impacts on small entities. This SIP disapproval under section 110 and of the CAA will not in-and-of itself create any new requirements but simply disapproves certain State requirements for inclusion into the SIP. Accordingly, it affords no opportunity for EPA to fashion for small entities less burdensome compliance or reporting requirements or timetables or exemptions from all or part of the rule. The fact that the CAA prescribes that various consequences (*e.g.,* higher offset requirements) may or will flow from this disapproval does not mean that EPA either can or must conduct a regulatory flexibility analysis for this action. Therefore, this action will not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act

This action contains no Federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1531–1538 for state, local, or tribal governments or the private sector. EPA has determined that the disapproval action does not include a Federal mandate that may result in estimated costs of $100 million or more to either state, local, or tribal governments in the aggregate, or to the private sector. This action disapproves pre-existing requirements under State or local law, and imposes no new requirements. Accordingly, no additional costs to state, local, or tribal governments, or to the private sector, result from this action.

Executive Order 13132, Federalism

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by state and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.''

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This action merely disapproves certain state requirements for inclusion into the SIP and does not alter the relationship or the distribution of power and responsibilities established in the CAA. Today's final disapproval does not have federalism implications. Thus, Executive Order 13132 does not apply to this action.

Executive Order 13175, Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP EPA is disapproving would not apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law. Thus, Executive

Order 13175 does not apply to this action.

Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it because it is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997). This SIP disapproval under section 110 will not in-and-of itself create any new regulations but simply disapproves certain state requirements for inclusion into the SIP.

Executive Order 13211, Actions That Significantly Affect Energy Supply, Distribution or Use

This action is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law 104–113, Section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through Office of Management and Budget, explanations when the Agency decides not to use available and applicable voluntary consensus standards. EPA believes that this action is not subject to requirements of section 12(d) of NTTAA because application of those requirements would be inconsistent with the CAA.

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

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

EPA lacks the discretionary authority to address environmental justice in this action. In reviewing SIP submissions, EPA's role is to approve or disapprove state choices, based on the criteria of the CAA. Accordingly, this action merely disapproves certain state requirements for inclusion into the SIP under section 110 of the CAA and will not in-and-of itself create any new requirements. Accordingly, it does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898.

Congressional Review

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**.

A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Statutory Authority

The statutory authority for this action is provided by section 110 of the CAA, as amended (42 U.S.C. 7410).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Particulate matter.

Dated: June 28, 2011.

Karl Brooks,

Regional Administrator, Region 7.

[FR Doc. 2011–17741 Filed 7–19–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2011–0131, FRL–9317–9]

Approval and Promulgation of Air Quality Implementation Plans; State of California; Regional Haze State Implementation Plan and Interstate Transport Plan; Interference With Visibility Requirement

Correction

In rule document 2011–14479, appearing on pages 34608–34611, in the issue of June 14, 2011, make the following correction:

On page 34608, in the second column, in the Environmental Protection Agency document, the subject is corrected to appear as above.

[FR Doc. C1–2011–14479 Filed 7–19–11; 8:45 am]

BILLING CODE 1505–01–D

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2011–0031; FRL–9440–7]

Approval and Promulgation of Air Quality Implementation Plans; New Mexico; Prevention of Significant Deterioration; Greenhouse Gas Tailoring Rule Revisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving a State Implementation Plan (SIP) revision submitted by the New Mexico Environment Department (NMED) to EPA on December 1, 2010. This SIP revision modifies New Mexico's Prevention of Significant Deterioration (PSD) program to establish appropriate emission thresholds for determining which new stationary sources and modification projects become subject to New Mexico's PSD permitting requirements for their greenhouse gas (GHG) emissions. EPA is fully approving New Mexico's December 1, 2010, PSD SIP revision because the Agency has determined that this PSD SIP revision is in accordance with section 110 and part C of the Federal Clean Air Act and EPA regulations regarding PSD permitting for GHGs.

DATES: This final rule will be effective August 19, 2011.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R06–OAR–2011–0031. All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in www.regulations.gov or in hard copy at the Air Planning Section (6PD–L), Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733. The file will be made available by appointment for public inspection in the Region 6 FOIA Review Room between the hours of 8:30 a.m. and 4:30 p.m. weekdays except for legal holidays. Contact the person listed in the **FOR FURTHER INFORMATION CONTACT** paragraph below or Mr. Bill Deese at 214–665–7253 to make an appointment. If possible, please make the appointment at least two working days in advance of your visit. There will be a 15 cent per page fee for making photocopies of documents. On the day of the visit, please check in at the EPA Region 6 reception area at 1445 Ross Avenue, Suite 700, Dallas, Texas.

The State submittal related to this SIP revision, and which is part of the EPA docket, is also available for public inspection at the State Air Agency listed below during official business hours by appointment:

New Mexico Environment Department, Air Quality Bureau, 1190 St. Francis Drive, Santa Fe, New Mexico 87502.

FOR FURTHER INFORMATION CONTACT: If you have questions concerning today's final rule, please contact Ms. Melanie Magee (6PD–R), Air Permits Section, Environmental Protection Agency, Region 6, 1445 Ross Avenue (6PD–R), Suite 1200, Dallas, TX 75202–2733. The telephone number is (214) 665–7161. Ms. Magee can also be reached via electronic mail at *magee.melanie@epa.gov.*

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

Table of Contents

I. What final action is EPA taking?

EPA is fully approving New Mexico's December 1, 2010, SIP submittal, relating to PSD requirements for GHG-emitting sources. Specifically, New Mexico's December 1, 2010, proposed SIP revision establishes appropriate emissions thresholds for determining PSD applicability to new and modified GHG-emitting sources in accordance with EPA's Tailoring Rule. EPA has made the determination that this SIP submittal is approvable because it is in accordance with the Clean Air Act (CAA) and EPA regulations regarding PSD permitting for GHGs.

As explained in our proposed approval of the New Mexico December 1, 2010, SIP revision, 76 FR 20907 (April 14, 2011), since EPA is finalizing its approval of New Mexico's changes to its air quality regulations to incorporate the appropriate thresholds for GHG permitting applicability into New Mexico's SIP, then paragraph (d) in § 52.1634 of 40 CFR part 52, added in EPA's PSD SIP Narrowing Rule to codify the limitation of EPA's approval of New Mexico's PSD SIP to exclude the applicability of PSD to GHG-emitting sources below the Tailoring Rule thresholds, is no longer necessary. In today's action, EPA is also amending § 52.1634 of 40 CFR part 52 to remove this unnecessary regulatory language.

Today, we are approving the December 1, 2010, New Mexico PSD SIP revision as we proposed and find that the SIP revision complies with section 110 and part C of the Federal Clean Air Act and EPA regulations regarding PSD permitting for GHGs.

II. What is the background for this action?

This section briefly summarizes EPA's recent GHG-related actions that provide the background for today's action. More detailed discussion of the background is found in the preambles for those actions, particularly in the background section of what we call the PSD SIP Narrowing Rule.[1]

A. GHG-related Actions

EPA has recently undertaken a series of actions pertaining to the regulation of GHGs that, although for the most part distinct from one another, establish the overall framework for today's final action on the New Mexico SIP. Four of these actions include, as they are commonly called, the "Endangerment Finding" and "Cause or Contribute Finding," which EPA issued in a single final action,[2] the "Johnson Memo Reconsideration,"[3] the "Light-Duty Vehicle Rule,"[4] and the "Tailoring Rule."[5] Taken together and in conjunction with the CAA, these actions established regulatory requirements for GHGs emitted from new motor vehicles and new motor vehicle engines; determined that such regulations, when they took effect on January 2, 2011, subjected GHGs emitted from stationary sources to PSD requirements; and limited the applicability of PSD requirements to GHG sources on a phased-in basis. EPA took this last action in the Tailoring Rule, which, more specifically, established appropriate GHG emission thresholds for determining the applicability of PSD requirements to GHG-emitting sources.

PSD is implemented through the SIP system, and so in December 2010, EPA promulgated several rules to implement the new GHG PSD SIP program. Recognizing that some states had approved SIP PSD programs that did not apply PSD to GHGs, EPA issued a SIP call and, for some of these states, a FIP.[6] Recognizing that other states had approved SIP PSD programs that do apply PSD to GHGs, but that do so for sources that emit as little as 100 or 250 tons per year (tpy) of GHG, and that do not limit PSD applicability to GHGs to the higher thresholds in the Tailoring Rule, EPA issued the GHG PSD SIP Narrowing Rule. Under that rule, EPA

[1] "Limitation of Approval of Prevention of Significant Deterioration Provisions Concerning Greenhouse Gas Emitting-Sources in State Implementation Plans; Final Rule." 75 FR 82536 (December 30, 2010).

[2] "Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act." 74 FR 66496 (December 15, 2009).

[3] "Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs." 75 FR 17004 (April 2, 2010).

[4] "Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule." 75 FR 25324 (May 7, 2010).

[5] Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule." 75 FR 31514 (June 3, 2010).

[6] Specifically, by notice dated December 13, 2010, EPA finalized a "SIP Call" that would require those states with SIPs that have approved PSD programs but do not authorize PSD permitting for GHGs to submit a SIP revision providing such authority. "Action To Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call," 75 FR 77698 (Dec. 13, 2010). EPA has begun making findings of failure to submit that would apply in any state unable to submit the required SIP revision by its deadline, and finalizing FIPs for such states. *See, e.g.,* "Action To Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Failure To Submit State Implementation Plan Revisions Required for Greenhouse Gases," 75 FR 81874 (December 29, 2010); "Action To Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Federal Implementation Plan," 75 FR 82246 (December 30, 2010). Because New Mexico's SIP already authorizes New Mexico to regulate GHGs once GHGs become subject to PSD requirements on January 2, 2011, New Mexico is not subject to the proposed SIP Call or FIP.

withdrew its approval of the affected SIPs to the extent those SIPs applied PSD requirements to GHG emissions from GHG-emitting sources below the Tailoring Rule thresholds.

B. New Mexico's Actions

On June 24, 2010, New Mexico provided a letter to EPA, in accordance with a request to all States from EPA in the Tailoring Rule, with confirmation that the State has the authority to regulate GHG in its PSD program. The letter confirmed that current New Mexico rules require regulating GHGs at the existing 100/250 tpy threshold, rather than at the higher thresholds set in the Tailoring Rule because the state does not have the authority to apply the meaning of the term ''subject to regulation'' established in the Tailoring Rule. New Mexico also submitted a letter on September 14, 2010, in response to the proposed GHG SIP Call, again confirming that EPA correctly classified New Mexico as a state with authority to apply PSD requirements to GHGs. The September 14, 2010, letter also states that NMED is pursuing rulemaking activity to define the terms ''greenhouse gas'' and ''subject to regulation.'' See the docket for this proposed rulemaking for copies of New Mexico's June 24, 2010, and September 14, 2010, letters.

In the PSD SIP Narrowing Rule, published on December 30, 2010, EPA withdrew its approval of New Mexico's SIP—among other SIPs—to the extent that SIP applies PSD permitting requirements to GHG emissions from sources emitting at levels below those set in the Tailoring Rule.[7] As a result, New Mexico's current approved SIP provides the state with authority to regulate GHGs, but only at and above the Tailoring Rule thresholds, and thus federally requires new and modified sources to receive a PSD permit based on GHG emissions only if they emit at or above the Tailoring Rule thresholds.

New Mexico has amended its state regulations to incorporate the Tailoring Rule thresholds, and has submitted the adopted regulations as revisions to the New Mexico SIP. EPA's approval of the New Mexico revisions will clarify the applicable thresholds in the New Mexico SIP and incorporate state law changes adopted at the local level into the federally-approved SIP.

The basis for this SIP revision is that limiting PSD applicability to GHG sources to the higher thresholds in the Tailoring Rule is consistent with the SIP provisions that provide required assurances of adequate resources, and thereby addresses the flaw in the SIP that led to the PSD SIP Narrowing Rule. Specifically, CAA section 110(a)(2)(E) includes as a requirement for SIP approval that States provide ''necessary assurances that the State * * * will have adequate personnel [and] funding '' to carry out such [SIP].'' In the Tailoring Rule, EPA established higher thresholds for PSD applicability to GHG-emitting sources on grounds that the states generally did not have adequate resources to apply PSD to GHG-emitting sources below the Tailoring Rule thresholds,[8] and no State, including New Mexico, asserted that it did have adequate resources to do so.[9] In the PSD SIP Narrowing Rule, EPA found that the affected states, including New Mexico, had a flaw in their SIPs at the time they submitted their PSD programs, which was that the applicability of the PSD programs was potentially broader than the resources available to them under their SIP.[10] Accordingly, for each affected state, including New Mexico, EPA concluded that EPA's action in approving the SIP was in error, under CAA section 110(k)(6), and EPA rescinded its approval to the extent the PSD program applies to GHG-emitting sources below the Tailoring Rule thresholds.[11] EPA recommended that States adopt a SIP revision to incorporate the Tailoring Rule thresholds, thereby (i) assuring that under State law, only sources at or above the Tailoring Rule thresholds would be subject to PSD; and (ii) avoiding confusion under the federally-approved SIP by clarifying that the SIP applies to only sources at or above the Tailoring Rule thresholds.[12]

The portions of the submitted SIP revision at 20.2.70.7(AL)(3) NMAC and 20.2.74.7(AZ)(6) NMAC act to limit the enforceability of the definition of ''subject to regulation'' in the event of an adverse federal court determination in certain GHG-related matters. EPA received a comment regarding the effect of such court actions, and now clarifies its interpretation of these provisions in response. The provisions state that in the event of a federal court determination that invalidates or renders unenforceable the Tailoring Rule, ''the definition 'subject to regulation' shall be enforceable by the Department only to the extent that it is enforceable by US EPA.'' EPA reads this provision to mean that the state will wait for and follow EPA's interpretation of the effect of such a court decision regarding the enforceability of these SIP revisions by EPA before altering its own application of that term. EPA approves the SIP on the basis of this interpretation. If a court issues such a decision, EPA intends to promptly describe the impact of the court's decision on the enforceability of its regulations.

III. What are EPA's responses to comments received on the proposed action?

EPA received one comment letter from Tri-State Generation and Transmission Association, Inc. in response to the proposed rulemaking. The comment letter is available for review in the docket for this rulemaking. A summary of the comments and EPA's responses are provided below.

Comment 1: Commenter states that its comments pertain to EPA's proposed approval of the PSD portion of the New Mexico GHG Tailoring Rule. Commenter maintains a policy position opposing regulation of greenhouse gas emissions under the Clean Air Act, including its permitting provisions. The fact that PSD and Title V permitting thresholds need ''tailoring'' to be appropriate for greenhouse gases demonstrates that the Clean Air Act is not intended to regulate greenhouse gas emissions.

Response 1: We refer Commenter to the ''Tailoring Rule'' (Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule'' 75 FR 31514 (June 3, 2010)) as well as our proposed rulemaking notice at 76 FR 20907 (April 14, 2011) that cites to and provides information on our national GHG actions and that provides the general basis for the regulation of GHGs under PSD permitting requirements. See footnotes 1–4 at 76 FR 20908, Footnote 6 at 20909. As we have detailed in those notices, EPA established that PSD applies to all pollutants newly subject to regulation, including non-NAAQS pollutants such as GHGs, in prior actions, and EPA has not re-opened that issue in this rulemaking. Accordingly, we do not believe these comments are relevant to this rulemaking.

Comment 2: Commenter is mindful of the many legal challenges to EPA's authority to regulate GHGs, and is concerned about what effect a stay, remand, or vacatur of one or all of the federal GHG-related rules would have on the New Mexico SIP revision. Commenter supports inclusion of

[7] ''Limitation of Approval of Prevention of Significant Deterioration Provisions Concerning Greenhouse Gas Emitting-Sources in State Implementation Plans; Final Rule.'' 75 FR 82536 (December 30, 2010).

[8] Tailoring Rule, 75 FR 31,517/1.

[9] SIP Narrowing Rule, 75 FR 82,540/2.

[10] *Id.* at 82,542/3.

[11] *Id.* at 82,544/1.

[12] *Id.* at 82,540/2.

''enforceability'' language at 20.2.70.7(AL)(3) NMAC and 20.2.74.7(AZ)(6) NMAC.

Response 2: As discussed above, EPA is finalizing its approval of the enforceability clause at 20.2.74.7 and interprets that clause to indicate that the state will wait for and follow EPA's interpretation of the effect of any adverse court decision regarding the enforceability of these SIP revisions. If a court acts adversely, EPA intends to promptly describe the impact of the court's decision on the enforceability of its regulations.

Comment 3: Commenter understands the importance of having the Tailoring Rule amendments in place at the state level. It would create an unreasonable burden on NMED's Air Quality Bureau, and all permit holders, should it be required that GHGs be permitted at the 100/250 tpy levels. Within that context, Commenter remains concerned about the practicalities of regulation of GHGs via air quality permits.

Response 3: We refer Commenter to our proposal for this final action that discusses the basis for a SIP revision that limits PSD applicability to GHG sources to the higher thresholds in the Tailoring Rule. While we appreciate Commenter's general concern about the practicalities of regulating of GHGs through air quality permits, Commenter did not provide any specific examples in the record to be able to adequately respond to this generalized statement. In addition, as discussed above, the requirement that sources seek PSD permits for GHG emissions was not established in this rulemaking, and was not reopened in this rulemaking. In fact, the State makes clear that GHG PSD permitting was required under its SIP prior to this rulemaking. We refer Commenter to New Mexico's June 24, 2010, and September 14, 2010, letters (mentioned elsewhere in this notice) and that are in the docket for this rulemaking.

Comment 4: Commenter states the SIP revision was made in an expedited timeframe, despite the fact that NMED, through its membership in the National Association of Clean Air Agencies (NACAA) and NACAA's December 28, 2009 letter to EPA about the Tailoring Rule, requested that EPA provide more time to states to afford consideration of the effects of and necessary regulatory changes for the implementation of the federal Tailoring Rule. EPA's expedited timeframe contributes to regulatory uncertainty.

Response 4: While we hear Commenter's concerns, we do not believe the comment is relevant to the scope of the action before us and we disagree with Commenter. We refer Commenter to the proposal for this action, which states that New Mexico amended its state regulations to incorporate the Tailoring Rule thresholds and timely submitted the state-adopted regulations as revisions to the state's SIP thereby contributing to regulatory certainty.

Comment 5: Commenter states that in the state administrative rulemaking hearing, several of Commenter's issues were addressed, however inconclusively. Since uncertainty remains on various issues Commenter raised, Commenter re-states some of those issues. In short, Commenter raises issues related to Best Available Control Technology (BACT), New Source Performance Standards (NSPS) for GHG, Carbon Capture Sequestration (CCS) and GHG Reporting and Cap and Trade issues.

Response 5: This current rulemaking action concerns whether the regulatory revisions relating to PSD requirements for GHG-emitting sources that NMED submitted to EPA on December 1, 2010, that seek to establish the appropriate emission thresholds for determining PSD applicability to new and modified GHG-emitting sources in accordance with EPA's Tailoring Rule, are approvable. The above comments raise issues that are outside the scope of this narrow rulemaking action and that we do not believe are relevant to the current action.

IV. Statutory and Executive Order Reviews

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

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

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

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by September 19, 2011. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

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

Dated: June 30, 2011.

Al Armendariz,

Regional Administrator, Region 6.

40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

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

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

Subpart GG—New Mexico

■ 2. Section 52.1620 is amended in paragraph (c) by revising the entry for Part 74 under ''New Mexico Administrative Code (NMAC) Title 20—Environment Protection Chapter 2—Air Quality'' to read as follows:

§ 52.1620 Identification of plan.

* * * * *

(c) * * *

EPA APPROVED NEW MEXICO REGULATIONS

State citation	Title/subject	State approval/ effective date	EPA approval date	Comments
New Mexico Administrative Code (NMAC) Title 20—Environment Protection Chapter 2—Air Quality				
* * *	*	*	*	*
Part 74	Permits—Prevention of Significant Deterioration.	1/1/2011	7/20/2011 [Insert *FR* page number where document begins].	
* * *	*	*	*	*

§ 52.1634 [Amended]

■ 3. Section 52.1634 is amended by removing and reserving paragraph (d).

[FR Doc. 2011–18125 Filed 7–19–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R02–OAR–2010–1025; FRL–9436–2]

Approval and Promulgation of Air Quality Implementation Plan; New Jersey and New York; Final Disapproval of Interstate Transport State Implementation Plan Revision for the 2006 24-Hour $PM_{2.5}$ NAAQS

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is taking final action to disapprove the New Jersey and the New York State Implementation Plan (SIP) revisions submitted to address significant contribution to nonattainment or interference with maintenance in another state with respect to the 2006 24-hour fine particle ($PM_{2.5}$) national ambient air quality standards (NAAQS). On January 20, 2010, New Jersey submitted a SIP revision to address sections of the Clean Air Act (CAA) concerning interstate transport requirements, and the sections of the CAA concerning infrastructure requirements. On March 23, 2010, New York submitted a SIP revision to address the section of the CAA concerning interstate transport, and sections 110(a)(1) and (2) of the CAA concerning infrastructure SIP requirements. In this action, EPA is taking final action to disapprove the portion of the New Jersey and the New York SIP revisions that addresses the requirement prohibiting a state's emissions from significantly contributing to nonattainment or interfering with maintenance of the NAAQS in any other state. The remaining elements of the submittals are not addressed in this action and will be addressed in a separate action. The intended effect of this action will be the implementation of a Federal Implementation Plan (FIP) for the State no later than 2 years from date of the disapproval. The proposed Transport Rule, when final, is the FIP that EPA intends to implement for the State.

DATES: *Effective Date:* This rule is effective on August 19, 2011.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R02–OAR–2010–1025. All documents in the docket are listed at *http://www.regulations.gov.* Although listed in the index, some information is not publicly available, e.g., Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the Environmental Protection Agency, Region 2 Office, Air Programs Branch, 290 Broadway, 25th Floor, New York, New York 10007–1866. This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The Docket telephone number is 212–637–4249.

FOR FURTHER INFORMATION CONTACT: Kenneth Fradkin (*fradkin.kenneth@epa.gov*), Air Programs Branch, 290 Broadway, 25th Floor, New York, New York 10007–1866, (212) 637–4249.

SUPPLEMENTARY INFORMATION: Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA. This section provides additional information by addressing the following questions:

I. What action is EPA taking?

EPA is taking final action to disapprove portions of the submissions from the State of New Jersey and the State of New York that were submitted to demonstrate that those states have adequately addressed elements of CAA section 110(a)(2)(D)(i)(I). Those elements require a state's SIP to contain adequate provisions to prohibit air pollutant emissions from sources within a state from significantly contributing to nonattainment in or interference with maintenance of the 2006 24-hour $PM_{2.5}$ NAAQS in any other state. The New Jersey and New York submissions do not contain adequate provisions to prohibit air pollutant emissions from within the states from significantly contributing to nonattainment in or interference with maintenance of the 2006 24-hour $PM_{2.5}$ NAAQS in other downwind states.

The remaining elements of the New Jersey and New York submittals, including the section 110 infrastructure, and section 110(a)(2)(D)(i)(II) regarding interfering with measures required in the applicable SIP for another state designed to prevent significant deterioration of air quality and protect visibility, are not addressed in this action and will be acted on in a separate rulemaking.

For additional details on EPA's analysis and findings, the reader is referred to the proposal published in the January 26, 2011 **Federal Register** (76 FR 4579) which is available on line at *http://www.regulations.gov*, Docket number EPA–R02–OAR–2010–1025.

II. What comments did EPA receive in response to the proposal?

EPA received one comment letter on the January 26, 2011 proposal. The letter can be found on the internet in the electronic docket for this action. To access the letter, please go to *http://www.regulations.gov* and search for Docket No. EPA–R02–OAR–2010–1025, or contact the person listed in the **FOR FURTHER INFORMATION CONTACT** paragraph above. The discussion below addresses those comments and our response.

A. Comment From the State of New Jersey Concerning the New Jersey Submittal

Comment: The commenter requests that EPA approve its SIP Revision because New Jersey has adopted multi-pollutant performance standards and met its rule commitments to address the emissions from electric generating units. In addition, New Jersey's air quality levels are in compliance with the 2006 24-hour $PM_{2.5}$ NAAQS.

EPA Response: EPA recognizes New Jersey's actions in improving air quality in the state and reducing the transport of emissions to downwind areas, including adopting multi-pollutant performance standards for electric generating units. However, despite such actions by New Jersey, EPA's evaluation, as discussed in the proposed disapproval, demonstrated that New Jersey's submittal is inadequate.

EPA notes that much of the recent improvement in air quality has resulted from the promulgation of the Clean Air Interstate Rule (CAIR). This rule was remanded to EPA in 2008 and will not remain in place indefinitely. Reductions associated with the CAIR thus also cannot be said to be permanent. EPA's modeling analysis, conducted for the proposed Transport Rule, as proposed on August 2, 2010, in the **Federal Register** (75 FR 45210) demonstrates that emissions from New Jersey significantly contribute to nonattainment or interfere with maintenance of the 2006 24-hour $PM_{2.5}$ NAAQS in downwind areas. Therefore, EPA cannot approve New Jersey's submittal.

III. What are EPA's conclusions?

EPA has evaluated the New Jersey and New York submittals for consistency with the CAA, EPA regulations, and EPA policy. The demonstrations submitted by New Jersey and New York do not meet the requirements of section 110(a)(2)(D)(i)(I) because the states did not evaluate or demonstrate with a technical analysis that the emissions reduction measures provided in their SIP revisions assure that they do not contribute significantly to nonattainment or interfere with maintenance of the 2006 24-hour $PM_{2.5}$ NAAQS. Accordingly, EPA is finalizing the disapproval of the portions of the New Jersey and the New York SIP revisions that address the section 110(a)(2)(D)(i)(I) requirement prohibiting a state's emissions from significantly contributing to nonattainment or interfering with maintenance of the NAAQS in any other state.

EPA is taking no action at this time on the remainder of the demonstration, including sections 110(a)(1) and (2) regarding infrastructure requirements, and section 110(a)(2)(D)(i)(II) regarding interference with measures required in the applicable SIP for another state designed to prevent significant deterioration of air quality and protect visibility. They will be addressed in a separate rulemaking.

Under section 179(a) of the CAA, final disapproval of a submittal that addresses a requirement of a Part D Plan (42 U.S.C. 7501–7515) or is required in response to a finding of substantial inadequacy as described in section 110(k)(5) (42 U.S.C. 7410(k)(5)) (SIP call) starts a sanctions clock. The provisions in the submittal we are disapproving were not submitted to meet either of those requirements. Therefore, no sanctions are triggered for this disapproval.

IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to act on state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law.

A. Executive Order 12866, Regulatory Planning and Review

This action is not a ''significant regulatory action'' under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under the Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011).

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq,* because this SIP disapproval under section 110 and subchapter I, part D of the Clean Air Act will not in-and-of-itself create any new information collection burdens but simply disapproves certain State requirements for inclusion into the SIP. Burden is defined at 5 CFR 1320.3(b).

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions. For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's rule on small entities, I certify that this action will not have a significant impact on a substantial number of small entities. This rule does not impose any requirements or create impacts on small entities. This SIP disapproval under section 110 and subchapter I, part D of the Clean Air Act will not in-and-of-itself create any new requirements but simply disapproves certain State requirements for inclusion into the SIP. Accordingly, it affords no opportunity for EPA to fashion for small entities less burdensome compliance or reporting requirements or timetables or exemptions from all or part of the rule. The fact that the Clean Air Act prescribes that various consequences (e.g., higher offset requirements) may or will flow from this disapproval does not mean that EPA either can or must conduct a regulatory flexibility analysis for this action. Therefore, this action will not have a significant economic impact on a substantial number of small entities.

D. Unfunded Mandates Reform Act

This action contains no Federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 for State, local, or tribal governments or the private sector. EPA has determined that the disapproval action does not include a Federal mandate that may result in estimated costs of $100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This action disapproves pre-existing requirements under State or local law, and imposes no new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

E. Executive Order 13132, Federalism

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, because it merely disapproves certain State requirements for inclusion into the SIP and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. Thus, Executive Order 13132 does not apply to this action.

F. Executive Order 13175, Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP EPA is disapproving would not apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law. Thus, Executive Order 13175 does not apply to this action.

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

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it because it is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997). This SIP disapproval under section 110 and subchapter I, part D of the Clean Air Act will not in-and-of-itself create any new regulations but simply disapproves certain State requirements for inclusion into the SIP.

H. Executive Order 13211, Actions That Significantly Affect Energy Supply, Distribution or Use

This action is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

The EPA believes that this action is not subject to requirements of Section 12(d) of NTTAA because application of those requirements would be inconsistent with the Clean Air Act.

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

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

EPA lacks the discretionary authority to address environmental justice in this action. In reviewing SIP submissions, EPA's role is to approve or disapprove state choices, based on the criteria of the Clean Air Act. Accordingly, this action merely disapproves certain State requirements for inclusion into the SIP under section 110 and subchapter I, part D of the Clean Air Act and will not in-and-of itself create any new requirements. Accordingly, it does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898.

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

This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

L. Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by September 19, 2011. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

Statutory Authority

The statutory authority for this action is provided by sections 110 of the CAA, as amended (42 U.S.C. 7410).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Particulate matter.

Dated: June 1, 2011.

Judith A. Enck,

Regional Administrator, Region 2.

[FR Doc. 2011–17742 Filed 7–19–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R07–OAR–2011–0215; FRL–9435–9]

Approval and Promulgation of Air Quality Implementation Plan; Missouri; Final Disapproval of Interstate Transport State Implementation Plan Revision for the 2006 24-Hour PM2.5 NAAQS

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: Pursuant to our authority under the Clean Air Act (CAA or Act), the Environmental Protection Agency (EPA) is taking final action to disapprove the portion of the ''Infrastructure'' State Implementation Plan (SIP) (CAA section 110(a)(1) and (2)) submittal from the State of Missouri intended to address the CAA section relating to the ''interstate transport'' requirements for the 2006 24-hour fine particle ($PM_{2.5}$) National Ambient Air Quality Standards (NAAQS) that prohibit a state from significantly contributing to nonattainment or interfering with maintenance of the NAAQS in any other state. This final action to disapprove the ''interstate transport'' portion of the Missouri SIP submittal received by EPA on December 28, 2009, only relates to those provisions and does not address the other portions of Missouri's December 28, 2009, submission. The rationale for this action and additional detail on this disapproval were described in EPA's proposed rulemaking published in the **Federal Register** on March 18, 2011. The effect of this action will be the promulgation of a Federal Implementation Plan (FIP) for Missouri no later than two years from the date of disapproval. EPA's proposed Transport Rule, when final, is the FIP that EPA intends to implement for Missouri.

DATES: *Effective Date:* This rule is effective on August 19, 2011.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R07–OAR–2011–0215. All documents in the docket are listed on the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, i.e., Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the U.S. Environmental Protection Agency, Region 7, in the Air Planning and Development Branch, of the Air and Waste Management Division, 901 North 5th Street, Kansas City, Kansas 66101. EPA requests that, if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The interested persons wanting to examine these documents should make an appointment with the office at least 24 hours in advance. The Regional Office official hours of business are Monday through Friday, 8 to 4:30, excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Ms. Elizabeth Kramer, Environmental Scientist, Air Planning and Development Branch, U.S. Environmental Protection Agency, Region 7, 901 North 5th Street, Kansas City, Kansas 66101; *telephone number:* (913) 551–7186; *fax number:* (913) 551–7844; *e-mail address: kramer.elizabeth@epa.gov.*

Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by September 19, 2011. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

SUPPLEMENTARY INFORMATION: Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA. These sections provide additional information on this final action:

I. Background

On March 18, 2011 (76 FR 14835), EPA proposed to disapprove a portion of the ''Infrastructure'' SIP (CAA 110(a)(1) and (2)) submittal from the State of Missouri relating to the interstate transport element of infrastructure (CAA section 110(a)(2)(D)(i)(I)). EPA received no comments on the proposed disapproval. For additional detail on EPA's rationale this final action, see the proposed rulemaking.

Section 110(a)(2) of the CAA lists the thirteen required elements that ''infrastructure'' SIPs must address, as applicable, including section 110(a)(2)(D)(i), which pertains to interstate transport of certain emissions. These ''good neighbor'' provisions require each state to submit a SIP that prohibits emissions which adversely affect another state in the ways contemplated in the statute. The section 110(a)(2)(D)(i), portion of Missouri's SIP must prevent sources in the State from emitting pollutants in amounts which will: (I) Contribute significantly to nonattainment of the NAAQS in other states and interfere with maintenance of the NAAQS in other states and (II) interfere with provisions to prevent significant deterioration of air quality in other states or interfere with efforts to protect visibility in other states.

On December 28, 2009, EPA received a SIP revision from the State of Missouri intended to address the requirements of section 110(a)(2) including the requirements of section 110(a)(2)(D)(i) for the 2006 24-hour $PM_{2.5}$ NAAQS. In this final rulemaking, EPA is disapproving only the 110(a)(2)(D)(i)(I) portion of the submittal that pertains to prohibiting sources in Missouri from emitting pollutants that significantly contribute to nonattainment or interfere with maintenance of the 2006 24-hour $PM_{2.5}$ NAAQS in other states. The elements on which we are taking action today are severable portions of the submittal. EPA intends to address the additional portions of the submittal in a subsequent action.

The requirements of section 110(a)(2)(D)(i)(I), as well as EPA's analysis of the State's submission, are explained in detail in the proposal. In summary, EPA proposed to disapprove the Missouri submittal because: (1) It described a number of rules Missouri had adopted to reduce $PM_{2.5}$ precursors (sulfur dioxide and nitrogen oxides), but did not include any analysis to show that these measures would prohibit the interstate impacts described in section 110(a)(2)(D)(i)(I); and (2) it relied on the Clean Air Interstate Rule provisions in the Missouri SIP, even though those provisions do not address impacts on the 2006 $PM_{2.5}$ standards. We also noted that Missouri's conclusion with respect to these interstate impact provisions was inconsistent with the preliminary modeling for EPA's proposed Transport Rule (*see* 75 FR 45210, August 2, 2010). The reader should refer to the March 18, 2011 proposed rulemaking (76 FR at 14837–8) for a detailed explanation of EPA's rationale for this determination. In addition, EPA has now completed the modeling for the final Transport Rule and, as indicated by the technical support documents (TSDs) for this action, Missouri in fact significantly contributes to downwind nonattainment in another state and interferes with maintenance of the 2006 24-hour $PM_{2.5}$ NAAQS in another state. Please see the TSDs for the final modeling and contribution analysis as they relate to this action.

II. Final Action

EPA is taking final action to disapprove a portion of the submission from the State of Missouri intended to demonstrate that Missouri has adequately addressed the elements of CAA section 110(a)(2)(D)(i)(I) that require Missouri's SIP to include adequate provisions to prohibit air pollutant emissions from sources within the State from significantly contributing to nonattainment in or interference with maintenance of the 2006 24-hour $PM_{2.5}$ NAAQS in any other state. EPA has determined that the Missouri submission does not contain adequate provisions to prohibit air pollutant emissions from within the State that significantly contribute to nonattainment in or interference with maintenance of the 2006 24-hour $PM_{2.5}$ NAAQS in other downwind states. As noted in the Background above, the final modeling for EPA's Transport Rule indicates that Missouri in fact significantly contributes to downwind nonattainment in another state and interferes with maintenance of the 2006 24-hour $PM_{2.5}$ NAAQS in another state.

Any remaining elements of the submittal, including language to address other CAA section 110(a)(2) elements, including section 110(a)(2)(D)(i)(II) regarding interference with measures required in the applicable SIP for another state designed to prevent significant deterioration of air quality and protect visibility, are not addressed in this action. EPA is disapproving only the provisions which relate to the section 110(a)(2)(D)(i)(I) portion of the submittal. EPA will act on those other provisions in a subsequent action.

Also, under section 179(a) of the CAA, final disapproval of a submittal that addresses a requirement of a Part D Plan (42 U.S.C.A. 7501–7515), or is required in response to a finding of substantial inadequacy as described in section 7410(k)(5) (SIP Call), starts a sanctions clock. The provisions in the submittal that we are disapproving were not submitted to meet either of those requirements. Therefore, no sanctions are triggered.

The full or partial disapproval of a SIP revision triggers the requirement under section 110(c) that EPA promulgate a FIP no later than 2 years from the date of the disapproval unless the state corrects the deficiency, and the Administrator approves the plan or plan revision before the Administrator promulgates such FIP.

EPA's final Transport Rule and related FIP, if finalized in the manner proposed, may address these interstate transport requirements of CAA section 110(a)(2)(D)(i)(I) for the State of Missouri for the 2006 24-hour $PM_{2.5}$ NAAQS.

III. Administrative Requirements

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to act on state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law.

Executive Order 12866, Regulatory Planning and Review

This action is not a ''significant regulatory action'' under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under the Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011).

Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq,* because this SIP disapproval under section 110 of the CAA will not in-and-of itself create any new information collection burdens but simply disapproves certain State requirements for inclusion into the SIP. Burden is defined at 5 CFR 1320.3(b).

Regulatory Flexibility Act

The Regulatory Flexibility Act generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions. For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's rule on small entities, I certify that this action will not have a significant impact on a substantial number of small entities. This rule does not impose any requirements or create impacts on small entities. This SIP disapproval under section 110 of the CAA will not in-and-of itself create any new requirements but simply disapproves certain State requirements for inclusion into the SIP. Accordingly, it affords no opportunity for EPA to fashion for small entities less burdensome compliance or reporting requirements or timetables or exemptions from all or part of the rule. The fact that the CAA prescribes that various consequences (e.g., higher offset requirements) may or will flow from this disapproval does not mean that EPA either can or must conduct a regulatory flexibility analysis for this action. Therefore, this action will not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act

This action contains no Federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1531–1538 for state, local, or tribal governments or the private sector. EPA has determined that the disapproval action does not include a Federal mandate that may result in estimated costs of $100 million or more to either state, local, or tribal governments in the aggregate, or to the private sector. This action disapproves pre-existing requirements under State or local law, and imposes no new requirements. Accordingly, no additional costs to state, local, or tribal governments, or to the private sector, result from this action.

Executive Order 13132, Federalism

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by state and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.''

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This action merely disapproves certain state requirements for inclusion into the SIP and does not alter the relationship or the distribution of power and responsibilities established in the CAA. Today's final disapproval does not have federalism implications. Thus, Executive Order 13132 does not apply to this action.

Executive Order 13175, Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP EPA is disapproving would not apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law. Thus, Executive Order 13175 does not apply to this action.

Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under Section 5–501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it because it is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997). This SIP disapproval under section 110 of the CAA will not in-and-of itself create any new regulations but simply disapproves certain state requirements for inclusion into the SIP.

Executive Order 13211, Actions That Significantly Affect Energy Supply, Distribution or Use

This action is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through the Office of Management and Budget, explanations when the Agency decides not to use available and applicable voluntary consensus standards. EPA believes that this action is not subject to requirements of section 12(d) of NTTAA because application of those requirements would be inconsistent with the CAA.

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

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

EPA lacks the discretionary authority to address environmental justice in this action. In reviewing SIP submissions, EPA's role is to approve or disapprove state choices, based on the criteria of the CAA. Accordingly, this action merely disapproves certain State requirements for inclusion into the SIP under section 110 of the CAA and will not in-and-of itself create any new requirements. Accordingly, it does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898.

Congressional Review

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**.

A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Statutory Authority

The statutory authority for this action is provided by section 110 of the CAA, as amended (42 U.S.C. 7410).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Particulate matter.

Dated: June 28, 2011.

Karl Brooks,

Regional Administrator, Region 7.

[FR Doc. 2011–17740 Filed 7–19–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2010–1012–201130; FRL–9438–2]

Approval and Promulgation of Air Quality Implementation Plan; Georgia; Disapproval of Interstate Transport Submission for the 2006 24-Hour $PM_{2.5}$ Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is taking final action to disapprove the portion of Georgia's October 21, 2009, submission which was intended to meet the requirement to address interstate transport for the 2006 24-hour fine particulate matter ($PM_{2.5}$) national ambient air quality standards (NAAQS). Additionally, EPA is responding to comments received on EPA's January 26, 2011, proposed disapproval of the aforementioned portion of Georgia's October 21, 2009, submission. On October 21, 2009, the State of Georgia, through the Georgia Environmental Protection Division (GA EPD), provided a letter to EPA certifying that the Georgia state implementation plan (SIP) meets the interstate transport requirements with regard to the 2006 24-hour $PM_{2.5}$ NAAQS. Specifically, the interstate transport requirements under the Clean Air Act (CAA or Act) prohibit a state's emissions from significantly contributing to nonattainment or interfering with the maintenance of the NAAQS in any other state. The effect of today's action will be the promulgation of a Federal Implementation Plan (FIP) for Georgia no later than two years from the date of disapproval. The proposed Transport Rule, when final, is the FIP that EPA intends to implement for Georgia.

DATES: *Effective Date:* This rule will be effective August 19, 2011.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R04–OAR–2010–1012. All documents in the docket are listed on the *http://www.regulations.*gov Web site. Although listed in the index, some information is not publicly available, i.e., Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30 excluding federal holidays.

FOR FURTHER INFORMATION CONTACT: For information regarding the Georgia SIP, contact Mr. Zuri Farngalo, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. Mr. Farngalo's telephone number is (404) 562–9152; *e-mail address: farngalo.zuri@epa.gov.* For information regarding the $PM_{2.5}$ interstate transport requirements under section 110(a)(2)(D)(i), contact Mr. Steven Scofield, Regulatory Development Section, at the same address above. Mr. Scofield's telephone number is (404) 562–9034; *e-mail address: scofield.steve@epa.gov.*

SUPPLEMENTARY INFORMATION:

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I. Background

Upon promulgation of a new or revised NAAQS, sections 110(a)(1) and (2) of the CAA require states to address basic SIP requirements, including emissions inventories, monitoring, and modeling to assure attainment and maintenance for that NAAQS. On December 18, 2006, EPA revised the 24-hour average $PM_{2.5}$ primary and secondary NAAQS from 65 micrograms per cubic meter ($\mu g/m^3$) to 35 $\mu g/m^3$, thus states were required to provide submissions to address section 110(a)(1) and (2) of the CAA (infrastructure SIPs) for this revised NAAQS. Georgia provided its infrastructure submission for the 2006 $PM_{2.5}$ NAAQS on October 21, 2009. On January 26, 2011, EPA proposed to disapprove the portion of Georgia's October 21, 2009, infrastructure submission related to interstate transport (i.e., 110(a)(2)(D)(i)(I)) for the 2006 $PM_{2.5}$ NAAQS. *See* 76 FR 4584. A summary of the background for this final action is provided below.

Section 110(a)(2) lists the elements that infrastructure SIPs must address, as applicable, including section 110(a)(2)(D)(i), which pertains to interstate transport of certain emissions. States were required to provide submissions to address the applicable 110(a)(2) infrastructure requirements, including section 110(a)(2)(D)(i), by September 21, 2009.[1]

On September 25, 2009, EPA issued a guidance entitled ''Guidance on SIP Elements Required Under Sections 110(a)(1) and (2) for the 2006 24-Hour Fine Particle ($PM_{2.5}$) National Ambient Air Quality Standards (NAAQS)'' (2006 $PM_{2.5}$ NAAQS Infrastructure Guidance). EPA developed the 2006 $PM_{2.5}$ NAAQS Infrastructure Guidance to make additional recommendations to states for making submissions to meet the requirements of section 110, including 110(a)(2)(D)(i) for the revised 2006 24-hour $PM_{2.5}$ NAAQS.

As identified in the 2006 $PM_{2.5}$ NAAQS Infrastructure Guidance, the ''good neighbor'' provisions in section 110(a)(2)(D)(i) require each state to submit a SIP that prohibits emissions that adversely affect another state in the ways contemplated in the CAA. Section 110(a)(2)(D)(i) contains four distinct requirements related to the impacts of interstate transport. Specifically, the SIP must prevent sources in the state from emitting pollutants in amounts which will: (1) Contribute significantly to nonattainment of the NAAQS in other states; (2) interfere with maintenance of the NAAQS in other states; (3) interfere with provisions to prevent significant deterioration of air quality in other states; or (4) interfere with efforts to protect visibility in other states.

In the 2006 $PM_{2.5}$ NAAQS Infrastructure Guidance, EPA explained that submissions from states pertaining to the ''significant contribution'' and ''interfere with maintenance'' requirements in section 110(a)(2)(D)(i)(I) must contain adequate provisions to prohibit air pollutant emissions from within the state that contribute significantly to nonattainment or

[1] The rule for the revised $PM_{2.5}$ NAAQS was signed by the Administrator and publically disseminated on September 21, 2006. Because EPA did not prescribe a shorter period for 110(a) SIP submittals, the submittals for the 2006 24-hour NAAQS were due on September 21, 2009, three years from the September 21, 2006, signature date.

interfere with maintenance of the NAAQS in any other state. EPA described a number of considerations for states for providing an adequate demonstration to address interstate transport requirements in the 2006 $PM_{2.5}$ NAAQS Infrastructure Guidance. First, EPA noted that the state's submission should explain whether or not emissions from the state contribute significantly to nonattainment or interfere with maintenance of the NAAQS in any other state and, if so, address the impact. EPA stated that the state's conclusion should be supported by an adequate technical analysis. Second, EPA recommended the various types of information that could be relevant to support the state's submission, such as information concerning emissions in the state, meteorological conditions in the state and the potentially impacted states, monitored ambient concentrations in the state, and air quality modeling. Third, EPA explained that states should address the ''interfere with maintenance'' requirement independently which requires an evaluation of impacts on areas of other states that are meeting the 2006 24-hour $PM_{2.5}$ NAAQS, not merely areas designated nonattainment. Lastly, EPA explained that states could not rely on the Clean Air Interstate Rule (CAIR) to comply with CAA section 110(a)(2)(D)(i) requirements for the 2006 24-hour $PM_{2.5}$ NAAQS because CAIR does not address this NAAQS. CAIR, promulgated by EPA on May 12, 2005 (*see* 70 FR 25162), required states to reduce emissions of sulfur dioxide and nitrogen oxides that significantly contribute to, and interfere with maintenance of the 1997 $PM_{2.5}$ NAAQS and/or ozone in any downwind state. CAIR was intended to provide states covered by the rule with a mechanism to satisfy their CAA section 110(a)(2)(D)(i)(I) obligations to address significant contribution to downwind nonattainment and interference with maintenance in another state with respect to the 1997 ozone and $PM_{2.5}$ NAAQS. Many states adopted the CAIR provisions and submitted SIPs to EPA to demonstrate compliance with the CAIR requirements in satisfaction of their 110(a)(2)(D)(i)(I) obligations for those two pollutants.

EPA was sued by a number of parties on various aspects of CAIR, and on July 11, 2008, the U.S. Court of Appeals for the District of Columbia Circuit (DC Circuit or Court) issued its decision to vacate and remand both CAIR and the associated CAIR FIPs in their entirety. *North Carolina* v. *EPA,* 531 F.3d 836 (DC Circuit, July 11, 2008). However, in response to EPA's petition for rehearing, the Court issued an order remanding CAIR to EPA without vacating either CAIR or the CAIR FIPs. *North Carolina* v. *EPA,* 550 F.3d 1176 (DC Circuit, December 23, 2008). The Court thereby left CAIR in place in order to ''temporarily preserve the environmental values covered by CAIR'' until EPA replaces it with a rule consistent with the Court's opinion. *Id.* at 1178. The Court directed EPA to ''remedy CAIR's flaws'' consistent with its July 11, 2008, opinion, but declined to impose a schedule on EPA for completing that action. *Id.*

In order to address the judicial remand of CAIR, EPA has proposed a new rule to address interstate transport pursuant to section 110(a)(2)(D)(i), the ''Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone'' (Transport Rule).[2] As part of the proposed Transport Rule, EPA specifically examined the section 110(a)(2)(D)(i) requirements that emissions from sources in a state must not ''significantly contribute to nonattainment'' and ''interfere with maintenance'' of the 2006 24-hour $PM_{2.5}$ NAAQS by other states. The modeling performed for the proposed Transport Rule shows that Georgia significantly contributes to nonattainment or interferes with maintenance of the 2006 24-hour $PM_{2.5}$ NAAQS in downwind areas. EPA has now completed the modeling for the final Transport Rule and, as indicated by the technical support documents for this action, Georgia in fact contributes to downwind nonattainment in another state or interferes with maintenance of the 2006 24-hour $PM_{2.5}$ NAAQS in another state.

On October 21, 2009, the State of Georgia, through GA EPD, provided a letter to EPA certifying that the Georgia SIP meets the interstate transport requirements with regard to the 2006 24-hour $PM_{2.5}$ NAAQS.[3] Specifically, Georgia certified that its current SIP adequately addresses the elements of CAA section 110(a)(2)(D)(i)(I) for the 2006 24-hour $PM_{2.5}$ NAAQS. CAA section 110(a)(2)(D)(i)(I) requires that implementation plans for each state contain adequate provisions to prohibit air pollutant emissions from sources within a state from significantly contributing to nonattainment in or interfering with maintenance of the NAAQS (in this case the 2006 24-hour $PM_{2.5}$ NAAQS) in any other state. On January 26, 2011, EPA proposed to disapprove the portion of Georgia's October 21, 2009, submission related to interstate transport for the 2006 24-hour $PM_{2.5}$ NAAQS because EPA made the preliminary determination that Georgia's October 21, 2009, submission does not meet the requirements of section 110(a)(2)(D)(i)(I) of the CAA for this NAAQS. This action is finalizing EPA's disapproval of Georgia's October 21, 2009, submission with regard to section 110(a)(2)(D)(i)(I) of the CAA for the 2006 24-hour $PM_{2.5}$ NAAQS. *See* EPA's January 26, 2011, proposed disapproval rulemaking at 76 FR 4584 for further information on EPA's rationale for this final action.

[2] See ''Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone; Proposed Rule,'' 75 FR 45210 (August 2, 2010).

[3] Georgia's October 21, 2009, certification letter also explained that Georgia's current SIP sufficiently addresses other requirements of section 110(a)(2) for the 2006 24-hour $PM_{2.5}$ NAAQS; however, today's final rulemaking only relates to the section 110(a)(2)(D)(i)(I) requirements for the 2006 24-hour $PM_{2.5}$ NAAQS. EPA will address the other section 110(a)(2) requirements for the 2006 24-hour $PM_{2.5}$ NAAQS in relation to Georgia's SIP in a rulemaking separate from today's final rulemaking.

II. EPA's Responses to Comments

EPA received three sets of adverse comments on the January 26, 2011, proposed rulemaking to disapprove the portion of Georgia's October 21, 2009, infrastructure submission on the interstate transport requirements of sections 110(a)(2)(D)(i)(I) of the CAA for the 2006 24-hour $PM_{2.5}$ NAAQS. A full set of the comments provided by GA EPD, the North Carolina Department of Environment and Natural Resources, and Georgia Power (hereinafter referred to as ''the Commenters'') are provided in the docket for this final action. As a general matter, the comments overlapped on some issues, and as a result, EPA has organized the response to comments by issue. In addition, EPA acknowledges Georgia's comments regarding SIP processing in general. As Georgia is aware, EPA is considering improvements to the SIP process and appreciates Georgia's comments in that regard.

For the most part, the Commenters oppose EPA's proposed disapproval action for the interstate portion of Georgia's October 21, 2009, infrastructure submission for the 2006 24-hour $PM_{2.5}$ NAAQS. The comments fall generally into the following categories: (1) Correction for reference to ''CSA''; (2) concerns regarding states' inability to rely on CAIR to satisfy the 110(a)(2)(D)(i)(I) requirements for the 2006 24-hour $PM_{2.5}$ NAAQS; (3) apparent lack of guidance from EPA on how states should meet the requirements; (4) concerns regarding the procedure of taking action to disapprove

Georgia's submittal; (5) acknowledgement of states' efforts and air quality conditions; and (6) concerns related to the Transport Rule. A summary of the comments and EPA's responses are provided below.

Correction for Inadvertent Reference to ''CSA'' in Georgia Rulemaking

Comment 1: One Commenter states that on page 4586 of the **Federal Register** notice of EPA's January 26, 2011, proposed disapproval, that ''EPA makes a reference to 'CSA' that appears to be completely out of place.'' The Commenter goes on to state that ''[t]here appears to be no basis for this reference and certainly has no relation to anything that Georgia included in our SIP submittal.''

Response 1: EPA agrees with this comment, and notes that the reference to ''CSA'' in EPA's January 26, 2009, proposed disapproval action related to a portion of Georgia's October 21, 2009, submission was a typographical error. ''CSA'' should be replaced with ''Georgia Multi-pollutant Rule'' and as such is being corrected in this final rule. In reviewing Georgia's SIP revision, EPA was aware of Georgia's multi-pollutant rule.

States' Inability To Rely on CAIR To Satisfy the 110(a)(2)(D)(i)(I) Requirements for the 2006 24-Hour $PM_{2.5}$ NAAQS

Comment 2: All Commenters express concern with EPA's proposed disapproval and assert that states should be able to rely on the Clean Air Interstate Rule (CAIR) to address the transport requirements in section 110(a)(2)(D)(i)(I) for the 2006 24-hour $PM_{2.5}$ NAAQS. The Commenters explain that the Court left CAIR in place and opine that states should be able to rely on emissions reductions from CAIR to address transport. One Commenter also mentions that ''[t]he Court did not impose a schedule on EPA for completing the Transport Rule; therefore, states have no assurances that EPA will ever replace the CAIR rule. Since there is no guarantee that the Transport Rule will be promulgated in a timely manner, states cannot rely on the reductions in the proposed Transport Rule and must rely on the CAIR reductions, which are permanent and enforceable.'' Another Commenter states: ''[b]ased on the belated guidance, EPA prohibits the states from relying in any way on emission reductions required under CAIR even though the rule remains in place today, is federally enforceable and is achieving the anticipated emissions reductions.''

Response 2: As discussed in EPA's September 25, 2009, guidance, ''Guidance on SIP Elements Required Under Section 110(a)(1) and (2) for the 24-Hour Fine Particle ($PM_{2.5}$) National Ambient Air Quality Standards (NAAQS)'' (hereinafter referred to as ''EPA's 2009 Guidance''), states cannot rely on the CAIR rule for the submission for the 2006 24-hour $PM_{2.5}$ NAAQS because CAIR does not address this NAAQS, and was never intended to address this NAAQS. CAIR was originally put in place to address the 1997 8-hour ozone and $PM_{2.5}$ NAAQS. In order to adequately address the requirements of section 110(a)(2)(D)(i)(I), states can only rely on permanent emission reductions to address transport for the *2006 24-hour $PM_{2.5}$ NAAQS,* and must include an appropriate technical demonstration.

Comments Regarding Guidance From EPA on How States Should Meet the Requirements

Comment 3: Two Commenters note that that 110(a)(2) infrastructure SIPs for the 24-hour $PM_{2.5}$ NAAQS were due September 21, 2009, but EPA's guidance was not released to the states until September 25, 2009.

Response 3: While EPA's 2009 Guidance regarding the 110(a)(2) infrastructure SIPs for the 2006 24-hour $PM_{2.5}$ NAAQS was released on September 25, 2009, this guidance did not establish new requirements beyond those already required by section 110(a)(2)(D)(i)(I) of the CAA. Relevant portions of section 110(a)(2) require, as follows, ''Each [implementation plan submitted by a State under this chapter] shall * * * contain adequate provisions—(i) prohibiting, consistent with the provisions of this subchapter, any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will—contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard * * * '' States are statutorily obligated to address the requirements of section 110(a)(2)(D)(i)(I) for the 2006 24-hour $PM_{2.5}$ NAAQS. This above-quoted provision provides States with the requirement.

Comment 4: Two Commenters express concern about communication in the SIP process. The Commenters go on to say that ''[e]ven though EPA's guidance was released only a short time later, EPA Region 4 gave absolutely no indication to its co-regulators that there would be a fatal flaw with the submittal.'' The commenter further states that, ''it wasn't until a year later that states were informed via an e-mail on August 27, 2010, that 'All Region 4 states submitted complete infrastructure SIPs for the 2006 $PM_{2.5}$ NAAQS, and our intention is to disapprove the 110(a)(2)(D)(i)(I) portion of those unless it is withdrawn by the state.' ''

Response 4: EPA disagrees with the Commenters' assertion that they were initially notified in an August 27, 2010, e-mail about EPA's expectations and concerns with states' submissions reliance on CAIR to meet the requirements for section 110(a)(2)(D)(i)(I) for the 2006 24-hour $PM_{2.5}$ NAAQS. As was explained above, Georgia's obligation stems from the CAA. As is EPA's practice, EPA reminded the States on a number of occasions of the interstate transport obligations in 110(a)(2)(D)(i)(I). In addition to the informal reminders (via e-mail and teleconferences, among other avenues), EPA's January 2011 proposal served as a formal, legal notification and provided for a formal opportunity for public comment.

Although EPA reminded states of EPA's expectations and concerns with states' reliance on CAIR to meet the requirements for section 110(a)(2)(D)(i)(I) for the 2006 24-hour $PM_{2.5}$ NAAQS in an August 27, 2010, e-mail, EPA formally notified states of the expectations and concerns in the EPA's 2009 Guidance. Specifically, EPA noted that SIP submissions that relied on CAIR for satisfying the 110(a)(2)(D)(i)(I) requirements for the 2006 24-hour $PM_{2.5}$ NAAQS would be inadequate, as CAIR did not address this NAAQS. EPA's proposed disapproval of the portion of Georgia's October 21, 2009, submission did not occur until January 2011, which was over a year after EPA's notification (through the release of the 2006 $PM_{2.5}$ NAAQS Infrastructure Guidance) of any states' deficiency for meeting the 110(a)(2)(D)(i)(I) requirement for the 2006 24-hr $PM_{2.5}$ NAAQS had that state relied on CAIR. Thus, Georgia had notification and an opportunity to provide supplemental information between the release of EPA's 2009 Guidance and EPA's proposed disapproval action in January 2011.

Georgia did provide some information in its comment letter on the January 2011 proposal. This information was also provided to EPA as part of Georgia's comments on the proposed Transport Rule. EPA's Transport Rule is expected to address those issues as part of the Federal Implementation Plan included as part of the Transport Rule. However, the information provided in Georgia's comment letter is not adequate to meet the requirements of section

110(a)(2)(D)(i)(I) as a formal SIP submittal.

Comment 5: One Commenter raises concerns with EPA treating its 2009 Guidance as ''binding'' and suggests that this action is contrary to statements made by EPA in support of EPA and states being ''co-regulators.''

Response 5: EPA disagrees with the Commenter's assertion that the proposed disapproval is contrary to EPA treating the states as co-regulators. As was explained earlier, EPA has regular contact with its state co-regulators. With regard to the proposed disapproval action, EPA corresponded with Georgia regarding the October 21, 2009, submittal prior to the proposed disapproval. In the past several months, EPA has corresponded with Georgia on a number of occasions regarding other SIP revisions and EPA's consideration of those revisions—as is EPA's typical practice to support the co-regulator relationship.

Further, EPA notes that the January 26, 2011, proposed disapproval of Georgia's October 21, 2009, submission as it relates to satisfying the 110(a)(2)(D)(i)(I) requirements for the 2006 24-hour $PM_{2.5}$ NAAQS is based on EPA's determination that Georgia did not provide adequate information to demonstrate compliance with the requirements of section 110(a)(2)(D)(i)(I) for the 2006 24-hour $PM_{2.5}$ NAAQS for Georgia. No new requirements were introduced in EPA's 2009 Guidance. This guidance simply provided additional clarifications but the CAA requirements existed long before Georgia's September 21, 2009, deadline for a SIP submission. Notably, Georgia's submission was provided after EPA's 2009 Guidance.

Comment 6: One Commenter mentions that ''EPA has not stated the amount of reduction they believe is needed to satisfy the transport requirements. Not only is this a situation where EPA moves the finish line (by releasing guidance AFTER the due date), the finish line isn't even knowable (because EPA refuses to inform the states how much reduction is enough to satisfy the requirements). EPA seems to say that it has to be whatever the final Transport Rule says, even though there is no final Transport Rule.''

Response 6: EPA disagrees with this comment. As was explained earlier, the state obligation stems from the CAA itself. As co-regulators, EPA makes efforts to assist states in submitting approvable revisions—and EPA took such action with EPA's 2009 Guidance. States had an opportunity to conduct their own analyses regarding interstate transport. Section 110(a)(2) requires that the state's submission contain adequate provisions prohibiting emissions from the state that contribute significantly to nonattainment of or interfere with maintenance of the NAAQS in any other state. In order to ensure compliance with the CAA's mandate of ''adequate'' provisions, the state's SIP revision must be supported by an adequate technical analysis, including, but not limited to, information concerning emissions in the state, meteorological conditions in the state and the potentially impacted states, monitored ambient concentrations in the state and the potentially impacted states, the distance to the nearest area that is not attaining the NAAQS in another state, and air quality modeling. EPA appreciates that Georgia has initiated the process of such an analysis (which is included in Georgia's comment letter).

Comment 7: One Commenter notes EPA's statement in the January 26, 2011, proposed disapproval where the Agency states: ''* * * without an adequate technical analysis EPA does not believe that states can sufficiently address the section 110(a)(2)(D)(i)(I) requirement for the 2006 PM2.5 NAAQS.'' The Commenter mentions that they, and possibly other states, were precluded from providing the necessary technical analysis by EPA because EPA did not release the guidance until after the SIP submission deadline. Further, the Commenter notes that EPA did not provide specific criteria for the technical analysis in the 2006 $PM_{2.5}$ Infrastructure Guidance, and mentions that ''[h]ad EPA provided adequate criteria for an approvable SIP in a timely manner, it is likely that [the state] would have been able to submit an approvable SIP by the statutory deadline.'' Another Commenter states: ''EPA has not provided Georgia and other similarly situated states with a meaningful opportunity to develop the required SIP.'' Further, the Commenter mentions that ''States cannot possibly be expected to develop approvable SIPs without knowing in advance the standards against which those SIPs will be judged.''

Response 7: EPA does not agree with the Commenter's assertions. As was explained earlier, the SIP submission requirement is identified in the CAA. EPA provided guidance before Georgia submitted its October 21, 2009, SIP revision. In addition, States were alerted that a technical analysis that involved modeling and permanent, enforceable emission reductions could be used to make an adequate demonstration to satisfy the 110(a)(2)(D)(i)(I) requirement for the 1997 $PM_{2.5}$ and ozone NAAQS when EPA promulgated CAIR in 2005. Due to the legal status of CAIR, states relying on CAIR as permanent were taking a risk given EPA's proposed Transport Rule and the court decision on CAIR. Further, states were officially informed that the 110(a)(2)(D)(i)(I) requirement for the 2006 24-hour $PM_{2.5}$ NAAQS could not be satisfied by reliance on CAIR (since that rule did not consider the 2006 24-hour $PM_{2.5}$ NAAQS) when EPA released EPA's 2009 Guidance . The submittal by Georgia relied on CAIR and it did not include a technical analysis—despite EPA's efforts to alert states that mere reliance on CAIR, on its own, would not meet the CAA requirements. EPA appreciates that Georgia's comment letter on the January 2011 proposal did provide additional technical support. As Georgia itself noted, some of the information provided by Georgia on the January 2011 disapproval proposal was also provided to EPA in response to the proposed Transport Rule. As was discussed in an earlier response, the technical information provided is not adequate to meet section 110(a)(2)(D)(i)(I) requirements.

Comment 8: One Commenter mentions that ''Georgia learned for the first time in this proposed disapproval that the only thing preventing us from having our SIP approved is an adequate technical analysis.'' The Commenter then asserts that ''* * * since EPA has not provided a 'reasonable deadline' to correct the deficiency, we are including our technical analysis as part of our comments on this proposal.''

Response 8: Consistent with section 110 of the CAA and implementing regulations at 40 CFR part 51, and as a general matter, ''adequate technical analyses'' are a cornerstone of ensuring that SIP revisions are approvable. EPA has addressed the timing of information in previous comments, but to underscore that point, EPA alerted states formally upon the release of the 2006 $PM_{2.5}$ NAAQS Infrastructure Guidance that CAIR could not be used to meet the 110(a)(2)(D)(i)(I) requirement for the 2006 $PM_{2.5}$ NAAQS. Georgia acknowledges as such in the October 21, 2009, infrastructure submission. With regard to the latter point in the comment and the technical analysis, see Response 7, above. In addition, there are formal SIP revision requirements described in 40 CFR part 51, subpart F. EPA does not agree that Georgia's comments on the January 2011 disapproval proposal may be considered a ''SIP revision;'' nonetheless, EPA did review the comments as was described in Response 7, above. Further information regarding the path forward following today's action is described below.

Upon disapproval of Georgia's submittal, EPA has a legal obligation, pursuant to the Act, to promulgate a FIP. Section 110(a)(1) of the Act requires states to submit SIPs that meet certain requirements within three years of promulgation of a NAAQS. These SIPs are required to contain, among other things, adequate provisions ''prohibiting, consistent with the provisions of this subchapter, any source or other type of emissions activity within the state from emitting any air pollutant in amounts which will—(I) contribute significantly to nonattainment in, or interfere with maintenance by, any other state with respect to any such national primary or secondary ambient air quality standard.'' Section 110(a)(1) gives the Administrator authority to prescribe a period shorter than three years for the states to adopt and submit such SIPs, but does not give the Administrator authority to lengthen the time allowed for submission.

Section 110(c)(1) of the Act, in turn, requires EPA to promulgate FIPs if EPA has found that the state has failed to make a required submission or if EPA has disapproved a state submission our found it to be incomplete. Specifically, section 110(c)(1) requires EPA to promulgate a FIP within two years after the Administrator ''(A) finds that a state has failed to make a required submission or finds that the plan or plan revision submitted by the state does not satisfy the minimum criteria established under subsection (k)(1)(A) of this section or (B) disapproves a state implementation plan submission in whole or in part.'' The Act uses mandatory language, finding that EPA *shall* promulgate a FIPs at any time within 2 years after the actions identified 110(c)(1)(A) or 110(c)(1)(B) have occurred. EPA's legal obligation to promulgate FIPs arises when those actions occur without regard to the underlying reason for the underlying state SIP deficiency. The obligation to promulgate a FIP must be discharged by EPA unless two conditions are met: (1) The state corrects the deficiency; and (2) the Administrator approves the plan or plan revision, before the Administrator promulgates the FIP.

Under this statutory scheme, EPA has authority and an obligation to promulgate a FIP to correct a SIP deficiency if the actions identified in section 110(c)(1)(A) or (B) have been taken, and the two conditions identified in 110(c)(1) have not been met. The question of whether EPA has authority to promulgate any particular FIP, therefore, must be considered on a state specific basis.

EPA disagrees with the Commenter's suggestion that the rule is inconsistent with the CAA because it does not give states time to develop, submit and receive EPA approval of SIPs before the FIP goes into effect. Section 110(a)(2) calls on states to submit SIPs that contain adequate provisions prohibiting the emissions proscribed by section 110(a)(2)(D)(i)(I). However, when EPA has not received such SIP submission or has disapproved a SIP submission, it has an obligation created by section 110(c)(1) to promulgate a FIP that meets the requirements of section 110(a)(2)(D)(i)(I). EPA does not believe it has authority to adjust the deadlines established in the Act in order to give states additional time, after promulgation of the Transport Rule, to submit SIPs that comply with section 110(a)(2)(D)(i)(I). EPA does not believe it has authority to alter the statutory requirement that it promulgate FIPs within two years of making a finding of failure to submit. EPA sought to discharge this duty with respect to the states covered by CAIR for the $PM_{2.5}$ NAAQS by promulgating CAIR; however, the Court found that rule unlawful and not sufficiently related to the statutory mandate of section 110(a)(2)(D)(i)(I). For this reason, EPA does not believe it could argue that the CAIR FIPs completely discharged its duty to promulgate FIPs with respect to the states whose section 110(a)(2)(D)(i)(I) SIPs are disapproved.

EPA is following the SIP process established in the statute. The 110(a) SIPs for the 2006 $PM_{2.5}$ standard were due in 2009. In each case, states were given the full 3 years to meet the requirement. The Transport Rule provides the FIP to fulfill the requirement that was unmet by the states through SIPs. EPA is required to promulgate a FIP within 2 years of a state's failure to have an approved SIP. States were in fact given the first chance to fulfill the requirement of Section 100(a)(2)(D)(i)(I). EPA's action is subsequent to the State's opportunity to first fulfill the requirement.

EPA has made every attempt to smooth the transition between the requirements of CAIR and those of the forthcoming Transport Rule. For future requirements, EPA will also make every effort to address transition issues. However, EPA cannot ignore its statutory obligations and therefore cannot ensure that no new requirements will be placed on the sources being regulated by this action. Every time a NAAQS is revised, there is a statutory obligation for states to submit SIPs to address certain CAA requirements. If states fail to meet the deadlines or submit incomplete or inadequate SIPs, EPA must act to ensure that the requirements are put into place.

Even though EPA is issuing a FIP, the State still has the opportunity to submit a SIP that can tailor requirements to the specific needs and concerns of the State in order to meet the applicable state budgets. Prior to this action, states had ample time under the provisions of the CAA to develop and submit approvable SIPs and did not. No state affected by the Transport Rule has submitted a SIP to replace the emission reductions that were required by CAIR, despite the *North Carolina* opinion issued in December 2008 that clearly said CAIR did not adequately address 110(a)(2)(D)(i)(I). While the remand left CAIR in place and states and sources were required to continue to comply with it, states had the opportunity to develop replacement measures to ensure that 110(a)(2)(D)(i)(I) components of their SIPs would continue to be fulfilled in the future.

Objection to the Use of Disapproval Actions for States' Implementation Plans

Comment 9: Three Commenters express concerns about EPA's proposed disapproval and indicate that EPA had an obligation to use section 110(k)(5) of the CAA. One Commenter states: ''EPA continues to be resistant to exploring a legislative approach to fixing some of the SIP issues, yet the correct process under the existing Clean Air Act to appropriately address this issue is not being used.'' The Commenter goes on to state: ''Section 110(k) requires that when EPA finds a plan to be inadequate, EPA shall (1) require the state to revise the plan, (2) notify the state of the inadequacy, and (3) may establish reasonable deadlines not to exceed 18 months.'' Additionally, the Commenter mentions that in their opinion, ''The proposed disapproval completely ignores #1 and #3 and only partially satisfies #2. Regarding #2, the EPA proposal simply states EPA's position that the SIP is inadequate, but fails to notify us 'of the inadequacy.' '' The Commenter asserts that ''* * * EPA still has failed to provide any specificity on what is required of a state to submit an approvable SIP,'' and mentions that ''These Clean Air Act requirements are not discretionary, and that 'EPA must comply with the provisions of Section 110(k)(5) by providing a reasonable period of time to allow [the state] to satisfy the inadequacy and sufficient and timely instructions on what is required to revise the plan instead of relying on a theoretical FIP as the sole remedy.' '' The Commenter concludes by stating that ''EPA may not take final action on this proposal until it complies with Section 110(k)(5) of the Clean Air Act.'' Another Commenter states ''[s]ection 110(k)(5) requires EPA to notify the State of the inadequacies and authorizes the Agency to establish reasonable deadlines for the submission of such plan revisions.'' That Commenter goes on to conclude that ''[t]he proposed disapproval of Georgia's SIP in combination with the proposed FIP violates these requirements.''

Response 9: The issues raised in this comment are also addressed by Response 8, above. To further clarify what is included in Response 8, Georgia's October 21, 2009, submission relating to section 110(a)(2)(D)(i)(I) for the 2006 $PM_{2.5}$ NAAQS is being disapproved pursuant to sections 110(k)(2) and (3) of the CAA, not section 110(k)(5). Section 110(k)(5) is applicable to SIPs that have been federally-approved, and are subsequently found to be substantially inadequate. This is not the case for Georgia's October 21, 2009, submission relating to section 110(a)(2)(D)(i)(I) for the 2006 $PM_{2.5}$ NAAQS. The October 21, 2009, submission was provided to EPA for a new requirement that was triggered by the promulgation of the 24-hour $PM_{2.5}$ NAAQS in 2006. EPA is required under section 110(k)(3) to act upon a state submittal with an approval or disapproval, within the time period designated under section 110(k)(2). With this action, EPA is disapproving Georgia's October 21, 2009, submission relating to section 110(a)(2)(D)(i)(I), because EPA has made the determination that the Georgia SIP does not satisfy these requirements for the 2006 $PM_{2.5}$ NAAQS. Georgia's submission is inadequate for its failure to meet the statutory requirements of 110(a)(2)(D)(i)(I) as noted above. The State can correct the deficiency by submitting a transport SIP that meets the provisions of the final Transport Rule or otherwise eliminates significant contribution and interference with maintenance. *See* Response to Comment 8.

Comment 10: One Commenter expresses concern about EPA's statement in the January 26, 2011, proposed disapprovals regarding the Agency not taking action on some elements of the states' 2006 24-hour $PM_{2.5}$ infrastructure submissions, and notes the Agency's statutory timeframe for taking action on SIP submissions. Specifically, the Commenter cites the following statement from EPA's January 26, 2011, proposed rule: ''[t]herefore, EPA is proposing to disapprove those provisions which relate to the 110(a)(2)(D)(i)(I) demonstration and to take no action on the remainder of the demonstration at this time.'' The Commenter mentions that EPA is ''clearly in violation of Clean Air Act Section 110(k)(2)'' by not taking action on the remainder of the states' submissions.

Response 10: In this action, EPA is disapproving certain elements of the State's submission related to the requirements under section 110(a)(2)(D)(i)(I). EPA has also determined that these elements are severable from the rest of the submission. Comments on elements that are not being addressed here are not relevant to this action and have no bearing on the appropriateness of this disapproval. As noted herein, EPA intends to act on those elements in a subsequent action.

Comment 11: One Commenter indicates that EPA could use section 110(k)(4) to conditionally approve the states' implementation plans for the transport requirements related to the 2006 24-hour $PM_{2.5}$ NAAQS in anticipation of the promulgation of the final Transport Rule, ''[a]ssuming EPA adequately addresses modeling and emissions inventory concerns raised during the comment period* * *''

Response 11: EPA does not agree that the use of 110(k)(4) for a conditional approval is appropriate in this circumstance. Conditional approvals may be used to approve a plan revision based on a written commitment of the State to adopt specific enforceable measures by a date certain, but not later than 1 year after the date of approval of the plan revision. If the State does not adopt specific enforceable measures within a year, the conditional approval automatically converts to a disapproval. The forthcoming Transport Rule is an action that is being promulgated from EPA and not the State, so it is unclear what ''condition'' the State would be responsible for satisfying by relying on the final promulgation of the Transport Rule. Further, as the Commenter implies, use of 110(k)(4) is optional.

Comment 12: One Commenter states: ''EPA's disapproval of SIPs is part of a larger effort by EPA to bypass the states in addressing interstate transport under the 1997 ozone and annual $PM_{2.5}$ standards and the 2006 24-hour $PM_{2.5}$ standard.'' The Commenter goes on to state that ''[i]n EPA's proposed Transport Rule and in the proposed disapproval of the interstate transport portions of states' 24-hour $PM_{2.5}$ infrastructure SIPs, EPA is usurping states' rights to address air quality issues within their borders.''

Response 12: EPA disagrees with this comment. The forthcoming Transport Rule will help to protect downwind states from adverse impacts of emissions from upwind states. Otherwise, the remedy for such downwind states would be to individually petition the Administrator for a finding that any major source or group of stationary sources emits or would emit any air pollutant in violation of the prohibition of section 110(a)(2)(D)(ii). Further, the October 21, 2009, SIP revision submitted by Georgia was not adequate to meet the requirements of section 110(a)(2)(D)(i)(I). (Similar issues are also discussed in Response 8, above.)

Comment 13: One Commenter mentions that ''[g]iven the role reserved to states by Congress, EPA must afford the states a meaningful opportunity to develop SIPs before EPA issues a federal implementation plan (FIP).''

Response 13: EPA disagrees with the Commenter's assertion that the State did not have meaningful opportunity to develop a SIP revision (i.e., in this case, to meet the 110(a)(2)(D)(i)(I) requirements for the 2006 24-hour $PM_{2.5}$ NAAQS). To the contrary, states had three years from the time the 2006 24-hour $PM_{2.5}$ NAAQS were promulgated to develop a SIP revision to meet the 110(a)(2)(D)(i)(I) requirements for this NAAQS. Specifically, the 2006 24-hour $PM_{2.5}$ NAAQS was promulgated on September 21, 2006, and thus submissions to address the 110(a)(2)(D)(i)(I) requirements for the 2006 24-hour $PM_{2.5}$ NAAQS were due from the states on September 21, 2009. EPA released its guidance in September 2009 and did not propose disapproval of the Georgia's October 21, 2009, SIP revision until January 26, 2011, which was more than a year after the State was formally made aware that the State could not rely on CAIR to meet the 110(a)(2)(D)(i)(I) requirements for the 2006 24-hour $PM_{2.5}$ NAAQS. *See also* Response to comment 8.

Comment 14: One Commenter states: ''[w]hile the courts have recognized that EPA has a role to play in resolving interstate transport issues, the Agency has no 'roving commission' to effectively leapfrog over the SIP process and impose its own choices on states and regulated parties.'' The Commenter indicates that EPA is circumventing the SIP process with the proposed disapproval action, and cites *Michigan* v. *EPA,* 268 F.3d 1075, 1084 (DC Cir. 2001) for support of its proposition. Specifically, the Commenter mentions ''EPA's disapproval of Georgia's SIP combined with the impending FIP usurps the role of the states in the federal-state partnership.'' Further, the Commenter states ''[t]he proposed disapproval and the proposed transport rule both suggest that EPA intends to supplant the SIP process with its own Transport Rule FIP this year.''

Response 14: First, EPA disagrees with the Commenter's suggestion that the proposed disapproval action for the portion of Georgia's October 21, 2009, SIP revision and the Agency's option to put the forthcoming Transport Rule in place as a FIP is circumventing the SIP process. As noted in previous responses in this rulemaking (such as Response 8 and 13), states had three years from the date of promulgation of the 2006 24-hour $PM_{2.5}$ NAAQS to develop an adequate submission to meet the requirements of section 110(a)(2)(D)(i)(I) for this NAAQS. Specifically, the 2006 24-hour $PM_{2.5}$ NAAQS were promulgated on September 21, 2006, and thus submissions to address the 110(a)(2)(D)(i)(I) requirements for the 2006 24-hour $PM_{2.5}$ NAAQS were due from the states on September 21, 2009. While EPA did not release the 2006 $PM_{2.5}$ NAAQS Infrastructure Guidance until September 25, 2009, EPA also did not propose disapproval of the Georgia's October 21, 2009, SIP revision until January 26, 2011, which was more than a year after the State was formally made aware that the State could not rely on CAIR to meet the 110(a)(2)(D)(i)(I) requirements for the 2006 24-hour $PM_{2.5}$ NAAQS. EPA notes that CAIR was not intended to meet the transport requirements for the 2006 24-hour $PM_{2.5}$ NAAQS. As was discussed at length in Response 8 above, EPA's process with regard to today's disapproval and the forthcoming Transport Rule follow clear processes described in the CAA. EPA appreciates that commenter would have preferred that another approach be utilized; however, EPA's action today followed an established process for such actions. Lastly, the *Michigan* v. *EPA* case cited to by the commenter simply does not apply to the current action. That case involved EPA's implementation of a permitting program (not a SIP action) where there were complicating questions of Indian Law and jurisdiction. In today's action, EPA is acting consistent with the procedures set forth in the CAA, as was described in detail in Response 8.

Acknowledgement of States' Efforts and Air Quality Conditions

Comment 15: Two Commenters mention innovative air pollution control strategies that states have implemented to reduce emissions, and seem to indicate that the adoption of those strategies, in-and-of itself, complies with the interstate transport provisions of section 110(a)(2)(D)(i)(I) for the 2006 24-hour $PM_{2.5}$ NAAQS. The Commenters opine that state laws and rules have resulted in enormous reductions of pollutants that are key pollutants to interstate transport.

Response 15: EPA agrees that states have implemented innovative air pollution control strategies that have provided significant reductions in emissions, and the Agency commends states for their efforts. However, today's action relates to whether Georgia has provided an adequate technical analysis and emissions reductions to show compliance with the 110(a)(2)(D)(i)(I) requirements for the 2006 24-hour $PM_{2.5}$ NAAQS for Georgia. It is EPA's final determination that Georgia's October 21, 2009, submission (as well as the technical analysis provided in the public comments) do not provide an adequate technical analysis and emissions reductions for this determination and thus EPA is disapproving the portion of Georgia's October 21, 2009, submission as it relates to the 110(a)(2)(D)(i)(I) requirements for the 2006 24-hour $PM_{2.5}$ NAAQS for Georgia.

Concerns Related to the Transport Rule

Comment 16: One Commenter expresses concern regarding EPA's statement in the January 26, 2011, proposed disapproval regarding the modeling used to support the proposed Transport Rule, and the findings in relation to whether states significantly contribute to nonattainment or interfere with maintenance of the 2006 24-hour $PM_{2.5}$ NAAQS in downwind areas. The Commenter states that ''based on 2007–2009 monitoring data, all of these areas are currently meeting the 2006 24-hour $PM_{2.5}$ NAAQS'' and expresses concern that EPA did not note the area's status with regard to the 2006 24-hour $PM_{2.5}$ NAAQS in the proposal. The Commenter goes on to say ''we noted in our official comments on the proposed Transport Rule, EPA had numerous errors in the modeling inputs and failed to ensure that the model performance was acceptable. This may explain the disparity between EPA's modeling results and the real world monitors.''

Response 16: Today's action relates to whether the State provided an adequate technical analysis and emissions reductions to show compliance with the 110(a)(2)(D)(i)(I) requirements for the 2006 24-hour $PM_{2.5}$ NAAQS for Georgia, and is not based on the attainment status of Georgia areas. Georgia did not provide adequate technical analysis to EPA to demonstrate compliance with the 110(a)(2)(D)(i)(I) requirements for the 2006 24-hour $PM_{2.5}$ NAAQS. With regard to the Commenter's concern about the forthcoming Transport Rule, EPA notes that the Agency received numerous comments on the proposed Transport Rule and is considering those comments as it works toward promulgation of a final Transport Rule. All comments on the Transport Rule will be addressed in that context.

Comment 17: All Commenters assert that EPA's proposed finding of significant contribution for the proposed Transport Rule is based on an inaccurate emissions inventory, fails to take into account all of the reductions required by the state rules already in effect, and contains numerous other errors that only compound these problems.

Response 17: EPA received numerous comments on the proposed Transport Rule and is considering those comments as it works toward promulgation of a final Transport Rule. All comments on the Transport Rule will be addressed in that context.

III. Final Action

EPA is taking final action to disapprove the portion of Georgia's October 21, 2009, submission, relating to section 110(a)(2)(D)(i)(I), because EPA has made the determination that Georgia's SIP does not satisfy the requirements for the 2006 24-hour $PM_{2.5}$ NAAQS. Although EPA is taking final action to disapprove the portion of Georgia's October 21, 2009, submission relating to section 110(a)(2)(D)(i)(I), EPA acknowledges the State's efforts to address this requirement in its October 21, 2009, submission. Unfortunately, the submittal relies on CAIR and without an adequate technical analysis EPA does not believe that states can adequately address the section 110(a)(2)(D)(i)(I) requirement for the 2006 $PM_{2.5}$ NAAQS. The purpose of the Transport Rule that EPA is developing and has proposed is to respond to the remand of CAIR by the Court and address the section 110(a)(2)(D)(i)(I) requirements for the 2006 $PM_{2.5}$ NAAQS for the affected states. In today's action, EPA is not taking any disapproval action on the remaining elements of the submission, including other section 110(a)(2) infrastructure elements, and specifically the section 110(a)(2)(D)(i)(II) portion regarding interference with measures required in the applicable SIP for another state designed to prevent significant deterioration of air quality and protect visibility but instead will act on those provisions in a separate rulemaking.

Under section 179(a) of the CAA, final disapproval of a submittal that addresses a requirement of a Part D Plan (42 U.S.C.A. section 7501–7515) or is required in response to a finding of substantial inadequacy as described in section 7410(k)(5) (SIP call) starts a sanctions clock. Section 110(a)(2)(D)(i)(I) provisions (the provisions being disapproved in today's notice) were not submitted to meet requirements for Part D, and therefore, no sanctions will be triggered. This final action triggers the requirement under section 110(c) that EPA promulgate a FIP no later than 2 years from the date of the disapproval unless the State corrects the deficiency, and the Administrator approves the plan or plan revision before the Administrator promulgates such FIP. The proposed Transport Rule, when final, is the FIP that EPA intends to implement to satisfy the 110(a)(2)(D)(i)(I) requirement for Georgia for the 2006 $PM_{2.5}$ NAAQS.

IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to act on state law as meeting federal requirements and does not impose additional requirements beyond those imposed by state law.

A. Executive Order 12866, Regulatory Planning and Review

This action is not a ''significant regulatory action'' under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under the Executive Order.

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, because this SIP disapproval under section 110 and subchapter I, part D of the CAA will not in-and-of itself create any new information collection burdens but simply disapproves certain state requirements for inclusion into the SIP. Burden is defined at 5 CFR 1320.3(b).

C. Regulatory Flexibility Act (RFA)

The RFA generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions. For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's final rule on small entities, I certify that this action will not have a significant impact on a substantial number of small entities. This rule does not impose any requirements or create impacts on small entities. This SIP disapproval under section 110 and subchapter I, part D of the CAA will not in-and-of itself create any new requirements but simply disapproves certain state requirements for inclusion into the SIP. Accordingly, it affords no opportunity for EPA to fashion for small entities less burdensome compliance or reporting requirements or timetables or exemptions from all or part of the rule. The fact that the CAA prescribes that various consequences (e.g., higher offset requirements) may or will flow from this disapproval does not mean that EPA either can or must conduct a regulatory flexibility analysis for this action. Therefore, this action will not have a significant economic impact on a substantial number of small entities. EPA continues to be interested in the potential impacts of this proposed rule on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

This action contains no Federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 for state, local, or tribal governments or the private sector. EPA has determined that the disapproval action does not include a federal mandate that may result in estimated costs of $100 million or more to either state, local, or tribal governments in the aggregate, or to the private sector. This action disapproves pre-existing requirements under state or local law, and imposes no new requirements. Accordingly, no additional costs to state, local, or tribal governments, or to the private sector, result from this action.

E. Executive Order 13132, Federalism

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.''

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, because it merely disapproves certain state requirements for inclusion into the SIP and does not alter the relationship or the distribution of power and responsibilities established in the CAA. Thus, Executive Order 13132 does not apply to this action.

F. Executive Order 13175, Coordination With Indian Tribal Governments

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

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

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it because it is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997). This SIP disapproval under section 110 and subchapter I, part

D of the CAA will not in-and-of itself create any new regulations but simply disapproves certain state requirements for inclusion into the SIP.

H. Executive Order 13211, Actions That Significantly Affect Energy Supply, Distribution or Use

This action is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act (NTTAA)

Section 12(d) of the NTTAA, Public Law 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through the Office of Management and Budget, explanations when the Agency decides not to use available and applicable voluntary consensus standards. EPA believes that this action is not subject to requirements of Section 12(d) of NTTAA because application of those requirements would be inconsistent with the CAA.

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

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

EPA lacks the discretionary authority to address environmental justice in this proposed action. In reviewing SIP submissions, EPA's role is to approve or disapprove state choices, based on the criteria of the CAA. Accordingly, this action merely proposes to disapprove certain state requirements for inclusion into the SIP under section 110 and subchapter I, part D of the CAA and will not in-and-of itself create any new requirements. Accordingly, it does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898.

K. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by September 19, 2011. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Particulate matter, Reporting and recordkeeping requirements.

Dated: June 28, 2011.

A. Stanley Meiburg,

Acting Regional Administrator, Region 4.

40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

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

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

Subpart L—Georgia

■ 2. Section 52.578 is amended by adding paragraph (d), to read as follows:

§ 52.578 Control strategy: Sulfur oxides and particulate matter.

* * * * *

(d) *Disapproval.* EPA is disapproving portions of Georgia's Infrastructure SIP for the 2006 24-hour $PM_{2.5}$ NAAQS addressing interstate transport, specifically with respect to section 110(a)(2)(D)(i)(I).

[FR Doc. 2011–17998 Filed 7–19–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2010–1015–201129; FRL–9438–3]

Approval and Promulgation of Air Quality Implementation Plan; North Carolina; Disapproval of Interstate Transport Submission for the 2006 24-Hour $PM_{2.5}$ Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is taking final action to disapprove the portion of North Carolina's September 21, 2009, submission which was intended to meet the requirement to address interstate transport for the 2006 24-hour fine particulate matter ($PM_{2.5}$) national ambient air quality standards (NAAQS). Additionally, EPA is responding to comments received on EPA's January 26, 2011, proposed disapproval of the aforementioned portion of North Carolina's September 21, 2009, submission. On September 21, 2009, the State of North Carolina, through the North Carolina Department of Environment and Natural Resources (NC DENR), provided a letter to EPA certifying that North Carolina's state implementation plan (SIP) meets the interstate transport requirements with regard to the 2006 24-hour $PM_{2.5}$ NAAQS. Specifically, the interstate transport requirements under the Clean Air Act (CAA or Act) prohibit a state's emissions from significantly contributing to nonattainment or interfering with the maintenance of the NAAQS in any other state. The effect of today's action will be the promulgation of a Federal Implementation Plan (FIP) for North Carolina no later than two years from the date of disapproval. The proposed Transport Rule, when final, is the FIP that EPA intends to implement for North Carolina.

DATES: *Effective Date:* This rule will be effective August 19, 2011.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R04–OAR–2010–1015. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, i.e., Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30 excluding federal holidays.

FOR FURTHER INFORMATION CONTACT: For information regarding the North Carolina SIP, contact Mr. Zuri Farngalo, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. Mr. Farngalo's telephone number is (404) 562–9152; *e-mail address: farngalo.zuri@epa.gov.* For information regarding the $PM_{2.5}$ interstate transport requirements under section 110(a)(2)(D)(i), contact Mr. Steven Scofield, Regulatory Development Section, at the same address above. Mr. Scofield's telephone number is (404) 562–9034; *e-mail address: scofield.steve@epa.gov.*

SUPPLEMENTARY INFORMATION:

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I. Background

Upon promulgation of a new or revised NAAQS, sections 110(a)(1) and (2) of the CAA require states to address basic SIP requirements, including emissions inventories, monitoring, and modeling to assure attainment and maintenance for that NAAQS. On December 18, 2006, EPA revised the 24-hour average $PM_{2.5}$ primary and secondary NAAQS from 65 micrograms per cubic meter (μg/m³) to 35 μg/m³, thus states were required to provide submissions to address section 110(a)(1) and (2) of the CAA (infrastructure SIPs) for this revised NAAQS. North Carolina provided its infrastructure submission for the 2006 $PM_{2.5}$ NAAQS on September 21, 2009. On January 26, 2011, EPA proposed to disapprove the portion of North Carolina's September 21, 2009, infrastructure submission related to interstate transport (i.e., 110(a)(2)(D)(i)(I)) for the 2006 $PM_{2.5}$ NAAQS. *See* 76 FR 4592. A summary of the background for this final action is provided below.

Section 110(a)(2) lists the elements that infrastructure SIPs must address, as applicable, including section 110(a)(2)(D)(i), which pertains to interstate transport of certain emissions. States were required to provide submissions to address the applicable 110(a)(2) infrastructure requirements, including section 110(a)(2)(D)(i), by September 21, 2009.[1]

On September 25, 2009, EPA issued a guidance entitled ''Guidance on SIP Elements Required Under Sections 110(a)(1) and (2) for the 2006 24-Hour Fine Particle ($PM_{2.5}$) National Ambient Air Quality Standards (NAAQS)'' (herein after referred to as ''EPA's 2009 Guidance''). EPA developed the EPA's 2009 Guidance to make additional recommendations to states for making submissions to meet the requirements of section 110, including 110(a)(2)(D)(i) for the revised 2006 24-hour $PM_{2.5}$ NAAQS.

As identified in the EPA's 2009 Guidance, the ''good neighbor'' provisions in section 110(a)(2)(D)(i) require each state to submit a SIP that prohibits emissions that adversely affect another state in the ways contemplated in the CAA. Section 110(a)(2)(D)(i) contains four distinct requirements related to the impacts of interstate transport. Specifically, the SIP must prevent sources in the state from emitting pollutants in amounts which will: (1) Contribute significantly to nonattainment of the NAAQS in other states; (2) interfere with maintenance of the NAAQS in other states; (3) interfere with provisions to prevent significant deterioration of air quality in other states; or (4) interfere with efforts to protect visibility in other states.

In the EPA's 2009 Guidance, EPA explained that submissions from states pertaining to the ''significant contribution'' and ''interfere with maintenance'' requirements in section 110(a)(2)(D)(i)(I) must contain adequate provisions to prohibit air pollutant emissions from within the state that contribute significantly to nonattainment or interfere with maintenance of the NAAQS in any other state. EPA described a number of considerations for states for providing an adequate demonstration to address interstate transport requirements in the EPA's 2009 Guidance. First, EPA noted that the state's submission should explain whether or not emissions from the state contribute significantly to nonattainment or interfere with maintenance of the NAAQS in any other state and, if so, address the impact. EPA stated that the state's conclusion should be supported by an adequate technical analysis. Second, EPA recommended the various types of information that could be relevant to support the state's submission, such as information concerning emissions in the state, meteorological conditions in the state and the potentially impacted states, monitored ambient concentrations in the state, and air quality modeling. Third, EPA explained that states should address the ''interfere with maintenance'' requirement independently which requires an evaluation of impacts on areas of other states that are meeting the 2006 24-hour $PM_{2.5}$ NAAQS, not merely areas designated nonattainment. Lastly, EPA explained that states could not rely on the Clean Air Interstate Rule (CAIR) to comply with CAA section 110(a)(2)(D)(i) requirements for the 2006 24-hour $PM_{2.5}$ NAAQS because CAIR does not address this NAAQS. CAIR, promulgated by EPA on May 12, 2005 (*See* 70 FR 25162), required states to reduce emissions of sulfur dioxide and nitrogen oxides that significantly contribute to, and interfere with maintenance of the 1997 $PM_{2.5}$ NAAQS and/or ozone in any downwind state. CAIR was intended to provide states covered by the rule with a mechanism to satisfy their CAA section 110(a)(2)(D)(i)(I) obligations to address significant contribution to downwind nonattainment and interference with maintenance in another state with respect to the 1997 ozone and $PM_{2.5}$ NAAQS. Many states adopted the CAIR provisions and submitted SIPs to EPA to demonstrate compliance with the CAIR requirements in satisfaction of their 110(a)(2)(D)(i)(I) obligations for those two pollutants.

EPA was sued by a number of parties on various aspects of CAIR, and on July 11, 2008, the U.S. Court of Appeals for the District of Columbia Circuit (DC Circuit or Court) issued its decision to vacate and remand both CAIR and the associated CAIR FIPs in their entirety. *North Carolina* v. *EPA,* 531 F.3d 836 (DC Circuit, July 11, 2008). However, in response to EPA's petition for rehearing, the Court issued an order remanding CAIR to EPA without vacating either CAIR or the CAIR FIPs. *North Carolina* v. *EPA,* 550 F.3d 1176 (DC Circuit, December 23, 2008). The Court thereby left CAIR in place in order to ''temporarily preserve the

[1] The rule for the revised $PM_{2.5}$ NAAQS was signed by the Administrator and publically disseminated on September 21, 2006. Because EPA did not prescribe a shorter period for 110(a) SIP submittals, the submittals for the 2006 24-hour NAAQS were due on September 21, 2009, three years from the September 21, 2006, signature date.

environmental values covered by CAIR'' until EPA replaces it with a rule consistent with the Court's opinion. *Id.* at 1178. The Court directed EPA to ''remedy CAIR's flaws'' consistent with its July 11, 2008, opinion, but declined to impose a schedule on EPA for completing that action. *Id.*

In order to address the judicial remand of CAIR, EPA has proposed a new rule to address interstate transport pursuant to section 110(a)(2)(D)(i), the ''Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone'' (Transport Rule).[2] As part of the proposed Transport Rule, EPA specifically examined the section 110(a)(2)(D)(i) requirements that emissions from sources in a state must not ''significantly contribute to nonattainment'' and ''interfere with maintenance'' of the 2006 24-hour $PM_{2.5}$ NAAQS by other states. The modeling performed for the proposed Transport Rule shows that North Carolina significantly contributes to nonattainment or interferes with maintenance of the 2006 24-hour $PM_{2.5}$ NAAQS in downwind areas. EPA has now completed the modeling for the final Transport Rule and, as indicated by the technical support documents for this action, North Carolina in fact contributes to downwind nonattainment in another state or interferes with maintenance of the 2006 24-hour $PM_{2.5}$ NAAQS in another state.

On September 21, 2009, the State of North Carolina, through NC DENR, provided a letter to EPA certifying that the North Carolina SIP meets the interstate transport requirements with regard to the 2006 24-hour $PM_{2.5}$ NAAQS.[3] Specifically, North Carolina certified that its current SIP adequately addresses the elements of CAA section 110(a)(2)(D)(i)(I) for the 2006 24-hour $PM_{2.5}$ NAAQS. CAA section 110(a)(2)(D)(i)(I) requires that implementation plans for each state contain adequate provisions to prohibit air pollutant emissions from sources within a state from significantly contributing to nonattainment in or interfering with maintenance of the NAAQS (in this case the 2006 24-hour $PM_{2.5}$ NAAQS) in any other state. On January 26, 2011, EPA proposed to disapprove the portion of North Carolina's September 21, 2009, submission related to interstate transport for the 2006 24-hour $PM_{2.5}$ NAAQS because EPA made the preliminary determination that North Carolina's September 21, 2009, submission does not meet the requirements of section 110(a)(2)(D)(i)(I) of the CAA for this NAAQS. This action is finalizing EPA's disapproval of North Carolina's September 21, 2009, submission with regard to section 110(a)(2)(D)(i)(I) of the CAA for the 2006 24-hour $PM_{2.5}$ NAAQS. *See* EPA's January 26, 2011, proposed disapproval rulemaking at 76 FR 4592 for further information on EPA's rationale for this final action.

II. EPA's Responses to Comments

EPA received two sets of adverse comments on the January 26, 2011, proposed rulemaking to disapprove the portion of North Carolina's September 21, 2009, infrastructure submission on the interstate transport requirements of sections 110(a)(2)(D)(i)(I) of the CAA for the 2006 24-hour $PM_{2.5}$ NAAQS. A full set of the comments provided by NC DENR and the Georgia Environmental Protection Division (hereinafter referred to as ''the Commenters'') are provided in the docket for this final action. As a general matter, the comments overlapped on some issues, and as a result, EPA has organized the response to comments by issue. In addition, EPA acknowledges Georgia's comments regarding SIP processing in general. As Georgia is aware, EPA is considering improvements to the SIP process and appreciates Georgia's comments in that regard.

For the most part, the Commenters oppose EPA's proposed disapproval action for the interstate portion of North Carolina's September 21, 2009, infrastructure submission for the 2006 24-hour $PM_{2.5}$ NAAQS. The comments fall generally into the following categories: (1) States' inability to rely on CAIR to satisfy the 110(a)(2)(D)(i)(I) requirements for the 2006 24-hour $PM_{2.5}$ NAAQS; (2) apparent lack of guidance from EPA on how states should meet the requirements; (3) concerns regarding the procedure of taking action to disapprove North Carolina's submittal; (4) acknowledgement of states' efforts and air quality conditions; and (5) concerns related to the Transport Rule. A summary of the comments and EPA's responses are provided below.

States' Inability to Rely on CAIR to Satisfy the 110(a)(2)(D)(i)(I) Requirements for the 2006 24-Hour $PM_{2.5}$ NAAQS

Comment 1: The Commenters express concern with EPA's proposed disapproval and assert that states should be able to rely on CAIR to address the transport requirements in section 110(a)(2)(D)(i)(I) for the 2006 24-hour $PM_{2.5}$ NAAQS. The Commenters explain that the Court left CAIR in place and opine that states should be able to rely on emissions reductions from CAIR to address transport. One Commenter also mentions that ''[t]he Court did not impose a schedule on EPA for completing the Transport Rule; therefore, states have no assurances that EPA will ever replace the CAIR rule. Since there is no guarantee that the Transport Rule will be promulgated in a timely manner, states cannot rely on the reductions in the proposed Transport Rule and must rely on the CAIR reductions, which are permanent and enforceable.''

Response 1: As discussed in EPA's 2009 Guidance, states cannot rely on the CAIR rule for the submission for the 2006 24-hour $PM_{2.5}$ NAAQS because CAIR does not address this NAAQS, and was never intended to address this NAAQS. CAIR was originally put in place to address the 1997 8-hour ozone and $PM_{2.5}$ NAAQS. In order to adequately address the requirements of section 110(a)(2)(D)(i)(I), states can only rely on permanent emission reductions to address transport for the *2006 24-hour $PM_{2.5}$ NAAQS,* and must include an appropriate technical demonstration.

Apparent Lack of Guidance From EPA on How States Should Meet the Requirements

Comment 2: Both Commenters note that that 110(a)(2) infrastructure SIPs for the 24-hour $PM_{2.5}$ NAAQS were due September 21, 2009, but EPA's guidance was not released to the states until September 25, 2009.

Response 2: While EPA's 2009 Guidance regarding the 110(a)(2) infrastructure SIPs for the 2006 24-hour $PM_{2.5}$ NAAQS was released on September 25, 2009, this guidance did not establish new requirements beyond those already required by section 110(a)(2)(D)(i)(I) of the CAA. Relevant portions of section 110(a)(2) require, as follows, ''Each [implementation plan submitted by a State under this chapter] shall * * * contain adequate provisions—(i) prohibiting, consistent with the provisions of this subchapter, any source or other type of emissions activity within the State from emitting

[2] See ''Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone; Proposed Rule,'' 75 FR 45210 (August 2, 2010).

[3] North Carolina's September 21, 2009, certification letter also explained that North Carolina's current SIP sufficiently addresses other requirements of section 110(a)(2) for the 2006 24-hour $PM_{2.5}$ NAAQS; however, today's final rulemaking only relates to the section 110(a)(2)(D)(i)(I) requirements for the 2006 24-hour $PM_{2.5}$ NAAQS. EPA will address the other section 110(a)(2) requirements for the 2006 24-hour $PM_{2.5}$ NAAQS in relation to North Carolina's SIP in a rulemaking separate from today's final rulemaking.

any air pollutant in amounts which will—contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard * * *'' States are statutorily obligated to address the requirements of section 110(a)(2)(D)(i)(I) for the 2006 24-hour $PM_{2.5}$ NAAQS. This above-quoted provision provides States with the requirement.

Comment 3: The Commenters express concern about communication in the SIP process. The Commenters go on to say that ''[e]ven though EPA's guidance was released only a short time later, EPA Region 4 gave absolutely no indication to its co-regulators that there would be a fatal flaw with the submittal.'' The commenter further states that, ''it wasn't until a year later that states were informed via an e-mail on August 27, 2010, that 'All Region 4 states submitted complete infrastructure SIPs for the 2006 $PM_{2.5}$ NAAQS, and our intention is to disapprove the 110(a)(2)(D)(i)(I) portion of those unless it is withdrawn by the state.' ''

Response 3: EPA disagrees with the Commenters' assertion that they were initially notified in an August 27, 2010, e-mail about EPA's expectations and concerns with states' submissions reliance on CAIR to meet the requirements for section 110(a)(2)(D)(i)(I) for the 2006 24-hour $PM_{2.5}$ NAAQS. As was explained above, North Carolina's obligation stems from the CAA. As is EPA's practice, EPA reminded the States on a number of occasions of the interstate transport obligations in 110(a)(2)(D)(i)(I). In addition to the informal reminders (via e-mail and teleconferences, among other avenues), EPA's January 2011 proposal served as a formal, legal notification and provided for a formal opportunity for public comment.

Although EPA reminded states of EPA's expectations and concerns with states' reliance on CAIR to meet the requirements for section 110(a)(2)(D)(i)(I) for the 2006 24-hour $PM_{2.5}$ NAAQS in an August 27, 2010, e-mail, EPA formally notified states of the expectations and concerns in the EPA's 2009 Guidance. Specifically, EPA noted that SIP submissions that relied on CAIR for satisfying the 110(a)(2)(D)(i)(I) requirements for the 2006 24-hour $PM_{2.5}$ NAAQS would be inadequate, as CAIR did not address this NAAQS. EPA's proposed disapproval of the portion of North Carolina's September 21, 2009, submission did not occur until January 2011, which was over a year after EPA's notification (through the release of the EPA's 2009 Guidance) of any states' deficiency for meeting the 110(a)(2)(D)(i)(I) requirement for the 2006 24-hr $PM_{2.5}$ NAAQS had that state relied on CAIR. Thus, North Carolina had notification and an opportunity to provide supplemental information between the release of EPA's 2009 Guidance and EPA's proposed disapproval action in January 2011.

Comment 4: One Commenter raises concerns with EPA treating its 2009 Guidance as ''binding'' and suggests that this action is contrary to statements made by EPA in support of EPA and states being ''co-regulators.''

Response 4: EPA disagrees with the Commenter's assertion that the proposed disapproval is contrary to EPA treating the states as co-regulators. As was explained earlier, EPA has regular contact with its state co-regulators. With regard to the proposed disapproval action, EPA corresponded with North Carolina regarding the September 21, 2009, submittal prior to the proposed disapproval. In the past several months, EPA has corresponded with North Carolina on a number of occasions regarding other SIP revisions and EPA's consideration of those revisions—as is EPA's typical practice to support the co-regulator relationship.

Further, EPA notes that the January 26, 2011, proposed disapproval of North Carolina's September 21, 2009, submission as it relates to satisfying the 110(a)(2)(D)(i)(I) requirements for the 2006 24-hour $PM_{2.5}$ NAAQS is based on EPA's determination that North Carolina did not provide adequate information to demonstrate compliance with the requirements of section 110(a)(2)(D)(i)(I) for the 2006 24-hour $PM_{2.5}$ NAAQS for North Carolina. No new requirements were introduced in EPA's 2009 Guidance. This guidance simply provided additional clarifications but the CAA requirements existed long before North Carolina's September 21, 2009, deadline for a SIP submission.

Comment 5: One Commenter mentions that ''EPA has not stated the amount of reduction they believe is needed to satisfy the transport requirements. Not only is this a situation where EPA moves the finish line (by releasing guidance AFTER the due date), the finish line isn't even knowable (because EPA refuses to inform the states how much reduction is enough to satisfy the requirements). EPA seems to say that it has to be whatever the final Transport Rule says, even though there is no final Transport Rule.''

Response 5: EPA disagrees with this comment. As was explained earlier, the state obligation stems from the CAA itself. As co-regulators, EPA makes efforts to assist states in submitting approvable revisions—and EPA took such action with EPA's 2009 Guidance. States had an opportunity to conduct their own analyses regarding interstate transport. Section 110(a)(2) requires that the state's submission contain adequate provisions prohibiting emissions from the state that contribute significantly to nonattainment of or interfere with maintenance of the NAAQS in any other state. In order to ensure compliance with the CAA's mandate of ''adequate'' provisions, the state's SIP revision must be supported by an adequate technical analysis, including, but not limited to, information concerning emissions in the state, meteorological conditions in the state and the potentially impacted states, monitored ambient concentrations in the state and the potentially impacted states, the distance to the nearest area that is not attaining the NAAQS in another state, and air quality modeling. EPA appreciates that North Carolina has initiated the process of such an analysis (which is included in North Carolina's comment letter).

Comment 6: One Commenter notes EPA's statement in the January 26, 2011, proposed disapproval where the Agency states: ''* * * without an adequate technical analysis EPA does not believe that states can sufficiently address the section 110(a)(2)(D)(i)(I) requirement for the 2006 $PM_{2.5}$ NAAQS.'' The Commenter mentions that they, and possibly other states, were precluded from providing the necessary technical analysis by EPA because EPA did not release the guidance until after the SIP submission deadline. Further, the Commenter notes that EPA did not provide specific criteria for the technical analysis in the EPA's 2009 Guidance, and mentions that ''[h]ad EPA provided adequate criteria for an approvable SIP in a timely manner, it is likely that [the state] would have been able to submit an approvable SIP by the statutory deadline.'' The Commenter included a technical analysis as part of their comments on the proposal.

Response 6: EPA does not agree with the Commenter's assertions. As was explained earlier, the SIP submission requirement is identified in the CAA. In addition, States were alerted that a technical analysis that involved modeling and permanent, enforceable emission reductions could be used to make an adequate demonstration to satisfy the 110(a)(2)(D)(i)(I) requirement for the 1997 $PM_{2.5}$ and ozone NAAQS when EPA promulgated CAIR in 2005. Due to the legal status of CAIR, states relying on CAIR as permanent were taking a risk given EPA's proposed Transport Rule and the court decision on CAIR. Further, states were officially informed that the 110(a)(2)(D)(i)(I) requirement for the 2006 24-hour $PM_{2.5}$ NAAQS could not be satisfied by reliance on CAIR (since that rule did not consider the 2006 24-hour $PM_{2.5}$ NAAQS) when EPA released EPA's 2009 Guidance. The submittal by North Carolina relied on CAIR and it did not include an adequate technical analysis—despite EPA's efforts to alert states that mere reliance on CAIR, on its own, would not meet the CAA requirements.

Consistent with section 110 of the CAA and implementing regulations at 40 CFR part 51, and as a general matter, ''adequate technical analyses'' are a cornerstone of ensuring that SIP revisions are approvable. EPA has addressed the timing of information in previous comments, but to underscore that point, EPA alerted states formally upon the release of the EPA's 2009 Guidance that CAIR could not be used to meet the 110(a)(2)(D)(i)(I) requirement for the 2006 $PM_{2.5}$ NAAQS. In addition, there are formal SIP revision requirements described in 40 CFR part 51, subpart F. EPA does not agree that North Carolina's comments on the January 2011 disapproval proposal may be considered a ''SIP revision;'' nonetheless, EPA did review the comments as was described above. Further information regarding the path forward following today's action is described below.

Upon disapproval of North Carolina's submittal, EPA has a legal obligation, pursuant to the Act, to promulgate a FIP. Section 110(a)(1) of the Act requires states to submit SIPs that meet certain requirements within three years of promulgation of a NAAQS. These SIPs are required to contain, among other things, adequate provisions ''prohibiting, consistent with the provisions of this subchapter, any source or other type of emissions activity within the state from emitting any air pollutant in amounts which will—(I) contribute significantly to nonattainment in, or interfere with maintenance by, any other state with respect to any such national primary or secondary ambient air quality standard.'' Section 110(a)(1) gives the Administrator authority to prescribe a period shorter than three years for the states to adopt and submit such SIPs, but does not give the Administrator authority to lengthen the time allowed for submission.

Section 110(c)(1) of the Act, in turn, requires EPA to promulgate FIPs if EPA has found that the state has failed to make a required submission or if EPA has disapproved a state submission our found it to be incomplete. Specifically, section 110(c)(1) requires EPA to promulgate a FIP within two years after the Administrator ''(A) finds that a state has failed to make a required submission or finds that the plan or plan revision submitted by the state does not satisfy the minimum criteria established under subsection (k)(1)(A) of this section or (B) disapproves a state implementation plan submission in whole or in part.'' The Act uses mandatory language, finding that EPA *shall* promulgate a FIPs at any time within 2 years after the actions identified 110(c)(1)(A) or 110(c)(1)(B) have occurred. EPA's legal obligation to promulgate FIPs arises when those actions occur without regard to the underlying reason for the underlying state SIP deficiency. The obligation to promulgate a FIP must be discharged by EPA unless two conditions are met: (1) The state corrects the deficiency; and (2) the Administrator approves the plan or plan revision, before the Administrator promulgates the FIP.

Under this statutory scheme, EPA has authority and an obligation to promulgate a FIP to correct a SIP deficiency if the actions identified in section 110(c)(1)(A) or (B) have been taken, and the two conditions identified in 110(c)(1) have not been met. The question of whether EPA has authority to promulgate any particular FIP, therefore, must be considered on a state specific basis.

EPA disagrees with the Commenter's suggestion that the rule is inconsistent with the CAA because it does not give states time to develop, submit and receive EPA approval of SIPs before the FIP goes into effect. Section 110(a)(2) calls on states to submit SIPs that contain adequate provisions prohibiting the emissions proscribed by section 110(a)(2)(D)(i)(I). However, when EPA has not received such SIP submission or has disapproved a SIP submission, it has an obligation created by section 110(c)(1) to promulgate a FIP that meets the requirements of section 110(a)(2)(D)(i)(I). EPA does not believe it has authority to adjust the deadlines established in the Act in order to give states additional time, after promulgation of the Transport Rule, to submit SIPs that comply with section 110(a)(2)(D)(i)(I). EPA does not believe it has authority to alter the statutory requirement that it promulgate FIPs within two years of making a finding of failure to submit. EPA sought to discharge this duty with respect to the states covered by CAIR for the $PM_{2.5}$ NAAQS by promulgating CAIR; however, the Court found that rule unlawful and not sufficiently related to the statutory mandate of section 110(a)(2)(D)(i)(I). For this reason, EPA does not believe it could argue that the CAIR FIPs completely discharged its duty to promulgate FIPs with respect to the states whose section 110(a)(2)(D)(i)(I) SIPs are disapproved.

EPA is following the SIP process established in the statute. The 110(a) SIPs for the 2006 $PM_{2.5}$ standard were due in 2009. In each case, states were given the full 3 years to meet the requirement. The Transport Rule provides the FIP to fulfill the requirement that was unmet by the states through SIPs. EPA is required to promulgate a FIP within 2 years of a state's failure to have an approved SIP. States were in fact given the first chance to fulfill the requirement of Section 100(a)(2)(D)(i)(I). EPA's action is subsequent to the State's opportunity to first fulfill the requirement.

EPA has made every attempt to smooth the transition between the requirements of CAIR and those of the forthcoming Transport Rule. For future requirements, EPA will also make every effort to address transition issues. However, EPA cannot ignore its statutory obligations and therefore cannot ensure that no new requirements will be placed on the sources being regulated by this action. Every time a NAAQS is revised, there is a statutory obligation for states to submit SIPs to address certain CAA requirements. If states fail to meet the deadlines or submit incomplete or inadequate SIPs, EPA must act to ensure that the requirements are put into place.

Even though EPA is issuing a FIP, the State still has the opportunity to submit a SIP that can tailor requirements to the specific needs and concerns of the State in order to meet the applicable state budgets. Prior to this action, states had ample time under the provisions of the CAA to develop and submit approvable SIPs and did not. No state affected by the Transport Rule has submitted a SIP to replace the emission reductions that were required by CAIR, despite the *North Carolina* opinion issued in December 2008 that clearly said CAIR did not adequately address 110(a)(2)(D)(i)(I). While the remand left CAIR in place and states and sources were required to continue to comply with it, states had the opportunity to develop replacement measures to ensure that 110(a)(2)(D)(i)(I) components of their SIPs would continue to be fulfilled in the future.

Objection to the Use of Disapproval Actions for States' Implementation Plans

Comment 7: Two Commenters express concerns about EPA's proposed disapproval and indicate that EPA had an obligation to use section 110(k)(5) of the CAA. One Commenter states: ''EPA continues to be resistant to exploring a legislative approach to fixing some of the SIP issues, yet the correct process under the existing Clean Air Act to appropriately address this issue is not being used.'' The Commenter goes on to state: ''Section 110(k) requires that when EPA finds a plan to be inadequate, EPA shall (1) require the state to revise the plan, (2) notify the state of the inadequacy, and (3) may establish reasonable deadlines not to exceed 18 months.'' Additionally, the Commenter mentions that in their opinion, ''The proposed disapproval completely ignores #1 and #3 and only partially satisfies #2. Regarding #2, the EPA proposal simply states EPA's position that the SIP is inadequate, but fails to notify us 'of the inadequacy.' '' The Commenter asserts that ''* * * EPA still has failed to provide any specificity on what is required of a state to submit an approvable SIP,'' and mentions that ''These Clean Air Act requirements are not discretionary, and that 'EPA must comply with the provisions of Section 110(k)(5) by providing a reasonable period of time to allow [the state] to satisfy the inadequacy and sufficient and timely instructions on what is required to revise the plan instead of relying on a theoretical FIP as the sole remedy.' '' The Commenter concludes by stating that ''EPA may not take final action on this proposal until it complies with Section 110(k)(5) of the Clean Air Act.''

Response 7: The issues raised in this comment are also addressed by Response 6, above. To further clarify what is included in Response 6, North Carolina's September 21, 2009, submission relating to section 110(a)(2)(D)(i)(I) for the 2006 $PM_{2.5}$ NAAQS is being disapproved pursuant to sections 110(k)(2) and (3) of the CAA, not section 110(k)(5). Section 110(k)(5) is applicable to SIPs that have been federally-approved, and are subsequently found to be substantially inadequate. This is not the case for North Carolina's September 21, 2009, submission relating to section 110(a)(2)(D)(i)(I) for the 2006 $PM_{2.5}$ NAAQS as the September 21, 2009, submission was provided to EPA for a new requirement that was triggered by the promulgation of the 24-hour $PM_{2.5}$ NAAQS in 2006. EPA is required under section 110(k)(3) to act upon a state submittal with an approval or disapproval, within the time period designated under section 110(k)(2). With this action, EPA is disapproving North Carolina's September 21, 2009, submission relating to section 110(a)(2)(D)(i)(I), because EPA has made the determination that the North Carolina SIP does not satisfy these requirements for the 2006 $PM_{2.5}$ NAAQS. North Carolina's submission is inadequate for its failure to meet the statutory requirements of 110(a)(2)(D)(i)(I) as noted above. The State can correct the deficiency by submitting a transport SIP that meets the provisions of the forthcoming Transport Rule or otherwise eliminates significant contribution and interference with maintenance. *See* Response to Comment 6.

Comment 8: One Commenter expresses concern about EPA's statement in the January 26, 2011, proposed disapprovals regarding the Agency not taking action on some elements of the states' 2006 24-hour $PM_{2.5}$ infrastructure submissions, and notes the Agency's statutory timeframe for taking action on SIP submissions. Specifically, the Commenter cites the following statement from EPA's January 26, 2011, proposed rule: ''[t]herefore, EPA is proposing to disapprove those provisions which relate to the 110(a)(2)(D)(i)(I) demonstration and to take no action on the remainder of the demonstration at this time.'' The Commenter mentions that EPA is ''clearly in violation of Clean Air Act Section 110(k)(2)'' by not taking action on the remainder of the states' submissions.

Response 8: In this action, EPA is disapproving certain elements of the State's submission related to the requirements under section 110(a)(2)(D)(i)(I). EPA has also determined that these elements are severable from the rest of the submission. Comments on elements that are not being addressed here are not relevant to this action. As noted herein, EPA intends to act on those elements in a subsequent action. *See* Response to Comment 6 for additional information.

Comment 9: One Commenter indicates that EPA could use section 110(k)(4) to conditionally approve the states' implementation plans for the transport requirements related to the 2006 24-hour $PM_{2.5}$ NAAQS in anticipation of the promulgation of the final Transport Rule, ''[a]ssuming EPA adequately addresses modeling and emissions inventory concerns raised during the comment period * * *''

Response 9: EPA does not agree that the use of 110(k)(4) for a conditional approval is appropriate in this circumstance. Conditional approvals may be used to approve a plan revision based on a written commitment of the State to adopt specific enforceable measures by a date certain, but not later than 1 year after the date of approval of the plan revision. If the State does not adopt specific enforceable measures within a year, the conditional approval automatically converts to a disapproval. The forthcoming Transport Rule is an action that is being promulgated from EPA and not the State, so it is unclear what ''condition'' the State would be responsible for satisfying by relying on the final promulgation of the Transport Rule. Further, as the Commenter implies, use of 110(k)(4) is optional. See Response to Comment 6 for additional information.

Acknowledgement of States' Efforts and Air Quality Conditions

Comment 10: Both Commenters mention innovative air pollution control strategies that states have implemented to reduce emissions, and seem to indicate that the adoption of those strategies, in-and-of itself, complies with the interstate transport provisions of section 110(a)(2)(D)(i)(I) for the 2006 24-hour $PM_{2.5}$ NAAQS. The Commenters opine that state laws and rules have resulted in enormous reductions of pollutants that are key pollutants to interstate transport.

Response 10: EPA agrees that states have implemented innovative air pollution control strategies that have provided significant reductions in emissions, and the Agency commends states for their efforts. However, today's action relates to whether North Carolina has provided an adequate technical analysis and emissions reductions to show compliance with the 110(a)(2)(D)(i)(I) requirements for the 2006 24-hour $PM_{2.5}$ NAAQS for North Carolina. It is EPA's final determination that North Carolina's September 21, 2009, submission does not provide an adequate technical analysis and emissions reductions for this determination and thus EPA is disapproving the portion of North Carolina's September 21, 2009, submission as it relates to the 110(a)(2)(D)(i)(I) requirements for the 2006 24-hour $PM_{2.5}$ NAAQS for North Carolina.

Concerns Related to the Transport Rule

Comment 11: One Commenter expresses concern regarding EPA's statement in the January 26, 2011, proposed disapproval regarding the modeling used to support the proposed Transport Rule, and the findings in relation to whether states significantly contribute to nonattainment or interfere with maintenance of the 2006 24-hour $PM_{2.5}$ NAAQS in downwind areas. The Commenter states that ''based on 2007–2009 monitoring data, all of these areas are currently meeting the 2006 24-hour $PM_{2.5}$ NAAQS'' and expresses concern that EPA did not note the area's status with regard to the 2006 24-hour $PM_{2.5}$ NAAQS in the proposal. The Commenter goes on to say ''we noted in our official comments on the proposed Transport Rule, EPA had numerous errors in the modeling inputs and failed to ensure that the model performance was acceptable. This may explain the disparity between EPA's modeling results and the real world monitors.''

Response 11: Today's action relates to whether the State provided an adequate technical analysis and emissions reductions to show compliance with the 110(a)(2)(D)(i)(I) requirements for the 2006 24-hour $PM_{2.5}$ NAAQS for North Carolina, and is not based on the attainment status of North Carolina areas. North Carolina did not provide an adequate technical analysis to EPA to demonstrate compliance with the 110(a)(2)(D)(i)(I) requirements for the 2006 24-hour $PM_{2.5}$ NAAQS. With regard to the Commenter's concern about the forthcoming Transport Rule, EPA notes that the Agency received numerous comments on the proposed Transport Rule and is considering those comments as it works toward promulgation of a final Transport Rule. All comments on the Transport Rule will be addressed in that context.

Comment 12: Both Commenters assert that EPA's proposed finding of significant contribution for the proposed Transport Rule is based on an inaccurate emissions inventory, fails to take into account all of the reductions required by the state rules already in effect, and contains numerous other errors that only compound these problems.

Response 12: EPA received numerous comments on the proposed Transport Rule and is considering those comments as it works toward promulgation of a final Transport Rule. All comments on the Transport Rule will be addressed in that context.

III. Final Action

EPA is taking final action to disapprove the portion of North Carolina's September 21, 2009, submission, relating to section 110(a)(2)(D)(i)(I), because EPA has made the determination that North Carolina SIP does not satisfy the requirements for the 2006 24-hour $PM_{2.5}$ NAAQS. Although EPA is taking final action to disapprove the portion of North Carolina's September 21, 2009, submission relating to section 110(a)(2)(D)(i)(I), EPA acknowledges the State's efforts to address this requirement in its September 21, 2009, submission. Unfortunately, the submittal relies on CAIR and without an adequate technical analysis EPA does not believe that states can adequately address the section 110(a)(2)(D)(i)(I) requirement for the 2006 $PM_{2.5}$ NAAQS. The purpose of the Transport Rule that EPA is developing and has proposed is to respond to the remand of CAIR by the Court and address the section 110(a)(2)(D)(i)(I) requirements for the 2006 24-hour $PM_{2.5}$ NAAQS for the affected states. In today's action, EPA is not taking any disapproval action on the remaining elements of the submission, including other section 110(a)(2) infrastructure elements, and specifically the section 110(a)(2)(D)(i)(II) portion regarding interference with measures required in the applicable SIP for another state designed to prevent significant deterioration of air quality and protect visibility but instead will act on those provisions in a separate rulemaking.

Under section 179(a) of the CAA, final disapproval of a submittal that addresses a requirement of a Part D Plan (42 U.S.C. sections 7501–7515) or is required in response to a finding of substantial inadequacy as described in section 7410(k)(5) (SIP call) starts a sanctions clock. Section 110(a)(2)(D)(i)(I) provisions (the provisions being disapproved in today's notice) were not submitted to meet requirements for Part D, and therefore, no sanctions will be triggered. This final action triggers the requirement under section 110(c) that EPA promulgate a FIP no later than 2 years from the date of the disapproval unless the State corrects the deficiency, and the Administrator approves the plan or plan revision before the Administrator promulgates such FIP. The proposed Transport Rule, when final, is the FIP that EPA intends to implement to satisfy the 110(a)(2)(D)(i)(I) requirement for North Carolina for the 2006 24-hr $PM_{2.5}$ NAAQS.

IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to act on state law as meeting federal requirements and does not impose additional requirements beyond those imposed by state law.

A. Executive Order 12866, Regulatory Planning and Review

This action is not a ''significant regulatory action'' under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under the Executive Order.

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq,* because this SIP disapproval under section 110 and subchapter I, part D of the CAA will not in-and-of itself create any new information collection burdens but simply disapproves certain state requirements for inclusion into the SIP. Burden is defined at 5 CFR 1320.3(b).

C. Regulatory Flexibility Act (RFA)

The RFA generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions. For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's final rule on small entities, I certify that this action will not have a significant impact on a substantial number of small entities. This rule does not impose any requirements or create impacts on small entities. This SIP disapproval under section 110 and subchapter I, part D of the CAA will not in-and-of itself create any new requirements but simply disapproves certain state requirements for inclusion into the SIP. Accordingly, it affords no opportunity for EPA to fashion for small entities less burdensome compliance or reporting requirements or timetables or exemptions from all or part of the rule.

The fact that the CAA prescribes that various consequences (e.g., higher offset requirements) may or will flow from this disapproval does not mean that EPA either can or must conduct a regulatory flexibility analysis for this action. Therefore, this action will not have a significant economic impact on a substantial number of small entities. EPA continues to be interested in the potential impacts of this proposed rule on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

This action contains no Federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 for state, local, or tribal governments or the private sector. EPA has determined that the disapproval action does not include a federal mandate that may result in estimated costs of $100 million or more to either state, local, or tribal governments in the aggregate, or to the private sector. This action disapproves pre-existing requirements under state or local law, and imposes no new requirements. Accordingly, no additional costs to state, local, or tribal governments, or to the private sector, result from this action.

E. Executive Order 13132, Federalism

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.''

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, because it merely disapproves certain state requirements for inclusion into the SIP and does not alter the relationship or the distribution of power and responsibilities established in the CAA. Thus, Executive Order 13132 does not apply to this action.

F. Executive Order 13175, Coordination with Indian Tribal Governments

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

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

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it because it is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997). This SIP disapproval under section 110 and subchapter I, part D of the CAA will not in-and-of itself create any new regulations but simply disapproves certain state requirements for inclusion into the SIP.

H. Executive Order 13211, Actions that Significantly Affect Energy Supply, Distribution or Use

This action is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act (NTTAA)

Section 12(d) of the NTTAA, Public Law 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through the Office of Management and Budget, explanations when the Agency decides not to use available and applicable voluntary consensus standards. EPA believes that this action is not subject to requirements of Section 12(d) of NTTAA because application of those requirements would be inconsistent with the CAA.

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

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

EPA lacks the discretionary authority to address environmental justice in this proposed action. In reviewing SIP submissions, EPA's role is to approve or disapprove state choices, based on the criteria of the CAA. Accordingly, this action merely proposes to disapprove certain state requirements for inclusion into the SIP under section 110 and subchapter I, part D of the CAA and will not in-and-of itself create any new requirements. Accordingly, it does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898.

K. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by September 19, 2011. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Particulate matter, Reporting and recordkeeping requirements.

Dated: June 28, 2011.

A. Stanley Meiburg,

Acting Regional Administrator, Region 4.

40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

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

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

Subpart II—North Carolina

■ 2. Section 52.1781 is amended by adding paragraph (g), to read as follows:

§ 52.1781 Control strategy: Sulfur oxides and particulate matter.

* * * * *

(g) *Disapproval.* EPA is disapproving portions of North Carolina's Infrastructure SIP for the 2006 24-hour $PM_{2.5}$ NAAQS addressing interstate transport, specifically with respect to section 110(a)(2)(D)(i)(I).

[FR Doc. 2011–18000 Filed 7–19–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2011–0046; FRL–9318–1]

Approval and Promulgation of Implementation Plans; State of California; Interstate Transport of Pollution; Significant Contribution to Nonattainment and Interference With Maintenance Requirements

Correction

In rule document 2011–14480 appearing on pages 34872–34876, in the issue of Wednesday, June 15, 2011, make the following correction:

On page number 34872, in the second column, in the Environmental Protection Agency document, the subject is corrected to appear as above.

[FR Doc. C1–2011–14480 Filed 7–19–11; 8:45 am]

BILLING CODE 1505–01–D

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2009–0805; FRL–9435–8]

Approval of Air Quality Implementation Plans; Indiana and Ohio; Disapproval of Interstate Transport State Implementation Plan Revision for the 2006 24-hour $PM_{2.5}$ NAAQS

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: Pursuant to its authority under the Clean Air Act (CAA), EPA is taking final action to disapprove the portions of submittals by the Indiana Department of Environmental Management (IDEM) and the Ohio Environmental Protection Agency (Ohio EPA) that pertain to requirements in the CAA to address interstate transport for the 2006 24-hour fine particle ($PM_{2.5}$) National Ambient Air Quality Standards (NAAQS). EPA is not, however, currently taking action on the remainder of the State Implementation Plan (SIP) submittals from IDEM and Ohio EPA concerning other basic or ''Infrastructure'' elements required under the CAA. The proposed rule associated with this final action was published on February 4, 2011. The effect of this action will be an obligation for EPA to promulgate a Federal Implementation Plan (FIP) for Indiana and Ohio no later than two years from the date of disapproval. The Transport Rule, when final, is the FIP that EPA intends to implement for Indiana and Ohio.

DATES: This final rule is effective on August 19, 2011.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R05–OAR–2009–0805. All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information 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 U.S. Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. We recommend that you telephone Andy Chang at (312) 886–0258 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Andy Chang, Environmental Engineer, Attainment Planning and Maintenance Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–0258, *chang.andy@epa.gov*.

SUPPLEMENTARY INFORMATION: Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA. This supplementary information section is arranged as follows:

I. What is the background for this action?

Section 110(a)(1) of the CAA requires states to submit basic or ''Infrastructure'' SIPs to address a new or revised NAAQS within three years after promulgation of such standards, or within such shorter period as EPA may prescribe. As provided by section 110(k)(2) of the CAA, within twelve months of a determination that a submitted SIP is complete under 110(k)(1) of the CAA, the Administrator shall act on the plan. As authorized in section 110(k)(3) of the CAA, where portions of the state submittals are severable, within that twelve-month period EPA may approve the portions of the submittals that meet the requirements of the CAA, take no action on certain portions of the submittals, and disapprove the portions of the submittals that do not meet the requirements of the CAA. When the deficient provisions are not severable from all of the submitted provisions, EPA must propose disapproval of the submittals, consistent with section 110(k)(3) of the CAA.

Section 110(a)(2) of the CAA lists the elements that such new Infrastructure SIPs must address, as applicable, including section 110(a)(2)(D)(i), which pertains to interstate transport of certain emissions, also known as the CAA ''good neighbor'' provisions.

On December 18, 2006, EPA revised the 24-hour average $PM_{2.5}$ primary and secondary NAAQS from 65 micrograms per cubic meter (μg/m^3) to 35 μg/m^3 (see, 71 FR 61144).[1] On September 25, 2009, EPA issued its ''Guidance on SIP Elements Required Under Sections 110(a)(1) and (2) for the 2006 24-Hour Fine Particle ($PM_{2.5}$) National Ambient Air Quality Standards (NAAQS)'' (2009 Guidance). EPA developed the 2009 Guidance for States making submissions to meet the requirements of section 110, including 110(a)(2)(D)(i) for the revised 2006 24-hour $PM_{2.5}$ NAAQS.

As identified in the 2009 Guidance, the ''good neighbor'' provisions in section 110(a)(2)(D)(i) require each state to submit a SIP that prohibits emissions that adversely affect another state in the

[1] The rule for the revised $PM_{2.5}$ NAAQS was signed by the Administrator and publically disseminated on September 21, 2006. Because EPA did not prescribe a shorter period for 110(a) SIP submittals, these submittals for the 2006 24-hour $PM_{2.5}$ NAAQS were due on September 21, 2009, three years from the September 21, 2006 signature date.

ways contemplated in the statute. Section 110(a)(2)(D)(i) contains four distinct requirements related to the impacts of interstate transport. The SIP must prevent sources in the state from emitting pollutants in amounts which will: (1) Contribute significantly to nonattainment of the NAAQS in other states; (2) interfere with maintenance of the NAAQS in other states; (3) interfere with provisions to prevent significant deterioration of air quality in other states; or (4) interfere with efforts to protect visibility in other states.

In the 2009 Guidance, EPA indicated that SIP submissions from states pertaining to the ''significant contribution'' and ''interfere with maintenance'' requirements of section 110(a)(2)(D)(i) should contain adequate provisions to prohibit air pollutant emissions from within the state that contribute significantly to nonattainment or interfere with maintenance of the NAAQS in any other state. EPA further indicated that the state's submission should explain whether or not emissions from the state have this impact and, if so, address the impact. EPA stated that the state's conclusion should be supported by an adequate technical analysis. EPA recommended the various types of information that could be relevant to support the state SIP submission, such as information concerning emissions in the state, meteorological conditions in the state and the potentially impacted states, monitored ambient concentrations in the state, and air quality modeling. Furthermore, EPA indicated that states should address the ''interfere with maintenance'' requirement independently, which requires an evaluation of impacts on areas of other states that are meeting the 2006 24-hour $PM_{2.5}$ NAAQS, not merely areas designated nonattainment. Lastly, in the 2009 Guidance, EPA stated that states could not rely on the Clean Air Interstate Rule (CAIR) to comply with the section 110(a)(2)(D)(i) requirements for the 2006 24-hour $PM_{2.5}$ NAAQS because CAIR does not address this NAAQS.

EPA promulgated CAIR on May 12, 2005 (see, 70 FR 25162). CAIR required states to reduce emissions of sulfur dioxide and nitrogen oxides that significantly contribute to, and interfere with maintenance of the 1997 NAAQS for $PM_{2.5}$ and/or ozone in any downwind state. CAIR was intended to provide states covered by the rule with a mechanism to satisfy their section 110(a)(2)(D)(i)(I) obligations to address significant contribution to downwind nonattainment and interference with maintenance in another state with respect to the 1997 ozone and $PM_{2.5}$ NAAQS. Many states adopted the CAIR provisions and submitted SIPs to EPA to demonstrate compliance with the CAIR requirements in satisfaction of their 110(a)(2)(D)(i)(I) obligations for those two pollutants.

EPA was sued by a number of parties on various aspects of CAIR, and on July 11, 2008, the U.S. Court of Appeals for the District of Columbia Circuit issued its decision to vacate and remand both CAIR and the associated CAIR FIPs in their entirety. *North Carolina* v. *EPA,* 531 F.3d 836 (DC Cir. 2008). However, in response to EPA's petition for rehearing, the Court issued an order remanding CAIR to EPA without vacating either CAIR or the CAIR FIPs. *North Carolina* v. *EPA,* 550 F.3d 1176 (DC Cir. 2008). The Court thereby left CAIR in place in order to ''temporarily preserve the environmental values covered by CAIR'' until EPA replaces it with a rule consistent with the Court's opinion. *Id.* at 1178. The Court directed EPA to ''remedy CAIR's flaws'' consistent with its July 11, 2008 opinion, but declined to impose a schedule on EPA for completing that action. *Id.*

In order to address the judicial remand of CAIR, EPA has proposed a new rule to address interstate transport pursuant to section 110(a)(2)(D)(i)(I), the ''Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone'' (Transport Rule).[2] As part of the proposed Transport Rule, EPA specifically examined the section 110(a)(2)(D)(i)(I) requirement that emissions from sources in a state must not ''significantly contribute to nonattainment'' and ''interfere with maintenance'' of the 2006 24-hour $PM_{2.5}$ NAAQS by other states. The modeling performed for the final Transport Rule shows that both Indiana and Ohio significantly contribute to nonattainment or interfere with maintenance of the 2006 24-hour $PM_{2.5}$ NAAQS in downwind areas.[3]

IDEM and Ohio EPA made submittals on October 20, 2009, and September 4, 2009, respectively, that were intended to demonstrate satisfaction of all Infrastructure SIP elements for the 2006 24-hour $PM_{2.5}$ NAAQS. Both States relied predominantly on their respective EPA-approved CAIR regulations to meet the interstate transport requirements of section 110(a)(2)(D)(i)(I). Indiana further committed to amend its rule once the Federal CAIR is amended or replaced.

[2] See ''Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone; Proposed Rule,'' 75 FR 45210 (August 2, 2010).

[3] The modeling for the final Transport Rule can be found as technical support documents in the docket folder for this action.

II. What is our response to comments received on the notice of proposed rulemaking?

The public comment period for EPA's proposal to disapprove the portions of the submittals from Indiana and Ohio addressing the requirements of section 110(a)(2)(D)(i)(I) closed on March 7, 2011. Indiana and Ohio each submitted a comment letter to EPA, and a synopsis of their comments, as well as EPA's response to each comment, is discussed below.

Comment 1: EPA fails to recognize that Indiana was one of a few states that submitted its Infrastructure SIP, and wrongly implies the State was negligent in addressing its CAA requirements. EPA cannot disapprove Indiana's SIP primarily for its reliance on CAIR. There is no way for Indiana or Ohio to cure EPA's failure to have all of the underlying Federal requirements in place for the states to meet the transport provision requirements for section 110(a)(2)(D). Although Indiana understands that the CAIR program cannot be defined as permanent and enforceable for SIP purposes, the Transport Rule is not yet final, and was not proposed until after the Infrastructure SIP deadline. Therefore, Indiana believes its Infrastructure SIP is adequate and contains provisions to address all requirements of Section 110(a)(2)(D). CAIR was the only option states could rely upon at the time the SIPs were due, and Indiana made it clear within its submittal that it would adopt the requirements of the replacement rule for CAIR in a timely manner.

Response 1: EPA recognizes the State's timely efforts in submitting its Infrastructure SIP for the 2006 24-hour $PM_{2.5}$ NAAQS. However, as outlined in EPA's proposed action, Indiana's portion of the Infrastructure SIP in addressing section 110(a)(2)(D)(i)(I) is inadequate and must therefore be disapproved.

States were provided with the 2009 Guidance detailing the required elements of an approvable Infrastructure SIP. Specific to the requirements of section 110(a)(2)(D)(i)(I), EPA indicated in the 2009 Guidance that a state's submittal should contain adequate provisions to prohibit air pollutant emissions from within the state that contribute significantly to nonattainment or interfere with maintenance of the NAAQS in any other state. EPA further indicated that the state's submission should explain whether or not emissions from the state have this impact and, if so, address the impact. EPA stated that the state's conclusion should be supported by an adequate technical analysis. IDEM did not provide a technical analysis in its submittal, but instead relied primarily on its approved CAIR regulations to address the requirements of section 110(a)(2)(D)(i)(I) with respect to the 2006 24-hour $PM_{2.5}$ NAAQS. In the proposed rulemaking, EPA provided rationale for why other programs already implemented, and cited by Indiana in its October 20, 2009 submittal, *e.g.,* the NO_x SIP Call, stack height requirements, and acid deposition control regulations, are not sufficient to meet the requirements of section 110(a)(2)(D)(i)(I).

CAIR was promulgated before the 24-hour $PM_{2.5}$ NAAQS were revised in 2006 and does not address interstate transport with respect to the 2006 24-hour $PM_{2.5}$ NAAQS.[4] Thus, as EPA's 2009 Guidance explicitly notes, states cannot rely on CAIR to comply with section 110(a)(2)(D)(i)(I) for the 2006 24-hour $PM_{2.5}$ NAAQS. Furthermore, SIPs can only rely on permanent emissions reductions, and because the Transport Rule in its final form will simultaneously replace and ''remedy CAIR's flaws,'' CAIR will not provide permanent emissions reductions. In conclusion, the portions of Indiana's submittal addressing the requirements of section 110(a)(2)(D)(i)(I) are inadequate, and cannot be approved.

Contrary to Indiana's assertion, CAIR was not the only option states could rely upon at the time Infrastructure SIPs were due. As reflected in the 2009 Guidance, CAIR did not address the 2006 24-hour $PM_{2.5}$ NAAQS obligating states under CAA section 110(a)(2)(D)(i)(I) to make the appropriate demonstration. However, the 2009 Guidance did explain the type of technical analysis and justification necessary to make that demonstration. Indiana did not provide any technical analysis or justification in its October 20, 2009 submittal to support any such demonstration.

Comment 2: EPA should provide Indiana the opportunity to revise its Infrastructure SIP once the Transport Rule is completed, especially since there is no court-ordered deadline for EPA to act on this particular SIP submittal.

Response 2: EPA is taking action to disapprove the portions of Indiana's Infrastructure SIP submittal addressing the requirements of section 110(a)(2)(D)(i)(I) under section 110(k)(2) and (3) of the CAA. This section of the CAA requires EPA to approve or disapprove a SIP within 12 months of its completeness determination. Under section 110(k), EPA was required to disapprove or approve Indiana's Infrastructure SIP by April 20, 2011. Indiana has an opportunity to revise and submit a SIP at any time and is invited to do so following final promulgation of the Transport Rule and within the time provided by the CAA.

Comment 3: EPA was not timely in developing the Transport Rule, which states expected to use when addressing the interstate transport requirements of the 2006 24-hour $PM_{2.5}$ NAAQS. Therefore, states' Infrastructure SIPs should not be disapproved at this time. Instead, EPA should delay action on the Infrastructure SIPs until states can revise them once the Transport Rule is finalized. EPA also stated that Indiana had failed to provide a modeling analysis. Did EPA expect an analysis from States when States knew that the proposed Transport Rule would adequately address the 2006 24-hour $PM_{2.5}$ NAAQS? Why would Indiana, or any other State, do modeling or rulemaking in advance of the Transport Rule being proposed?

Response 3: States must meet their statutory requirements by submitting SIPs with permanent and enforceable measures in a timely manner. Furthermore, all required documents and technical analyses should accompany the submittals. Lastly, as discussed in Response 2, above, section 110(k)(2) and (3) required EPA to disapprove or approve Indiana's Infrastructure SIP by April 2011.

Comment 4: Indiana disagrees with EPA's approach to address Section 110(a)(2)(D) requirements by way of a FIP. A FIP will allow expedient implementation of emission reductions; however, many states prefer to develop SIPs to better fit their needs. A FIP is also contrary to the spirit of the CAA by unnecessarily limiting state authority. When the Transport Rule is finalized, Indiana will be issued a FIP by EPA for failing to develop an adequate Infrastructure SIP—a requirement that Indiana has already fulfilled. Indiana plans to incorporate the Transport Rule into a state rule and replace the transport component of section 110(a)(2)(D) as expeditiously as possible, and does not believe that EPA needs to FIP Indiana in order for this action to occur in a timely manner.

Response 4: In this action, EPA is disapproving only the portions of Indiana's Infrastructure SIP for the 2006 24-hour $PM_{2.5}$ NAAQS that address the requirements of section 110(a)(2)(D)(i)(I). Upon disapproval of Indiana's submittal, EPA has a legal obligation, pursuant to the CAA, to promulgate a FIP. See Section 110(c)(1)(B) of the CAA. Section 110(a)(1) of the CAA requires states to submit SIPs that meet certain requirements within three years of promulgation of a NAAQS. These SIPs are required to contain, among other things, adequate provisions ''prohibiting, consistent with the provisions of this subchapter, any source or other type of emissions activity within the state from emitting any air pollutant in amounts which will—(I) contribute significantly to nonattainment in, or interfere with maintenance by, any other state with respect to any such national primary or secondary ambient air quality standard.'' Section 110(a)(1) gives the Administrator authority to prescribe a period shorter than three years for the states to adopt and submit such SIPs, but does not give the Administrator authority to lengthen the time allowed for submission.

Section 110(c)(1) of the Act, in turn, requires EPA to promulgate FIPs if EPA has found that the state has failed to make a required submission or if EPA has disapproved a state submission or found it to be incomplete. Specifically, section 110(c)(1) requires EPA to promulgate a FIP within two years after the Administrator ''(A) finds that a state has failed to make a required submission or finds that the plan or plan revision submitted by the state does not satisfy the minimum criteria established under subsection (k)(1)(A) of this section or (B) disapproves a state implementation plan submission in whole or in part.'' The CAA uses mandatory language, finding that EPA *shall* promulgate a FIP at any time within 2 years after the actions identified 110(c)(1)(A) or 110(c)(1)(B) have occurred. EPA's legal obligation to promulgate FIPs arises when those actions occur without regard to the underlying reason for the underlying SIP deficiency. The obligation to promulgate a FIP must be discharged by EPA unless two conditions are met: (1) The state corrects the deficiency; and (2) the Administrator approves the plan or plan revision, before the Administrator promulgates the FIP.

Under this statutory scheme, EPA has authority and an obligation to

[4] Further, as explained above and in the Transport Rule proposal, 75 FR 45210 (August 2, 2010), the DC Circuit in *North Carolina* v. *EPA* found that EPA's quantification of States' significant contribution and interference with maintenance in CAIR was improper, and remanded the rule to EPA. CAIR remains in effect only temporarily.

promulgate a FIP to correct a SIP deficiency if the actions identified in section 110(c)(1)(A) or (B) have been taken, and the two conditions identified in 110(c)(1) have not been met. The question of whether EPA has authority to promulgate any particular FIP, therefore, must be considered on a state specific basis.

EPA disagrees with Indiana's suggestion that the rule is inconsistent with the CAA because it does not give states time to develop, submit and receive EPA approval of SIPs before the FIP goes into effect. Section 110(a)(2) calls on states to submit SIPs that contain adequate provisions prohibiting the emissions proscribed by section 110(a)(2)(D)(i)(I). However, when EPA has not received such SIP submission or has disapproved a SIP submission, it has an obligation created by section 110(c)(1) to promulgate a FIP that meets the requirements of section 110(a)(2)(D)(i)(I). EPA does not believe it has authority to adjust the deadlines established in the Act in order to give states additional time, after promulgation of the Transport Rule, to submit SIPs that comply with section 110(a)(2)(D)(i)(I). Furthermore, EPA does not believe it has authority to alter the statutory requirement that it promulgate FIPs within two years of making a finding of failure to submit. EPA sought to discharge this duty with respect to the states covered by CAIR for the $PM_{2.5}$ NAAQS by promulgating the CAIR; however, the Court found that rule unlawful and not sufficiently related to the statutory mandate of section 110(a)(2)(D)(i)(I). For this reason, EPA does not believe it could argue that the CAIR FIPs completely discharged its duty to promulgate FIPs with respect to the states whose section 110(a)(2)(D)(i)(I) SIPs are disapproved.

EPA is following the SIP process established in the statute. The 110(a) SIPs for the 2006 24-hour $PM_{2.5}$ NAAQS were due in 2009. In each case, states were given the full 3 years to meet the requirement. The Transport Rule, when final, will provide the FIP to fulfill the requirement that was unmet by the states through SIPs. EPA is required to promulgate a FIP within two years of a state's failure to have an approved SIP. States were in fact given the first chance to fulfill the requirement of Section 100(a)(2)(D)(i)(I). EPA's action is subsequent to the State's opportunity to first fulfill the requirement.

EPA has made every attempt to facilitate the transition between the requirements of CAIR and those of the Transport Rule. For future requirements, EPA will also make every effort to address transition issues. However, EPA cannot ignore its statutory obligations and therefore cannot ensure that no new requirements will be placed on the sources being regulated by this action. Every time a NAAQS is revised, there is a statutory obligation for states to submit SIPs to address certain CAA requirements. If states fail to meet the deadlines or submit incomplete or inadequate SIPs, EPA must act to ensure that the requirements are put into place.

Even though EPA is planning to promulgate a FIP, the State still has the opportunity to submit a SIP that can tailor requirements to the specific needs and concerns of the State in order to meet the applicable state budgets. Prior to this action, states had ample time under the provisions of the CAA to develop and submit approvable SIPs and did not. No state affected by the Transport Rule has submitted a SIP to replace the emission reductions that were required by CAIR, despite the *North Carolina* opinion issued in December 2008 that clearly stated that CAIR did not adequately address 110(a)(2)(D)(i)(I). While the remand left CAIR in place, resulting in the continued requirement that states and sources comply with it, states had the opportunity to develop replacement measures to ensure that 110(a)(2)(D)(i)(I) components of their SIPs would continue to be fulfilled in the future.

Comment 5: Indiana has met the 2006 24-hour $PM_{2.5}$ NAAQS since the end of 2007 and monitoring values continue to trend downward. Indiana does not significantly contribute to violations of the annual standard in downwind areas. Therefore, Indiana does not contribute to any violations of the 2006 24-hour $PM_{2.5}$ NAAQS. EPA had not conducted a complete analysis on the contributions at the time the Infrastructure SIPs were due, nor did EPA give states a chance to provide comments on the analysis.

Response 5: As discussed in the proposed disapproval, the modeling performed for the proposed Transport Rule shows that Indiana significantly contributes to nonattainment or interferes with maintenance of the 2006 24-hour $PM_{2.5}$ NAAQS in downwind areas. EPA has now completed the modeling for the final Transport Rule and, as indicated by the technical support documents for this action, Indiana in fact contributes to downwind nonattainment in another state or interferes with maintenance of the 2006 24-hour $PM_{2.5}$ NAAQS in another state.

Comment 6: Modeling for the Transport Rule was based on the 1997 annual $PM_{2.5}$ NAAQS, not the 2006 24-hour $PM_{2.5}$ NAAQS. Also, the base years used in the modeling are not reflective of emissions or monitoring data which show downward trends in more recent years that include benefits from CAIR.

Response 6: The modeling performed by EPA for the final Transport Rule addresses both the 1997 annual $PM_{2.5}$ NAAQS and the 2006 24-hour $PM_{2.5}$ NAAQS. CAIR cannot be included in the analysis since it does not provide permanent emission reductions nor address the 2006 24-hour $PM_{2.5}$ NAAQS.

Comment 7: If EPA proceeds with its disapproval, and Indiana is not permitted to revise its Infrastructure SIP once the Transport Rule is finalized, EPA should properly characterize the circumstances surrounding its need to disapprove the submittal.

Response 7: The circumstances surrounding EPA's need to disapprove the portions of Indiana's Infrastructure SIP submittal for the 2006 24-hour $PM_{2.5}$ NAAQS that address the requirements of section 110(a)(2)(D)(i)(I) were discussed in the proposed disapproval. Additionally, Response 1, Response 3, and Response 4, above, reiterate the circumstances surrounding EPA's need to disapprove the portion of Indiana's Infrastructure SIP submittal for the 2006 24-hour $PM_{2.5}$ NAAQS that address the requirements of section 110(a)(2)(D)(i)(I). Indiana has an opportunity to revise and submit a SIP at any time, and is invited to do so following final promulgation of the Transport Rule and within the time provided by the CAA.

Response 8: EPA fails to acknowledge states' efforts to meet their requirements on a timely basis. EPA should approve Ohio's transport component of the Infrastructure SIP since the State submitted its SIP on time and in accordance with available guidance.

Response 9: EPA recognizes Ohio's timely efforts in submitting its Infrastructure SIP for the 2006 24-hour $PM_{2.5}$ NAAQS. However, in a similar manner as described above in the response to Comment 1, above, the portions of Ohio's submittal addressing the requirements of section 110(a)(2)(D)(i)(I) with respect to the 2006 24-hour $PM_{2.5}$ NAAQS are inadequate, and must be disapproved.

Comment 10: Instead of disapproving the portion of the SIP submittal at this time, EPA can issue a SIP deficiency notice and require a new SIP after the Transport Rule is finalized.

Response 10: EPA disagrees with Ohio's statement. EPA is taking action to disapprove the portions of Ohio's submittal under section 110(k)(2) and (3) of the CAA. Under section 110(k) of the CAA, EPA had an obligation to approve or disapprove Ohio's submittal by March 4, 2011.

Comment 11: EPA believes that it must issue this disapproval to address the transport of emissions and pollution for the 2006 $PM_{2.5}$ NAAQS through a FIP. The better course is to allow the states to develop their own SIP when adopting the Transport Rule.

Response 11: In this action, EPA is disapproving only the portions of Ohio's Infrastructure SIP for the 2006 24-hour $PM_{2.5}$ NAAQS that address the requirements of section 110(a)(2)(D)(i)(I). The full or partial disapproval of a SIP revision triggers the requirement under section 110(c) that EPA promulgate a FIP no later than two years from the date of the disapproval unless the state corrects the deficiency, and the Administrator approves the plan or plan revision before the Administrator promulgates such FIP. Ohio is welcome to submit a revised SIP for EPA approval that addresses the requirements of section 110(a)(2)(D)(i)(I) with respect to the 2006 24-hour $PM_{2.5}$ NAAQS after the Transport Rule is finalized, and within the time provided by the CAA.

III. What action is EPA taking?

For the reasons discussed in the proposed rulemaking, EPA is taking final action to disapprove submittals from Indiana and Ohio intended to demonstrate that each respective State has adequately addressed the elements of section 110(a)(2)(D)(i)(I) of the CAA with regard to the 2006 24-hour $PM_{2.5}$ NAAQS. This action pertains only to section 110(a)(2)(D)(i)(I); the States' submittals for the remainder of the 2006 24-hour $PM_{2.5}$ NAAQS Infrastructure SIPs will be addressed in separate rulemakings. The effect of this action will be an obligation for EPA to promulgate a FIP for Indiana and Ohio no later than two years from the date of disapproval. The final Transport Rule is the FIP that EPA currently intends to promulgate for Indiana and Ohio.

IV. Statutory and Executive Order Reviews

Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and, therefore, is not subject to review by the Office of Management and Budget.

Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

Because it is not a ''significant regulatory action'' under Executive Order 12866 or a ''significant energy action,'' this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001).

Regulatory Flexibility Act

This action merely disapproves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

Unfunded Mandates Reform Act

Because this rule disapproves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4).

Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This rule also does not have tribal implications because it will 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, as specified by Executive Order 13175 (59 FR 22951, November 9, 2000).

Executive Order 13132: Federalism

This action also does not have Federalism implications because it does not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely disapproves a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the CAA.

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

This rule also is not subject to Executive Order 13045 ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it approves a state rule implementing a Federal Standard.

National Technology Transfer Advancement Act

In reviewing state submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. In this context, in the absence of a prior existing requirement for the state to use voluntary consensus standards (VCS), EPA has no authority to disapprove a state submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a state submission, to use VCS in place of a state submission that otherwise satisfies the provisions of the CAA. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply.

Paperwork Reduction Act

This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Congressional Review Act

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

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by September 19, 2011. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Particulate matter.

Dated: June 28, 2011.

Susan Hedman,

Regional Administrator, Region 5.

40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

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

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

Subpart P—Indiana

■ 2. Section 52.776 is amended by adding paragraph (u), to read as follows:

§ 52.776 Control strategy: Particulate matter.

* * * * *

(u) *Disapproval.* EPA is disapproving the portions of Indiana's Infrastructure SIP for the 2006 24-hour $PM_{2.5}$ NAAQS addressing interstate transport, specifically with respect to section 110(a)(2)(D)(i)(I).

Subpart KK—Ohio

■ 3. Section 52.1880 is amended by adding paragraph (l), to read as follows:

§ 52.1880 Control strategy: Particulate matter.

* * * * *

(l) *Disapproval.* EPA is disapproving the portions of Ohio's Infrastructure SIP for the 2006 24-hour $PM_{2.5}$ NAAQS addressing interstate transport, specifically with respect to section 110(a)(2)(D)(i)(I).

[FR Doc. 2011–17739 Filed 7–19–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–HQ–OAR–2011–0338; FRL–9435–7]

Finding of Failure To Submit Section 110 State Implementation Plans for Interstate Transport for the 2006 National Ambient Air Quality Standards for Fine Particulate Matter

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: In this action, EPA is finding that Tennessee has failed to submit a State Implementation Plan (SIP) to satisfy the requirements of the Clean Air Act (CAA) with respect to the 2006 24-hour National Ambient Air Quality Standards (NAAQS) for fine particulate matter (24-hour $PM_{2.5}$). Although Tennessee has submitted a SIP to address the requirements, the state subsequently withdrew that portion of its SIP submittal because it relied on the Clean Air Interstate Rule to address transport. This finding creates a 2-year deadline for the promulgation of a Federal Implementation Plan (FIP) by EPA. In a separate action, commonly referred to as the Transport Rule, EPA is finalizing a FIP for Tennessee to address these requirements.

DATES: The effective date of this rule is August 19, 2011.

FOR FURTHER INFORMATION CONTACT: General questions concerning this final rule should be addressed to Edgar Mercado, Office of Atmospheric Programs, Clean Air Markets Division, 2400 Pennsylvania Avenue, Mail Code 6204J, Washington, DC 20460; telephone (202) 343–9440; *e-mail address: mercado.edgar@epa.gov.*

SUPPLEMENTARY INFORMATION: For questions related to Tennessee, please contact Richard A. Schutt, Chief, Regulatory Development Section, EPA Region IV, Sam Nun Atlanta Federal Center, 61 Forsyth Street, SW., 12th Floor, Atlanta, GA 30303.

Table of Contents

I. Background

On October 17, 2006, EPA published a final rule revising the 24-hour standard for fine particulate matter ($PM_{2.5}$) from 65 micrograms per cubic meter (μg/m3) to 35μg/m3. Section 110(a)(1) of the CAA requires states to submit revised SIPs that provide for the implementation, maintenance, and enforcement of a new or revised standard within 3 years after promulgation of such standard, or within such shorter period as EPA may prescribe. Section 110(a)(2)(D)(i) contains four elements that revised SIPs must address. This findings notice addresses the first two elements which require each state to submit SIPs which contain adequate provisions to prohibit air pollution within the state that (1) contributes significantly to another state's nonattainment of the NAAQS; or (2) interferes with another state's maintenance of the NAAQS. Section 110(a)(1) imposes the obligation upon states to make a SIP submission for a new or revised NAAQS, but the contents of that submission may vary depending upon the facts and circumstances. In particular, the data and analytical tools available at the time the state develops and submits the SIP for a new or revised NAAQS necessarily affects the content of the submission.

States were required to have submitted complete SIPs that addressed the section 110(a)(2)(D)(i)(I) requirement related to interstate transport for the 2006 24-hour $PM_{2.5}$ NAAQS by September 21, 2009. On June 9, 2010, in a separate final rulemaking (75 FR 32763), EPA found that 29 states and territories had not made a SIP submittal that addressed this requirement. Although Tennessee has submitted a SIP intended to address the Section 110(a)(2)(D)(i) requirements, the state subsequently withdrew the Section 110(a)(2)(D)(i) of its infrastructure SIP with respect to the 2006 24-hour $PM_{2.5}$ NAAQS on December 2, 2010, because it relied on the Clean Air Interstate Rule. Although deficient to address the transport of pollution as highlighted in recent EPA air quality modeling to support the final Transport Rule, EPA acknowledges the State's efforts in making this SIP submittal. In response to Tennessee's withdrawal of the 110(a)(2)(D)(i)(I) portions of its SIP because it relied on the Clean Air Interstate Rule, EPA is making a finding that Tennessee has failed to submit the required infrastructure SIP elements with respect to nonattainment or interference with maintenance of the 2006 24-hour $PM_{2.5}$ NAAQS. In accordance with Section 110(c)(1), this finding creates a 2-year deadline for the promulgation of a Federal Implementation Plan (FIP) by EPA unless, prior to promulgation of a FIP, the state makes a submission to meet and EPA approves such submission as meeting the attainment and maintenance requirements of section 110(a)(2)(D)(i)(I) for the 2006 24-hour $PM_{2.5}$ NAAQS. The State's SIP submittal to address other portions of Section 110(a)(2)(D)(i) will be addressed in a separate rulemaking.

This action does not result in sanctions pursuant to CAA section 179 because this finding of failure to submit does not pertain to a part D plan for nonattainment areas, or to a SIP Call pursuant to section 110(k)(5).

II. This Action

By this action, EPA is making the finding that Tennessee has failed to submit a SIP that addresses the requirements of section 110(a)(2)(D)(i)(I) of the CAA for the revised 2006 24-hour $PM_{2.5}$ NAAQS. This finding creates a 2-year deadline for the promulgation of a FIP by EPA for Tennessee unless the State submits a SIP to satisfy these section 110(a)(2)(D)(i)(I) requirements, and EPA approves such submission prior to promulgation of a FIP.

III. Statutory and Executive Order Reviews

A. Notice and Comment Under the Administrative Procedures Act (APA)

This is a final EPA action, which is subject to notice-and-comment requirements of the Administrative Procedures Act (APA), 5 U.S.C. 553(b). However, EPA invokes, consistent with past practice (for example, 61 FR 36294), the good cause exception pursuant to APA, 5 U.S.C. 553(b)(3)(B). Notice and comment are unnecessary because no significant EPA judgment is involved in making a finding of failure to submit SIPs or elements of SIPs required by the CAA, where states have made no submissions to meet the requirement by the statutory deadline.

B. Executive Order 12866: Regulatory Planning and Review

This action is not a ''significant regulatory action'' under the terms of Executive Order (EO) 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review by the Office of Management and Budget under the EO.

C. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* Burden is defined at 5 CFR 1320.3(b). This action relates to the requirement in the CAA for states to submit SIPs under section 110(a)(1) that implements the CAA requirements for the revised 24-hour $PM_{2.5}$ NAAQS. Section 110(a)(1) of the CAA requires that states submit SIPs that implement, maintain, and enforce a new or revised NAAQS which satisfies the requirements of section 110(a)(2) within 3 years of promulgation of such standard, or shorter period as EPA may provide. The present final action does not establish any new information collection requirement apart from that required by law.

D. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the APA or any other statute unless the EPA certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For the purpose of assessing the impacts of this final action on small entities, small entity is defined as: (1) A small business that is a small industry entity as defined in the U.S. Small Business Administration (SBA) size standards. (See 13 CFR, part 121); (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for profit enterprise which independently owned and operated is not dominate in its field.

Courts have interpreted the RFA to require a regulatory flexibility analysis only when small entities will be subject to the requirements of the rule. See, *Michigan* v. *EPA,* 213 F.3d 663, 668–69 (DC Cir., 2000), cert. den., 532 U.S. 903 (2001). This rule would not establish requirements applicable to small entities. Instead, it would require states to develop, adopt, and submit SIPs to meet the requirements of section 110(a)(2)(D)(i), and would leave to the states the task of determining how to meet those requirements, including which entities to regulate. Moreover, because affected states would have discretion to choose the sources to regulate and how much emissions reductions each selected source would have to achieve, EPA could not predict the effect of the rule on small entities. After considering the economic impacts of this final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. In addition, although the action is subject to the Administrative Procedures Act, the Agency has invoked the ''good cause'' exemption under 5 U.S.C. 553(b); therefore, it is not subject to the notice and comment requirement.

E. Unfunded Mandates Reform Act

This action contains no federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 for state, local, or tribal governments or the private sector. The action implements mandate(s) specifically and explicitly set forth by the Congress in CAA section 110(a)(2)(D)(i)(I) without the exercise of any policy discretion by EPA.

This action does not create any additional requirements beyond those of the 2006 24-hour $PM_{2.5}$ NAAQS (71 FR 61144, October 17, 2006). Therefore, no UMRA analysis is needed. This rule responds to the requirement in the CAA for states to submit SIPs to satisfy the requirements of section 110(a)(2) of the CAA for the 2006 24-hour $PM_{2.5}$ NAAQS. Section 110(a)(1) of the CAA requires that states submit SIPs that implement, maintain, and enforce a new or revised NAAQS within 3 years of promulgation of such standard, or shorter period as EPA may provide. This action does not impose any requirements beyond those specified in the Act.

Therefore, this action is not subject to the requirements of sections 202 or 205 of the UMRA. This action is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments.

F. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in EO 13132. The CAA establishes the scheme whereby states take the lead in developing plans to meet the NAAQS. This action will not modify the relationship of the states and EPA for purposes of developing programs to implement the NAAQS. Thus, Executive Order 13132 does not apply to this action.

G. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). This action responds to the requirement in the CAA for states to submit SIPs to satisfy the requirements of section 110(a)(2) of the CAA for the

2006 24-hour $PM_{2.5}$ NAAQS. Section 110(a)(1) of the CAA requires that states submit SIPs that implement, maintain, and enforce a new or revised NAAQS which satisfies the requirements of section 110(a)(2) within 3 years of promulgation of such standard, or shorter period as EPA may provide. The CAA provides for states and tribes to develop plans to regulate emissions of air pollutants within their jurisdictions. The regulations clarify the statutory obligations of states and tribes that develop plans to implement this rule. The Tribal Authority Rule (TAR) gives tribes the opportunity to develop and implement CAA programs, but it leaves to the discretion of the tribe whether to develop these programs and which programs, or appropriate elements of a program, the tribe will adopt.

This action does not have tribal implications as defined by Executive Order 13175. It does not have a substantial direct effect on one or more Indian tribes, because no tribe has implemented an air quality management program related to the 2006 24-hour $PM_{2.5}$ NAAQS at this time. Furthermore, this action does not affect the relationship or distribution of power and responsibilities between the federal government and Indian tribes. The CAA and the TAR establish the relationship of the federal government and Tribes in developing plans to attain the NAAQS, and this action does nothing to modify that relationship. Because this action does not have tribal implications, Executive Order 13175 does not apply.

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

This action is not subject to EO 13045 (62 FR 19885, April 23, 1997) because it is not economically significant as defined in EO 12866, and because the Agency does not believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. Nonetheless, we have evaluated the environmental health or safety effects of the 2006 24-hour $PM_{2.5}$ NAAQS on children. The results of this risk assessment are contained in the final rule for 24-hour $PM_{2.5}$ NAAQS (71 FR 61144, October 17, 2006).

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

This action is not subject to Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not a significant regulatory action under Executive Order 12866.

J. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law 104–113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

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

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

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

EPA lacks the discretionary authority to address environmental justice in this final action. This action responds to the requirement in the CAA for states to submit SIPs to satisfy the requirements of section 110(a)(2)(D)(i)(I) of the CAA for the 2006 24-hour $PM_{2.5}$ NAAQS. Section 110(a)(1) of the CAA requires that states submit SIPs that implement, maintain, and enforce a new or revised NAAQS which satisfies the requirements of section 110(a)(2) within 3 years of promulgation of such standard, or shorter period as EPA may provide. EPA is merely determining whether Tennessee has complied with this statutory requirement.

L. Congressional Review Act

The Congressional Review Act (CRA), 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. Section 808 allows the issuing agency to make a rule effective sooner than otherwise provided by the CRA if the agency makes a good cause finding that notice and public procedure is impracticable, unnecessary or contrary to the public interest. This determination must be supported by a brief statement. 5 U.S.C. 808(2). As stated previously, EPA has made such a good cause finding, including the reasons therefore, and established an effective date of August 19, 2011. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the action in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 808(2).

M. Judicial Review

Section 307(b)(1) of the CAA indicates which Federal Courts of Appeal have venue for petitions of review of final actions by EPA. This section provides, in part, that petitions for review must be filed in the Court of Appeals for the District of Columbia Circuit: (i) When the EPA action consists of ''nationally applicable regulations promulgated, or final actions taken, by the Administrator,'' or (ii) when such action is locally or regionally applicable, if ''such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination.''

The Administrator is determining that this action making a finding of failure to submit SIPs related to the section 110(a)(2)(D)(i)(I) requirements for the 2006 24-hour $PM_{2.5}$ NAAQS is of nationwide scope and effect for the purposes of section 307(b)(1). This is particularly appropriate because in the report on the 1977 Amendments that revised section 307(b)(1) of the CAA, Congress noted that the Administrator's determination that an action is of ''nationwide scope or effect'' would be appropriate for any action that has ''scope or effect beyond a single judicial circuit.'' H.R. Rep. No. 95–294 at 323, 324, reprinted in 1977 U.S.C.C.A.N. 1402–03. Here, the scope and effect of this rulemaking extends to numerous judicial circuits since the finding of failure to submit a SIP applies to a rulemaking of national scope and effect. In these circumstances, section 307(b)(1) and its legislative history call for the Administrator to find the rule to be of ''nationwide scope or effect'' and for venue to be in the District of Columbia Circuit.

Thus, any petitions for review of this action related to a finding of failure to submit SIPs related to the requirements of section 110(a)(2)(D)(i)(I) of the CAA must be filed in the Court of Appeals for the District of Columbia Circuit within 60 days from the date final action is published in the **Federal Register**.

List of Subjects in 40 CFR Part 52

Environmental protection, Administrative practice and procedure, Air pollution control, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: July 1, 2011.

Gina McCarthy,

Assistant Administrator, Office of Air and Radiation.

[FR Doc. 2011–17738 Filed 7–19–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2011–0460; FRL–9438–6]

Revisions to the California State Implementation Plan, Sacramento Metropolitan Air Quality Management District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is finalizing both an approval and a limited approval and limited disapproval of permitting rules submitted for the Sacramento Metropolitan Air Quality Management District (SMAQMD or District) portion of the California State Implementation Plan (SIP). These revisions were proposed in the **Federal Register** on May 19, 2011 and concern New Source Review (NSR) and Prevention of Significant Deterioration (PSD) permit programs for new and modified major stationary sources of air pollution. We are approving local rules that regulate these emission sources under the Clean Air Act as amended in 1990 (CAA).

DATES: *Effective Date:* This rule is effective on August 19, 2011.

ADDRESSES: EPA has established docket number EPA–R09–OAR–2011–0460 for this action. Generally, documents in the docket for this action are available electronically at *http://www.regulations.gov* or in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents are listed at *http://www.regulations.gov,* some information may be publicly available only at the hard copy location (*e.g.,* copyrighted material, large maps, multi-volume reports), and some may not be publicly available in either location (*e.g.,* CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Laura Yannayon, EPA Region IX, (415) 972–3534, *yannayon.laura@epa.gov.*

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

Table of Contents

I. Proposed Action

On May 19, 2011 (76 FR 28942), EPA proposed to approve the following rule that was submitted for incorporation into the California SIP.

Local agency	Rule No.	Rule title	Amended	Submitted
SMAQMD	203	Prevention of Significant Deterioration	1/27/11	1/28/11

We proposed to approve this rule because we determined that it complied with the applicable CAA requirements. Our proposed rule and related Technical Support Document (TSD) contain more information on the basis for this rulemaking and on our evaluation of the submittal.

On May 19, 2011 (76 FR 28942), EPA also proposed a limited approval and limited disapproval of the following rule that was submitted for incorporation into the California SIP.

Local agency	Rule No.	Rule title	Amended	Submitted
SMAQMD	214	Federal New Source Review	10/28/10	12/07/10

We proposed a limited approval because we determined that this rule improves the SIP and is largely consistent with the applicable CAA requirements. We simultaneously proposed a limited disapproval because some rule provisions do not satisfy the requirements of section 110 and part D of the CAA.

Specifically:

- The rule is missing definitions for the terms ''begin actual construction,'' ''federally enforceable'' and ''necessary preconstruction approvals or permits.''
- The rule is missing adequate public notice requirements for minor sources.
- The rule is missing provisions meeting the requirements of 40 CFR 51.165(a)(5)(ii) and 40 CFR 51.307(b)(2).
- The rule contains a cross reference to Rule 207—Title V—Federal Operating Permit Program, which is not SIP approved.

Our proposed rule and related TSD contain more information on the basis for this rulemaking and on our evaluation of the submittal.

II. Public Comments and EPA Responses

EPA's proposed action provided a 30-day public comment period. During this period, we received no comments.

III. EPA Action

No comments were submitted that change our assessment that the submitted SMAQMD Rule 203 complies with the applicable CAA requirements. Therefore, under CAA section 110(k)(3) and for the reasons set forth in our May 19, 2011 proposed rule, we are finalizing a full approval of Rule 203.

Additionally, no comments were submitted that change our basis for proposing a limited approval and limited disapproval of submitted SMAQMD Rule 214. Therefore, under CAA sections 110(k)(3) and 301(a), we are finalizing a limited approval and limited disapproval of Rule 214. We are finalizing a limited approval of the submitted rule because we continue to believe that the rule improves the SIP and is largely consistent with relevant CAA requirements. This action incorporates the submitted rule into the District portion of the California SIP, including those provisions identified as deficient. As authorized under sections 110(k)(3) and 301(a), EPA is simultaneously finalizing a limited disapproval of Rule 214. As a result, sanctions will be imposed unless EPA approves subsequent SIP revisions that correct the rule deficiencies within 18 months of the effective date of this action. These sanctions will be imposed under section 179 of the Act according to 40 CFR 52.31. In addition, EPA must promulgate a federal implementation plan (FIP) under section 110(c) unless we approve subsequent SIP revisions that correct the rule deficiencies within 24 months. Note that the submitted rule has been adopted by the SMAQMD, and EPA's final limited disapproval does not prevent the local agency from enforcing it. The limited disapproval also does not prevent any portion of the rule from being incorporated by reference into the federally enforceable SIP, as discussed in a July 9, 1992 EPA memo found at: *http://www.epa.gov/nsr/ttnnsr01/gen/pdf/memo-s.pdf.*

IV. Statutory and Executive Order Reviews

A. Executive Order 12866, Regulatory Planning and Review

The Office of Management and Budget (OMB) has exempted this regulatory action from Executive Order 12866, entitled ''Regulatory Planning and Review.''

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* Burden is defined at 5 CFR 1320.3(b).

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions.

This rule will not have a significant impact on a substantial number of small entities because SIP approvals and limited approvals/limited disapprovals under section 110 and subchapter I, part D of the Clean Air Act do not create any new requirements but simply approve requirements that the State is already imposing. Therefore, because this limited approval/limited disapproval action does not create any new requirements, I certify that this action will not have a significant economic impact on a substantial number of small entities.

Moreover, due to the nature of the Federal-State relationship under the Clean Air Act, preparation of flexibility analysis would constitute Federal inquiry into the economic reasonableness of State action. The Clean Air Act forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co.,* v. *U.S. EPA,* 427 U.S. 246, 255–66 (1976); 42 U.S.C. 7410(a)(2).

D. Unfunded Mandates Reform Act

Under sections 202 of the Unfunded Mandates Reform Act of 1995 (''Unfunded Mandates Act''), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate; or to the private sector, of $100 million or more. Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

EPA has determined that the limited approval/limited disapproval action promulgated does not include a Federal mandate that may result in estimated costs of $100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This Federal action approves pre-existing requirements under State or local law, and imposes no new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

E. Executive Order 13132, Federalism

Federalism (64 FR 43255, August 10, 1999) revokes and replaces Executive Orders 12612 (Federalism) and 12875 (Enhancing the Intergovernmental Partnership). Executive Order 13132 requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' Under Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, because it merely approves a State rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

F. Executive Order 13175, Coordination With Indian Tribal Governments

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' This final rule does not have tribal implications, as specified in Executive Order 13175. It will not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes. Thus, Executive Order 13175 does not apply to this rule.

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

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This rule is not subject to Executive Order 13045, because it approves a State rule implementing a Federal standard.

H. Executive Order 13211, Actions That Significantly Affect Energy Supply, Distribution, or Use

This rule is not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12 of the National Technology Transfer and Advancement Act (NTTAA) of 1995 requires Federal agencies to evaluate existing technical standards when developing a new regulation. To comply with NTTAA, EPA must consider and use ''voluntary consensus standards'' (VCS) if available and applicable when developing programs and policies unless doing so would be inconsistent with applicable law or otherwise impractical.

The EPA believes that VCS are inapplicable to this action. Today's action does not require the public to perform activities conducive to the use of VCS.

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

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

EPA lacks the discretionary authority to address environmental justice in this rulemaking.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. section 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. section 804(2). This rule will be effective on August 19, 2011.

L. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by September 19, 2011. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

List of Subjects in 40 CFR Part 52

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

Dated: June 30, 2011.

Jared Blumenfeld,

Regional Administrator, Region IX.

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

PART 52—[AMENDED]

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

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

Subpart F—California

■ 2. Section 52.220 is amended by adding paragraphs (c)(389) and (390) to read as follows:

§ 52.220 Identification of plan.

* * * * *

(c) * * *

(389) New and amended regulations were submitted on December 7, 2010, by the Governor's Designee.

(i) Incorporation by Reference.

(A) Sacramento Metropolitan Air Quality Management District.

(*1*) Rule 214, ''Federal New Source Review,'' as adopted on October 28, 2010.

(390) Amended regulations were submitted on January 28, 2011, by the Governor's Designee.

(i) Incorporation by Reference.

(A) Sacramento Metropolitan Air Quality Management District.

(*1*) Rule 203, ''Prevention of Significant Deterioration,'' as amended on January 27, 2011.

* * * * *

[FR Doc. 2011–18152 Filed 7–19–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 55

[EPA–R03–OAR–2011–0140; FRL- 9434–5]

Outer Continental Shelf Air Regulations Consistency Update for Virginia

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to approve an update to a portion of the Outer Continental Shelf (OCS) Air Regulations. Requirements applying to OCS sources located within 25 miles of a State's seaward boundary must be updated periodically to maintain continuity and ensure consistency with the regulations of the corresponding onshore area (COA), as mandated by the Clean Air Act Amendments of 1990 (CAA). The specific portion of the OCS air regulation that is being updated pertains to the requirements for OCS sources in the Commonwealth of Virginia (Virginia). The intended effect of approving the OCS requirements for Virginia is to regulate emissions from

OCS sources in accordance with the requirements onshore.

DATES: This rule is effective on September 19, 2011 without further notice, unless EPA receives adverse written comment by August 19, 2011. If adverse comments are received, EPA will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect. The incorporation by reference of certain publications listed in this rule is approved by the Director of the Federal Register as of September 19, 2011.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R03–OAR–2011–0140 by one of the following methods:

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

2. *E-mail: cox.kathleen@epa.gov.*

3. *Mail:* EPA–R03–OAR–2011–0140, Kathleen Cox, Associate Director, Office of Permits and Air Toxics, Mailcode 3AP10, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

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

Instructions: Direct your comments to Docket ID No. EPA–R03–OAR–2011–0140. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or 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.

Docket: All documents in the electronic docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *i.e.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Virginia Department of Environmental Quality, 629 East Main Street, Richmond, Virginia 23219.

FOR FURTHER INFORMATION CONTACT: Emlyn Vélez-Rosa, (215) 814–2038 or by e-mail at *velez-rosa.emlyn@epa.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background and Purpose

On September 4, 1992, EPA promulgated 40 CFR part 55, which established requirements to control air pollution from OCS sources in order to attain and maintain federal and state ambient air quality standards and to comply with the provisions of part C of title I of the CAA. Part 55 applies to all OCS sources offshore of the States except those located in the Gulf of Mexico west of 87.5 degrees longitude. Section 328 of the CAA requires that for such sources located within 25 miles of a State's seaward boundary, the requirements shall be the same as would be applicable if the source were located in the COA. Because the OCS requirements are based on onshore requirements, and onshore requirements may change, section 328(a)(1) requires that EPA update the OCS requirements as necessary to maintain consistency with onshore requirements.

To comply with this statutory mandate, EPA must incorporate applicable rules of the COA into 40 CFR part 55 as they exist onshore. This limits EPA's flexibility in deciding which requirements will be incorporated into part 55 and prevents EPA from making substantive changes to the requirements it incorporates. As a result, EPA may be incorporating rules into part 55 that do not conform to all EPA's state implementation plan (SIP) guidance or certain requirements of the CAA. Consistency updates may result in the inclusion of state or local rules or regulations into part 55, even though the same rules may ultimately be disapproved for inclusion as part of the SIP. Inclusion in the part 55 rule does not imply that a state or local rule meets the requirements of the CAA for SIP approval, nor does it imply that the state or local rule will be approved by EPA for inclusion in the SIP.

II. EPA's Evaluation

In updating 40 CFR part 55, EPA reviewed the state rules for inclusion in part 55 to ensure that they are rationally related to the attainment or maintenance of federal or state ambient air quality standards or part C of title I of the CAA; that they are not designed expressly to prevent exploration and development of the OCS; and that they are applicable to OCS sources. 40 CFR 55.1. EPA has also evaluated the rules to ensure they are not arbitrary or capricious. 40 CFR 55.12(e). In addition, EPA has excluded administrative or procedural rules.[1] In addition, EPA has excluded requirements that regulate toxics which are not related to the attainment and maintenance of federal and state ambient air quality standards.

III. Final Action

EPA is taking direct final action to incorporate the applicable provisions of the Virginia Administrative Code (VAC) into 40 CFR part 55 as required under section 328(a)(1) of the CAA.

EPA is publishing this rule without prior proposal because the Agency views this as a non-controversial amendment and anticipates no adverse comment. However, in the ''Proposed Rules'' section of today's **Federal Register**, EPA is publishing a separate document that will serve as the proposal to approve this consistency update if adverse comments are filed. This rule will be effective on September 19, 2011 without further notice unless EPA

[1] Each COA that has been delegated the authority to implement and enforce part 55 will use its administrative and procedural rules as onshore. However, in those instances where EPA has not delegated authority to implement and enforce part 55, EPA will use its own administrative and procedural requirements to implement the substantive requirements.

receives adverse comment by August 19, 2011. If EPA receives adverse comment, EPA will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. EPA will address all public comments in a subsequent final rule based on the proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time.

IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to establish requirements to control air pollution from OCS sources located within 25 miles of States' seaward boundary that are the same as onshore air control requirements. To comply with this statutory mandate, EPA must incorporate applicable onshore rules into 40 CFR part 55 as they exist onshore. 42 U.S.C. 7627(a)(1); 40 CFR 55.12. Thus, in promulgating OCS consistency updates, EPA's role is to maintain consistency between OCS regulations and the regulations of onshore areas, provided that they meet the criteria of the CAA. Accordingly, this action simply updates the existing OCS requirements to make them consistent with requirements onshore, without the exercise of any policy discretion by EPA. For that reason, this action:

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

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because 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, nor does it impose substantial direct compliance costs on tribal governments, nor preempt tribal law.

Under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.,* OMB has approved the information collection requirements contained in 40 CFR part 55 and, by extension, this update to the rules, and has assigned OMB control number 2060–0249. Notice of OMB's approval of EPA Information Collection Request (ICR) No. 1601.07 was published in the **Federal Register** on February 17, 2009 (74 FR 7432). The approval expires January 31, 2012. As EPA previously indicated (73 FR 66037 (November 6, 2008)), the annual public reporting and recordkeeping burden for collection of information under 40 CFR part 55 is estimated to average 112 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the 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 OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9 and are identified on the form and/or instrument, if applicable. In addition, the table in 40 CFR part 9 of currently approved OMB control numbers for various regulations lists the regulatory citations for the information requirements contained in 40 CFR part 55.

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

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by September 19, 2011. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This OCS consistency update action for Virginia may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 55

Environmental protection, Administrative practice and procedure, Air pollution control, Continental Shelf, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides.

Dated: June 3, 2011.

W.C. Early,

Acting Regional Administrator, Region III.

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

PART 55—[AMENDED]

■ 1. The authority citation for part 55 continues to read as follows:

Authority: Section 328 of the CAA (42 U.S.C. 7401, *et seq.*) as amended by Public Law 101–549.

■ 2. Section 55.14 is amended as follows:

■ a. By adding paragraph (d)(22).
■ b. By revising paragraph (e) introductory text.
■ c. By adding paragraph (e)(22).

§ 55.14 Requirements that apply to OCS sources located within 25 miles of States' seaward boundaries, by State.

* * * * *

(d) * * *

(22) Virginia.

(i) 40 CFR part 52, subpart VV.

(ii) [Reserved].

* * * * *

(e) State and local requirements. State and local requirements promulgated by EPA as applicable to OCS sources located within 25 miles of State's seaward boundaries have been compiled into separate documents organized by State and local areas of jurisdiction. These documents, set forth below, are incorporated by reference. This incorporation by reference was approved by the Director of the Federal Register Office in accordance with 5 U.S.C. 552 (a) and 40 CFR part 51. Copies may be inspected at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030 or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.* Copies of rules pertaining to particular States or local areas may be inspected or obtained from the EPA Docket Center-Public Reading Room, EPA West Building, Room 3334, 1301 Constitution Avenue, NW., Washington, DC 20004 or the appropriate EPA regional offices: U.S. EPA, Region I (Massachusetts) 5 Post Office Square, Boston, MA 02109–3912; U.S.EPA, Region III (Delaware and Virginia) 1650 Arch Street, Philadelphia, PA 19103, (215) 814–5000; U.S. EPA, Region 4 (Florida and North Carolina), 61 Forsyth Street, Atlanta, GA 30303; U.S. EPA, Region 9 (California), 75 Hawthorne Street, San Francisco, CA 94105; and U.S. EPA Region 10 (Alaska), 1200 Sixth Avenue, Seattle, WA 98101. For an informational listing of the State and local requirements incorporated into this part, which are applicable to sources of air pollution located on the OCS, see appendix A to this part.

* * * * *

(22) Virginia.

(i) State requirements.

(A) Outer Continental Shelf Air Regulations Consistency Update for Virginia, in effect as of March 2, 2011.

(B) [Reserved].

(ii) Local requirements.

(A) [Reserved].

* * * * *

■ 3. In Appendix A to part 55, add an entry for Virginia in alphabetical order to read as follows:

Appendix A to Part 55—Listing of State and Local Requirements Incorporated by Reference Into Part 55, By State

* * * * *

Virginia:

(a) State Requirements.

(1) The following Commonwealth of Virginia requirements are applicable to OCS Sources, March 2, 2011, Commonwealth of Virginia—Virginia Department of Environmental Quality. The following sections of Virginia Regulations for the Control and Abatement of Air Pollution Control (VAC), Title 9, Agency 5:

Chapter 10—General Definitions

(Effective 02/18/2010)

9VAC5–10–10. General.
9VAC5–10–20. Terms defined.
9VAC5–10–30. Abbreviations.

Chapter 20—General Provisions

(Effective 11/10/2010)

Part I—Administrative

9VAC5–20–10. Applicability.
9VAC5–20–21. Documents incorporated by reference.
9VAC5–20–50. Variances.
9VAC5–20–70. Circumvention.
9VAC5–20–80. Relationship of state regulations to federal regulations.
9VAC5–20–121. Air quality program policies and procedures.

Part II—Air Quality Programs

9VAC5–20–160. Registration.
9VAC5–20–170. Control programs.
9VAC5–20–180. Facility and control equipment maintenance or malfunction.
9VAC5–20–200. Air quality control regions.
9VAC5–20–201. Urban areas.
9VAC5–20–202. Metropolitan statistical areas.
9VAC5–20–203. Maintenance areas.
9VAC5–20–204. Nonattainment areas.
9VAC5–20–205. Prevention of significant deterioration areas.
9VAC5–20–206. Volatile organic compound and nitrogen oxides emission control areas.
9VAC5–20–220. Shutdown of a stationary source.
9VAC5–20–230. Certification of documents.

Chapter 30—Ambient Air Quality Standards

(Effective 08/18/2010)

9VAC5–30–10. General.
9VAC5–30–15. Reference conditions.
9VAC5–30–30. Sulfur oxides (sulfur dioxide).
9VAC5–30–40. Carbon monoxide.
9VAC5–30–50. Ozone (1-hour).
9VAC5–30–55. Ozone (8-hour, 0.08 ppm).
9VAC5–30–56. Ozone (8-hour, 0.075 ppm).
9VAC5–30–60. Particulate matter (PM10).
9VAC5–30–65. Particulate matter.
9VAC5–30–70. Oxides of nitrogen with nitrogen dioxide as the indicator.
9VAC5–30–80. Lead.

Chapter 40—Existing Stationary Sources

Part I—Special Provisions

(Effective 12/12/2007)

9VAC5–40–10. Applicability.
9VAC5–40–20. Compliance.
9VAC5–40–21. Compliance schedules.
9VAC5–40–22. Interpretation of emission standards based on process weight-rate tables.
9VAC5–40–30. Emission testing.
9VAC5–40–40. Monitoring.
9VAC5–40–41. Emission monitoring procedures for existing sources.
9VAC5–40–50. Notification, records and reporting.

Part II—Emission Standards

Article 1—Visible Emissions and Fugitive Dust/Emissions

(Effective 02/01/2003)

9VAC5–40–60. Applicability and designation of affected facility.
9VAC5–40–70. Definitions.
9VAC5–40–80. Standard for visible emissions.
9VAC5–40–90. Standard for fugitive dust/emissions.
9VAC5–40–100. Monitoring.
9VAC5–40–110. Test methods and procedures.
9VAC5–40–120. Waivers.

Article 4—General Process Operations

(Effective 12/15/2006)

9VAC5–40–240. Applicability and designation of affected facility.
9VAC5–40–250. Definitions.
9VAC5–40–260. Standard for particulate matter (AQCR 1–6).
9VAC5–40–270. Standard for particulate matter (AQCR 7).
9VAC5–40–280. Standard for sulfur dioxide.
9VAC5–40–290. Standard for hydrogen sulfide.
9VAC5–40–320. Standard for visible emissions.
9VAC5–40–330. Standard for fugitive dust/emissions.
9VAC5–40–350. Standard for toxic pollutants.
9VAC5–40–360. Compliance.
9VAC5–40–370. Test methods and procedures.
9VAC5–40–380. Monitoring.
9VAC5–40–390. Notification, records and reporting.
9VAC5–40–400. Registration.
9VAC5–40–410. Facility and control equipment maintenance or malfunction.
9VAC5–40–420. Permits.

Article 7—Incinerators

(Effective 01/01/1985)

9VAC5–40–730. Applicability and designation of affected facility.
9VAC5–40–740. Definitions.
9VAC5–40–750. Standard for particulate matter.
9VAC5–40–760. Standard for visible emissions.
9VAC5–40–770. Standard for fugitive dust/emissions.
9VAC5–40–790. Standard for toxic pollutants.

9VAC5–40–800. Prohibition of flue-fed incinerators.
9VAC5–40–810. Compliance.
9VAC5–40–820. Test methods and procedures.
9VAC5–40–830. Monitoring.
9VAC5–40–840. Notification, records and reporting.
9VAC5–40–850. Registration.
9VAC5–40–860. Facility and control equipment maintenance or malfunction.
9VAC5–40–870. Permits.

Article 8—Fuel Burning Equipment

(Effective 01/01/2002)

9VAC5–40–880. Applicability and designation of affected facility.
9VAC5–40–890. Definitions.
9VAC5–40–900. Standard for particulate matter.
9VAC5–40–910. Emission allocation system.
9VAC5–40–920. Determination of collection equipment efficiency factor.
9VAC5–40–930. Standard for sulfur dioxide.
9VAC5–40–940. Standard for visible emissions.
9VAC5–40–950. Standard for fugitive dust/emissions.
9VAC5–40–970. Standard for toxic pollutants.
9VAC5–40–980. Compliance.
9VAC5–40–990. Test methods and procedures.
9VAC5–40–1000. Monitoring.
9VAC5–40–1010. Notification, records and reporting.
9VAC5–40–1020. Registration.
9VAC5–40–1030. Facility and control equipment maintenance or malfunction.
9VAC5–40–1040. Permits.

Article 14—Sand-Gravel Processing; Stone Quarrying & Processing

(Effective 01/01/1985)

9VAC5–40–1820. Applicability and designation of affected facility.
9VAC5–40–1830. Definitions.
9VAC5–40–1840. Standard for particulate matter.
9VAC5–40–1850. Standard for visible emissions.
9VAC5–40–1860. Standard for fugitive dust/emissions.
9VAC5–40–1880. Standard for toxic pollutants.
9VAC5–40–1890. Compliance.
9VAC5–40–1900. Test methods and procedures.
9VAC5–40–1910. Monitoring.
9VAC5–40–1920. Notification, records and reporting.
9VAC5–40–1930. Registration.
9VAC5–40–1940. Facility and control equipment maintenance or malfunction.
9VAC5–40–1950. Permits.

Article 17—Woodworking Operations

(Effective 01/01/1985)

9VAC5–40–2250. Applicability and designation of affected facility.
9VAC5–40–2260. Definitions.
9VAC5–40–2270. Standard for particulate matter.
9VAC5–40–2280. Standard for visible emissions.
9VAC5–40–2290. Standard for fugitive dust/emissions.
9VAC5–40–2310. Standard for toxic pollutants.
9VAC5–40–2320. Compliance.
9VAC5–40–2330. Test methods and procedures.
9VAC5–40–2340. Monitoring.
9VAC5–40–2350. Notification, records and reporting.
9VAC5–40–2360. Registration.
9VAC5–40–2370. Facility and control equipment maintenance or malfunction.
9VAC5–40–2380. Permits.

Article 18—Primary and Secondary Metal Operations

(Effective 01/01/1985)

9VAC5–40–2390. Applicability and designation of affected facility.
9VAC5–40–2400. Definitions.
9VAC5–40–2410. Standard for particulate matter.
9VAC5–40–2420. Standard for sulfur oxides.
9VAC5–40–2430. Standard for visible emissions.
9VAC5–40–2440. Standard for fugitive dust/emissions.
9VAC5–40–2460. Standard for toxic pollutants.
9VAC5–40–2470. Compliance.
9VAC5–40–2480. Test methods and procedures.
9VAC5–40–2490. Monitoring.
9VAC5–40–2500. Notification, records and reporting.
9VAC5–40–2510. Registration.
9VAC5–40–2520. Facility and control equipment maintenance or malfunction.
9VAC5–40–2530. Permits.

Article 19—Lightweight Aggregate Process Operations

(Effective 01/01/1985)

9VAC5–40–2540. Applicability and designation of affected facility.
9VAC5–40–2550. Definitions.
9VAC5–40–2560. Standard for particulate matter.
9VAC5–40–2570. Standard for sulfur oxides.
9VAC5–40–2580. Standard for visible emissions.
9VAC5–40–2590. Standard for fugitive dust/emissions.
9VAC5–40–2610. Standard for toxic pollutants.
9VAC5–40–2620. Compliance.
9VAC5–40–2630. Test methods and procedures.
9VAC5–40–2640. Monitoring.
9VAC5–40–2650. Notification, records and reporting.
9VAC5–40–2660. Registration.
9VAC5–40–2670. Facility and control equipment maintenance or malfunction.
9VAC5–40–2680. Permits.

Article 24—Solvent Metal Cleaning Operations

(Effective 03/24/2004)

9VAC5–40–3260. Applicability and designation of affected facility.
9VAC5–40–3270. Definitions.
9VAC5–40–3280. Standard for volatile organic compounds.
9VAC5–40–3290. Control technology guidelines.
9VAC5–40–3300. Standard for visible emissions.
9VAC5–40–3310. Standard for fugitive dust/emissions.
9VAC5–40–3330. Standard for toxic pollutants.
9VAC5–40–3340. Compliance.
9VAC5–40–3350. Test methods and procedures.
9VAC5–40–3360. Monitoring.
9VAC5–40–3370. Notification, records and reporting.
9VAC5–40–3380. Registration.
9VAC5–40–3390. Facility and control equipment maintenance or malfunction.
9VAC5–40–3400. Permits.

Article 25—VOC Storage & Transfer Operations

(Effective 07/01/1991)

9VAC5–40–3410. Applicability and designation of affected facility.
9VAC5–40–3420. Definitions.
9VAC5–40–3430. Standard for volatile organic compounds.
9VAC5–40–3440. Control technology guidelines.
9VAC5–40–3450. Standard for visible emissions.
9VAC5–40–3460. Standard for fugitive dust/emissions.
9VAC5–40–3480. Standard for toxic pollutants.
9VAC5–40–3490. Compliance.
9VAC5–40–3500. Test methods and procedures.
9VAC5–40–3510. Monitoring.
9VAC5–40–3520. Notification, records and reporting.
9VAC5–40–3530. Registration.
9VAC5–40–3540. Facility and control equipment maintenance or malfunction.
9VAC5–40–3550. Permits.

Article 34—Miscellaneous Metal Parts/Products Coating Application

(Effective 07/01/1991)

9VAC5–40–4760. Applicability and designation of affected facility.
9VAC5–40–4770. Definitions.
9VAC5–40–4780. Standard for volatile organic compounds.
9VAC5–40–4790. Control technology guidelines.
9VAC5–40–4800. Standard for visible emissions.
9VAC5–40–4810. Standard for fugitive dust/emissions.
9VAC5–40–4830. Standard for toxic pollutants.
9VAC5–40–4840. Compliance.
9VAC5–40–4850. Test methods and procedures.
9VAC5–40–4860. Monitoring.
9VAC5–40–4870. Notification, records and reporting.
9VAC5–40–4880. Registration.
9VAC5–40–4890. Facility and control equipment maintenance or malfunction.
9VAC5–40–4900. Permits.

Article 37—Petroleum Liquid Storage and Transfer Operations

(Effective 10/04/2006)

9VAC5–40–5200. Applicability and designation of affected facility.
9VAC5–40–5210. Definitions.
9VAC5–40–5220. Standard for volatile organic compounds.

9VAC5–40–5230. Control technology guidelines.
9VAC5–40–5240. Standard for visible emissions.
9VAC5–40–5250. Standard for fugitive dust/emissions.
9VAC5–40–5270. Standard for toxic pollutants.
9VAC5–40–5280. Compliance.
9VAC5–40–5290. Test methods and procedures.
9VAC5–40–5300. Monitoring.
9VAC5–40–5310. Notification, records and reporting.
9VAC5–40–5320. Registration.
9VAC5–40–5330. Facility and control equipment maintenance or malfunction.
9VAC5–40–5340. Permits.

Article 41—Mobile Sources

(Effective 08/01/1991)

9VAC5–40–5650. Applicability and designation of affected facility.
9VAC5–40–5660. Definitions.
9VAC5–40–5670. Motor vehicles.
9VAC5–40–5680. Other mobile sources.
9VAC5–40–5690. Export/import of motor vehicles.

Article 42—Portable Fuel Container Spillage Control

(Effective 10/04/2006)

9VAC5–40–5700. Applicability.
9VAC5–40–5710. Definitions.
9VAC5–40–5720. Standard for volatile organic compounds.
9VAC5–40–5730. Administrative requirements.
9VAC5–40–5740. Compliance.
9VAC5–40–5750. Compliance schedule.
9VAC5–40–5760. Test methods and procedures.
9VAC5–40–5770. Notification, records and reporting.

Article 44—Hospital/medical/infectious Waste Incinerators

(Effective 07/01/2003)

9VAC5–40–6000. Applicability and designation of affected facility.
9VAC5–40–6010. Definitions.
9VAC5–40–6020. Standard for particulate matter.
9VAC5–40–6030. Standard for carbon monoxide.
9VAC5–40–6040. Standard for dioxins/furans.
9VAC5–40–6050. Standard for hydrogen chloride.
9VAC5–40–6060. Standard for sulfur dioxide.
9VAC5–40–6070. Standard for nitrogen oxides.
9VAC5–40–6080. Standard for lead.
9VAC5–40–6090. Standard for cadmium.
9VAC5–40–6100. Standard for mercury.
9VAC5–40–6110. Standard for visible emissions.
9VAC5–40–6120. Standard for fugitive dust/emissions.
9VAC5–40–6140. Standard for toxic pollutants.
9VAC5–40–6150. HMIWI operator training and qualification.
9VAC5–40–6160. Waste management plans.
9VAC5–40–6170. Inspections.
9VAC5–40–6180. Compliance, emissions testing, and monitoring.
9VAC5–40–6190. Recordkeeping and reporting.
9VAC5–40–6200. Compliance schedules.
9VAC5–40–6210. Registration.
9VAC5–40–6220. Facility and control equipment maintenance or malfunction.
9VAC5–40–6230. Permits.

Article 45—Commercial/Industrial Solid Waste Incinerators

(Effective 09/10/2003)

9VAC5–40–6250. Applicability and designation of affected facility.
9VAC5–40–6260. Definitions.
9VAC5–40–6270. Standard for particulate matter.
9VAC5–40–6280. Standard for carbon monoxide.
9VAC5–40–6290. Standard for dioxins/furans.
9VAC5–40–6300. Standard for hydrogen chloride.
9VAC5–40–6310. Standard for sulfur dioxide.
9VAC5–40–6320. Standard for nitrogen oxides.
9VAC5–40–6330. Standard for lead.
9VAC5–40–6340. Standard for cadmium.
9VAC5–40–6350. Standard for mercury.
9VAC5–40–6360. Standard for visible emissions.
9VAC5–40–6370. Standard for fugitive dust/emissions.
9VAC5–40–6390. Standard for toxic pollutants.
9VAC5–40–6400. Operator training and qualification.
9VAC5–40–6410. Waste management plan.
9VAC5–40–6420. Compliance schedule.
9VAC5–40–6421. Compliance schedule extension.
9VAC5–40–6422. Shutdown and restart.
9VAC5–40–6430. Operating limits.
9VAC5–40–6440. Facility and control equipment maintenance or malfunction.
9VAC5–40–6450. Test methods and procedures.
9VAC5–40–6460. Compliance.
9VAC5–40–6470. Monitoring.
9VAC5–40–6480. Recordkeeping and reporting.
9VAC5–40–6490. Requirements for air curtain incinerators.
9VAC5–40–6500. Registration.
9VAC5–40–6510. Permits.

Article 46—Small Municipal Waste Combustors

(Effective 05/04/2005)

9VAC5–40–6550. Applicability and designation of affected facility.
9VAC5–40–6560. Definitions.
9VAC5–40–6570. Standard for particulate matter.
9VAC5–40–6580. Standard for carbon monoxide.
9VAC5–40–6590. Standard for dioxins/furans.
9VAC5–40–6600. Standard for hydrogen chloride.
9VAC5–40–6610. Standard for sulfur dioxide.
9VAC5–40–6620. Standard for nitrogen oxides.
9VAC5–40–6630. Standard for lead.
9VAC5–40–6640. Standard for cadmium.
9VAC5–40–6650. Standard for mercury.
9VAC5–40–6660. Standard for visible emissions.
9VAC5–40–6670. Standard for fugitive dust/emissions.
9VAC5–40–6690. Standard for toxic pollutants.
9VAC5–40–6700. Operator training and certification.
9VAC5–40–6710. Compliance schedule.
9VAC5–40–6720. Operating requirements.
9VAC5–40–6730. Compliance.
9VAC5–40–6740. Test methods and procedures.
9VAC5–40–6750. Monitoring.
9VAC5–40–6760. Recordkeeping.
9VAC5–40–6770. Reporting.
9VAC5–40–6780. Requirements for air curtain incinerators that burn 100 percent yard waste.
9VAC5–40–6790. Registration.
9VAC5–40–6800. Facility and control equipment maintenance or malfunction.
9VAC5–40–6810. Permits.

Article 47—Solvent Cleaning

(Effective 03/24/2004)

9VAC5–40–6820. Applicability and designation of affected facility.
9VAC5–40–6830. Definitions.
9VAC5–40–6840. Standard for volatile organic compounds.
9VAC5–40–6850. Standard for visible emissions.
9VAC5–40–6860. Standard for fugitive dust/emissions.
9VAC5–40–6880. Standard for toxic pollutants.
9VAC5–40–6890. Compliance.
9VAC5–40–6900. Compliance schedules.
9VAC5–40–6910. Test methods and procedures.
9VAC5–40–6920. Monitoring.
9VAC5–40–6930. Notification, records and reporting.
9VAC5–40–6940. Registration.
9VAC5–40–6950. Facility and control equipment maintenance or malfunction.
9VAC5–40–6960. Permits.

Article 48—Mobile Equipment Repair and Refinishing

(Effective 10/04/2006)

9VAC5–40–6970. Applicability and designation of affected facility.
9VAC5–40–6980. Definitions.
9VAC5–40–6990. Standard for volatile organic compounds.
9VAC5–40–7000. Standard for visible emissions.
9VAC5–40–7010. Standard for fugitive dust/emissions.
9VAC5–40–7030. Standard for toxic pollutants.
9VAC5–40–7040. Compliance.
9VAC5–40–7050. Compliance schedule.
9VAC5–40–7060. Test methods and procedures.
9VAC5–40–7070. Monitoring.
9VAC5–40–7080. Notification, records and reporting.
9VAC5–40–7090. Registration.
9VAC5–40–7100. Facility and control equipment maintenance or malfunction.

9VAC5–40–7110. Permits.

Article 51—Stationary Sources Subject to Case-by-Case RACT Determinations

(Effective 01/20/2010)

9VAC5–40–7370. Applicability and designation of affected facility.
9VAC5–40–7380. Definitions.
9VAC5–40–7390. Standard for volatile organic compounds (1-hour ozone standard).
9VAC5–40–7400. Standard for volatile organic compounds (8-hour ozone standard).
9VAC5–40–7410. Standard for nitrogen oxides (1-hour ozone standard).
9VAC5–40–7420. Standard for nitrogen oxides (8-hour ozone standard).
9VAC5–40–7430. Presumptive reasonably available control technology guidelines for stationary sources of nitrogen oxides.
9VAC5–40–7440. Standard for visible emissions.
9VAC5–40–7450. Standard for fugitive dust/emissions.
9VAC5–40–7470. Standard for toxic pollutants.
9VAC5–40–7480. Compliance.
9VAC5–40–7490. Test methods and procedures.
9VAC5–40–7500. Monitoring.
9VAC5–40–7510. Notification, records and reporting.
9VAC5–40–7520. Registration.
9VAC5–40–7530. Facility and control equipment maintenance or malfunction.
9VAC5–40–7540. Permits.

Article 54—Large Municipal Waste Combustors

(Effective 07/01/2003)

9VAC5–40–7950. Applicability and designation of affected facility.
9VAC5–40–7960. Definitions.
9VAC5–40–7970. Standard for particulate matter.
9VAC5–40–7980. Standard for carbon monoxide.
9VAC5–40–7990. Standard for cadmium.
9VAC5–40–8000. Standard for lead.
9VAC5–40–8010. Standard for mercury.
9VAC5–40–8020. Standard for sulfur dioxide.
9VAC5–40–8030. Standard for hydrogen chloride.
9VAC5–40–8040. Standard for dioxin/furan.
9VAC5–40–8050. Standard for nitrogen oxides.
9VAC5–40–8060. Standard for visible emissions.
9VAC5–40–8070. Standard for fugitive dust/emissions.
9VAC5–40–8090. Standard for toxic pollutants.
9VAC5–40–8100. Compliance.
9VAC5–40–8110. Compliance schedules.
9VAC5–40–8120. Operating practices.
9VAC5–40–8130. Operator training and certification.
9VAC5–40–8150. Monitoring.
9VAC5–40–8170. Registration.
9VAC5–40–8180. Facility and control equipment maintenance or malfunction.
9VAC5–40–8190. Permits.

Chapter 50—New and Modified Stationary Sources

Part I—Special provisions

(Effective 12/12/2007)

9VAC5–50–10. Applicability.
9VAC5–50–20. Compliance.
9VAC5–50–30. Performance testing.
9VAC5–50–40. Monitoring.
9VAC5–50–50. Notification, records and reporting.

Part II—Emission Standards

Article 1—Visible emissions and fugitive dust/emissions

(Effective 02/01/2003)

9VAC5–50–60. Applicability and designation of affected facility.
9VAC5–50–70. Definitions.
9VAC5–50–80. Standard for visible emissions.
9VAC5–50–90. Standard for fugitive dust/emissions.
9VAC5–50–100. Monitoring.
9VAC5–50–110. Test methods and procedures.
9VAC5–50–120. Waivers.

Article 4—Stationary sources

(Effective 09/01/2006)

9VAC5–50–240. Applicability and designation of affected facility.
9VAC5–50–250. Definitions.
9VAC5–50–260. Standard for stationary sources.
9VAC5–50–270. Standard for major stationary sources (nonattainment areas).
9VAC5–50–280. Standard for major stationary sources (prevention of significant deterioration areas).
9VAC5–50–290. Standard for visible emissions.
9VAC5–50–300. Standard for fugitive dust/emissions.
9VAC5–50–320. Standard for toxic pollutants.
9VAC5–50–330. Compliance.
9VAC5–50–340. Test methods and procedures.
9VAC5–50–350. Monitoring.
9VAC5–50–360. Notification, records and reporting.
9VAC5–50–370. Registration.
9VAC5–50–380. Facility and control equipment maintenance or malfunction.
9VAC5–50–390. Permits.

Article 5—EPA New Source Performance Standards

(Effective 03/02/2011)

9VAC5–50–400. General.
9VAC5–50–405. Authority to implement and enforce standards as authorized by EPA.
9VAC5–50–410. Designated standards of performance.
9VAC5–50–420. Word or phrase substitutions.

Article 6—Medical waste incinerators

(Effective 06/01/1995)

9VAC5–50–430. Applicability and designation of affected facility.
9VAC5–50–440. Definitions.
9VAC5–50–450. Standard for particulate matter.
9VAC5–50–460. Standard for carbon monoxide.
9VAC5–50–470. Standard for hydrogen chloride.
9VAC5–50–480. Standard for dioxins and furans.
9VAC5–50–490. Standard for visible emissions.
9VAC5–50–500. Standard for fugitive dust/emissions.
9VAC5–50–520. Standard for toxic pollutants.
9VAC5–50–530. Standard for radioactive materials.
9VAC5–50–540. Compliance.
9VAC5–50–550. Test methods and procedures.
9VAC5–50–560. Monitoring.
9VAC5–50–570. Notification, records and reporting.
9VAC5–50–580. Registration.
9VAC5–50–590. Facility and control equipment maintenance or malfunction.
9VAC5–50–600. Permits.

Chapter 60—Hazardous Air Pollutant Sources

Part I—Special provisions

(Effective 08/01/2002)

9VAC5–60–10. Applicability.
9VAC5–60–20. Compliance.
9VAC5–60–30. Emission testing.
9VAC5–60–40. Monitoring.
9VAC5–60–50. Notification, records and reporting.

Part II—Emission Standards

Article 1—EPA National Emissions Standards for Hazardous Air Pollutants

(Effective 03/02/2011)

9VAC5–60–60. General.
9VAC5–60–65. Authority to implement and enforce standards as authorized by EPA.
9VAC5–60–70. Designated emission standards.
9VAC5–60–80. Word or phrase substitutions.

Article 2—EPA Maximum Achievable Control Technology Standards

(Effective 03/02/2011)

9VAC5–60–90. General.
9VAC5–60–92. Federal Hazardous Air Pollutant Program.
9VAC5–60–95. Authority to implement and enforce standards as authorized by EPA.
9VAC5–60–100. Designated emission standards.
9VAC5–60–110. Word or phrase substitutions.

Article 3—Control Technology Determinations for Major Sources of Hazardous Air Pollutants

(Effective 07/01/2004)

9VAC5–60–120. Applicability.
9VAC5–60–130. Definitions.
9VAC5–60–140. Approval process for new and existing affected sources.
9VAC5–60–150. Application content for case-by-case MACT determinations.
9VAC5–60–160. Preconstruction review procedures for new affected sources subject to 9VAC5–60–140C1.
9VAC5–60–170. Maximum achievable control technology (MACT)

determinations for affected sources subject to case-by-case determination of equivalent emission limitations.
9VAC5–60–180. Requirements for case-by-case determination of equivalent emission limitations after promulgation of a subsequent MACT standard.

Article 4—Toxic Pollutants from Existing Sources

(Effective 05/01/2002)

9VAC5–60–200. Applicability and designation of affected facility.
9VAC5–60–210. Definitions.
9VAC5–60–220. Standard for toxic pollutants.
9VAC5–60–230. Significant ambient air concentration guidelines.
9VAC5–60–240. Submittal of information.
9VAC5–60–250. Determination of ambient air concentrations.
9VAC5–60–260. Compliance.
9VAC5–60–270. Public participation.

Article 5—Toxic Pollutants from New and Modified Sources

(Effective 05/01/2002)

9VAC5–60–300. Applicability and designation of affected facility.
9VAC5–60–310. Definitions.
9VAC5–60–320. Standard for toxic pollutants.
9VAC5–60–330. Significant ambient air concentration guidelines.
9VAC5–60–340. Submittal of information.
9VAC5–60–350. Determination of ambient air concentrations.
9VAC5–60–360. Compliance.
9VAC5–60–370. Public participation.

Chapter 70—Air Pollution Episode Prevention

(Effective 04/01/1999)

9VAC5–70–10. Applicability.
9VAC5–70–20. Definitions.
9VAC5–70–30. General.
9VAC5–70–40. Episode determination.
9VAC5–70–50. Standby emission reduction plans.
9VAC5–70–60. Control requirements.
9VAC5–70–70. Local air pollution control agency participation.

Chapter 80—Permits for Stationary Sources

Part I—Permit Actions and Public Hearings Before the Board

(Effective 11/12/2009)

9VAC5–80–5. Definitions.
9VAC5–80–15. Applicability.
9VAC5–80–25. Direct consideration of permit actions by the board.
9VAC5–80–35. Public hearings to contest permit actions.

Part II—Permit Procedures

Article 1—Federal (Title V) Operating Permits for Stationary Sources

(Effective 03/02/2011)

9VAC5–80–50. Applicability.
9VAC5–80–60. Definitions.
9VAC5–80–70. General.
9VAC5–80–80. Applications.
9VAC5–80–90. Application information required.
9VAC5–80–100. Emission caps.
9VAC5–80–110. Permit content.
9VAC5–80–120. General permits.
9VAC5–80–130. Temporary sources.
9VAC5–80–140. Permit shield.
9VAC5–80–150. Action on permit application.
9VAC5–80–160. Transfer of permits.
9VAC5–80–170. Permit renewal and expiration.
9VAC5–80–180. Permanent shutdown for emissions trading.
9VAC5–80–190. Changes to permits.
9VAC5–80–200. Administrative permit amendments.
9VAC5–80–210. Minor permit modifications.
9VAC5–80–220. Group processing of minor permit modifications.
9VAC5–80–230. Significant modification procedures.
9VAC5–80–240. Reopening for cause.
9VAC5–80–250. Malfunction.
9VAC5–80–260. Enforcement.
9VAC5–80–270. Public participation.
9VAC5–80–280. Operational flexibility.
9VAC5–80–290. Permit review by EPA and affected states.
9VAC5–80–300. Voluntary inclusions of additional state-only requirements as applicable state requirements in the permit.

Article 2—Permit Program (Title V) Fees for Stationary Sources

(Effective 07/18/2001)

9VAC5–80–310. Applicability.
9VAC5–80–320. Definitions.
9VAC5–80–330. General.
9VAC5–80–340. Annual permit program fee calculation.
9VAC5–80–350. Annual permit program fee payment.

Article 4—Insignificant Activities

(Effective 01/01/2001)

9VAC5–80–710. General.
9VAC5–80–720. Insignificant activities.

Article 5—State Operating Permits

(Effective 12/31/2008)

9VAC5–80–800. Applicability.
9VAC5–80–810. Definitions.
9VAC5–80–820. General.
9VAC5–80–830. Applications.
9VAC5–80–840. Application information required.
9VAC5–80–850. Standards and conditions for granting permits.
9VAC5–80–860. Action on permit application.
9VAC5–80–870. Application review and analysis.
9VAC5–80–880. Compliance determination and verification by testing.
9VAC5–80–890. Monitoring requirements.
9VAC5–80–900. Reporting requirements.
9VAC5–80–910. Existence of permit no defense.
9VAC5–80–920. Circumvention.
9VAC5–80–930. Compliance with local zoning requirements.
9VAC5–80–940. Transfer of permits.
9VAC5–80–950. Termination of permits.
9VAC5–80–960. Changes to permits.
9VAC5–80–970. Administrative permit amendments.
9VAC5–80–980. Minor permit amendments.
9VAC5–80–990. Significant amendment procedures.
9VAC5–80–1000. Reopening for cause.
9VAC5–80–1010. Enforcement.
9VAC5–80–1020. Public participation.
9VAC5–80–1030. General permits.
9VAC5–80–1040. Review and evaluation of article.

Article 6—Permits for New and Modified Stationary Sources

(Effective 06/24/2009)

9VAC5–80–1100. Applicability.
9VAC5–80–1110. Definitions.
9VAC5–80–1120. General.
9VAC5–80–1140. Applications.
9VAC5–80–1150. Application information required.
9VAC5–80–1160. Action on permit application.
9VAC5–80–1170. Public participation.
9VAC5–80–1180. Standards and conditions for granting permits.
9VAC5–80–1190. Application review and analysis.
9VAC5–80–1200. Compliance determination and verification by performance testing.
9VAC5–80–1210. Permit invalidation, suspension, revocation and enforcement.
9VAC5–80–1220. Existence of permit no defense.
9VAC5–80–1230. Compliance with local zoning requirements.
9VAC5–80–1240. Transfer of permits.
9VAC5–80–1250. General permits.
9VAC5–80–1260. Changes to permits.
9VAC5–80–1270. Administrative permit amendments.
9VAC5–80–1280. Minor permit amendments.
9VAC5–80–1290. Significant amendment procedures.
9VAC5–80–1300. Reopening for cause.
9VAC5–80–1320. Permit exemption levels.

Article 7—Permits for New and Reconstructed Major Sources of HAPs

(Effective 12/31/2008)

9VAC5–80–1400. Applicability.
9VAC5–80–1410. Definitions.
9VAC5–80–1420. General.
9VAC5–80–1430. Applications.
9VAC5–80–1440. Application information required.
9VAC5–80–1450. Action on permit application.
9VAC5–80–1460. Public participation.
9VAC5–80–1470. Standards and conditions for granting permits.
9VAC5–80–1480. Application review and analysis.
9VAC5–80–1490. Compliance determination and verification by performance testing.
9VAC5–80–1500. Permit invalidation, rescission, revocation and enforcement.
9VAC5–80–1510. Existence of permit no defense.
9VAC5–80–1520. Compliance with local zoning requirements.
9VAC5–80–1530. Transfer of permits.
9VAC5–80–1540. Changes to permits.
9VAC5–80–1550. Administrative permit amendments.
9VAC5–80–1560. Minor permit amendments.
9VAC5–80–1570. Significant amendment procedures.

9VAC5–80–1580. Reopening for cause.
9VAC5–80–1590. Requirements for constructed or reconstructed major sources subject to a subsequently promulgated MACT standard or MACT requirements.

Article 8—Permits for Major Stationary Sources and Modifications—PSD Areas

(Effective 03/02/2011)

9VAC5–80–1605. Applicability.
9VAC5–80–1615. Definitions.
9VAC5–80–1625. General.
9VAC5–80–1635. Ambient air increments.
9VAC5–80–1645. Ambient air ceilings.
9VAC5–80–1655. Applications.
9VAC5–80–1665. Compliance with local zoning requirements.
9VAC5–80–1675. Compliance determination and verification by performance testing.
9VAC5–80–1685. Stack heights.
9VAC5–80–1695. Exemptions.
9VAC5–80–1705. Control technology review.
9VAC5–80–1715. Source impact analysis.
9VAC5–80–1725. Air quality models.
9VAC5–80–1735. Air quality analysis.
9VAC5–80–1745. Source information.
9VAC5–80–1755. Additional impact analyses.
9VAC5–80–1765. Sources affecting federal class I areas—additional requirements.
9VAC5–80–1773. Action on permit application.
9VAC5–80–1775. Public participation.
9VAC5–80–1785. Source obligation.
9VAC5–80–1795. Environmental impact statements.
9VAC5–80–1805. Disputed permits.
9VAC5–80–1815. Interstate pollution abatement.
9VAC5–80–1825. Innovative control technology.
9VAC5–80–1865. Actuals plantwide applicability limits (PALs).
9VAC5–80–1915. Actions to combine permit terms and conditions.
9VAC5–80–1925. Actions to change permits.
9VAC5–80–1935. Administrative permit amendments.
9VAC5–80–1945. Minor permit amendments.
9VAC5–80–1955. Significant amendment procedures.
9VAC5–80–1965. Reopening for cause.
9VAC5–80–1975. Transfer of permits.
9VAC5–80–1985. Permit invalidation, suspension, revocation, and enforcement.
9VAC5–80–1995. Existence of permit no defense.

Article 9—Permits for Major Stationary Sources and Modifications—Nonattainment Areas

(Effective 03/02/2011)

9VAC5–80–2000. Applicability.
9VAC5–80–2010. Definitions.
9VAC5–80–2020. General.
9VAC5–80–2030. Applications.
9VAC5–80–2040. Application information required.
9VAC5–80–2050. Standards and conditions for granting permits.
9VAC5–80–2060. Action on permit application.
9VAC5–80–2070. Public participation.
9VAC5–80–2080. Compliance determination and verification by performance testing.
9VAC5–80–2090. Application review and analysis.
9VAC5–80–2091. Source obligation.
9VAC5–80–2110. Interstate pollution abatement.
9VAC5–80–2120. Offsets.
9VAC5–80–2130. De minimis increases and stationary source modification alternatives for ozone nonattainment areas classified as serious or severe in 9VAC5–20–204.
9VAC5–80–2140. Exemptions.
9VAC5–80–2144. Actuals plantwide applicability limits (PALs).
9VAC5–80–2150. Compliance with local zoning requirements.
9VAC5–80–2170. Transfer of permits.
9VAC5–80–2180. Permit invalidation, suspension, revocation and enforcement.
9VAC5–80–2190. Existence of permit no defense.
9VAC5–80–2195. Actions to combine permit terms and conditions.
9VAC5–80–2200. Actions to change permits.
9VAC5–80–2210. Administrative permit amendments.
9VAC5–80–2220. Minor permit amendments.
9VAC5–80–2230. Significant amendment procedures.
9VAC5–80–2240. Reopening for cause.

Article 10—Permit Application Fees for Stationary Sources

(Effective 12/01/2004)

9VAC5–80–2250. Applicability.
9VAC5–80–2260. Definitions.
9VAC5–80–2270. General.
9VAC5–80–2280. Permit application fee calculation.
9VAC5–80–2290. Permit application fee payment.
9VAC5–80–2300. Credit for payment of permit application fees.

Chapter 85—Permits for Stationary Sources of Pollutants Subject to Regulation (Greenhouse Gas Tailoring)

(Effective 01/02/2011)

Part I—Applicability

9VAC5–85–10. Applicability.

Part II—Federal (Title V) operating permit actions

9VAC5–85–20. Federal (Title V) operating permit actions.
9VAC5–85–30. Definitions.

Part III—Prevention of Significant Deterioration Area permit actions

9VAC5–85–40. Prevention of significant deterioration area permit actions.
9VAC5–85–50. Definitions.

Part IV—State operating permit actions

9VAC5–85–60. State operating permit actions.
9VAC5–85–70. Definitions.

Chapter 130—Open Burning

(Effective 03/18/2009)

Part I—General Provisions

9VAC5–130–10. Applicability.
9VAC5–130–20. Definitions.
9VAC5–130–30. Open burning prohibitions.
9VAC5–130–40. Permissible open burning.
9VAC5–130–50. Forest management and agricultural practices.
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Part II—Local Ordinances

9VAC5–130–100. Local ordinances on open burning.

Chapter 150—Transportation Conformity

(Effective 01/01/1998)

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9VAC5–150–20. Terms defined.

Part II—General Provisions

9VAC5–150–30. Applicability.
9VAC5–150–40. Authority of board and DEQ.
9VAC5–150–80. Relationship of state regulations to federal regulations.

Part III—Criteria and Procedures for Making Conformity Determinations

9VAC5–150–110. Priority.
9VAC5–150–120. Frequency of conformity determinations.
9VAC5–150–130. Consultation.
9VAC5–150–140. Content of transportation plans.
9VAC5–150–150. Relationship of transportation plan and TIP conformity with the NEPA process.
9VAC5–150–160. Fiscal constraints for transportation plans and TIPs.
9VAC5–150–170. Criteria and procedures for determining conformity of transportation plans, programs, and projects: General.
9VAC5–150–180. Criteria and procedures: latest planning assumptions.
9VAC5–150–190. Criteria and procedures: latest emissions model.
9VAC5–150–200. Criteria and procedures: consultation.
9VAC5–150–210. Criteria and procedures: timely implementation of TCMs.
9VAC5–150–220. Criteria and procedures: currently conforming transportation plan and TIP.
9VAC5–150–230. Criteria and procedures: projects from a plan and TIP.
9VAC5–150–240. Criteria and procedures: localized CO and PM_{10} violations (hot spots).
9VAC5–150–250. Criteria and procedures: compliance with PM_{10} control measures.
9VAC5–150–260. Criteria and procedures: motor vehicle emissions budget (transportation plan).
9VAC5–150–270. Criteria and procedures: motor vehicle emissions budget (TIP).
9VAC5–150–280. Criteria and procedures: motor vehicle emissions budget (project not from a plan and TIP).
9VAC5–150–290. Criteria and procedures: localized CO violations (hot spots) in the interim period.
9VAC5–150–300. Criteria and procedures: interim period reductions in ozone and CO areas (transportation plan).
9VAC5–150–310. Criteria and procedures: interim period reductions in ozone and CO areas (TIP).
9VAC5–150–320. Criteria and procedures: interim period reductions for ozone and CO areas (project not from a plan and TIP).

9VAC5–150–330. Criteria and procedures: interim period reductions for PM_{10} and NO_2 areas (transportation plan).
9VAC5–150–340. Criteria and procedures: interim period reductions for PM_{10} and NO_2 areas (TIP).
9VAC5–150–350. Criteria and procedures: interim period reductions for PM_{10} and NO_2 areas (project not from a plan and TIP).
9VAC5–150–360. Transition from the interim period to the control strategy period.
9VAC5–150–370. Requirements for adoption or approval of projects by recipients of funds designated under Title 23 USC or the Federal Transit Act.
9VAC5–150–380. Procedures for determining regional transportation-related emissions.
9VAC5–150–390. Procedures for determining localized CO and PM_{10} concentrations (hot-spot analysis).
9VAC5–150–400. Using the motor vehicle emissions budget in the applicable implementation plan (or implementation plan submission).
9VAC5–150–410. Enforceability of design concept and scope and project-level mitigation and control measures.
9VAC5–150–420. Exempt projects.
9VAC5–150–430. Projects exempt from regional emissions analyses.
9VAC5–150–440. Special provisions for nonattainment areas which are not required to demonstrate reasonable further progress and attainment.
9VAC5–150–450. Review and confirmation of this chapter by board.

Chapter 151—Transportation Conformity

(Effective 03/02/2011)

Part I—General Definitions

9VAC5–151–10. Definitions.

Part II—General Provisions

9VAC5–151–20. Applicability.
9VAC5–151–30. Authority of board and DEQ.

Part III—Criteria and Procedures for Making Conformity Determinations

9VAC5–151–40. General.
9VAC5–151–50. Designated provisions.
9VAC5–151–60. Word or phrase substitutions.
9VAC5–151–70. Consultation.

Chapter 160—General Conformity

(Effective 03/02/2011)

Part I—General Definitions

9VAC5–160–10. General.
9VAC5–160–20. Terms defined.

Part II—General Provisions

9VAC5–160–30. Applicability.
9VAC5–160–40. Authority of board and department.
9VAC5–160–80. Relationship of state regulations to federal regulations.

Part III—Criteria and procedures for making conformity determinations

9VAC5–160–110. General.
9VAC5–160–120. Conformity analysis.
9VAC5–160–130. Reporting requirements.
9VAC5–160–140. Public participation.
9VAC5–160–150. Frequency of conformity determinations.
9VAC5–160–160. Criteria for determining conformity.
9VAC5–160–170. Procedures for conformity determinations.
9VAC5–160–180. Mitigation of air quality impacts.
9VAC5–160–190. Savings provision.
9VAC5–160–200. Review and confirmation of this chapter by board.

Chapter 500—Exclusionary General Permit for Title V Permit

(Effective 07/01/1997)

Part I—Definitions

9VAC5–500–10. General.
9VAC5–500–20. Terms defined.

Part II—General Provisions

9VAC5–500–30. Purpose.
9VAC5–500–40. Applicability.
9VAC5–500–50. General.
9VAC5–500–60. Existence of permit no defense.
9VAC5–500–70. Circumvention.
9VAC5–500–80. Enforcement of a general permit.

Part III—General permit administrative procedures

9VAC5–500–90. Requirements for department issuance of authority to operate under the general permit.
9VAC5–500–100. Applications for coverage under the general permit.
9VAC5–500–110. Required application information.
9VAC5–500–120. General permit content.
9VAC5–500–130. Issuance of an authorization to operate under the general permit.
9VAC5–500–140. Transfer of authorizations to operate under the general permit.

Part IV—General permit terms and conditions

9VAC5–500–150. Emissions levels and requirements.
9VAC5–500–160. Emissions levels.
9VAC5–500–170. Compliance determination and verification by emission testing.
9VAC5–500–180. Compliance determination and verification by emission monitoring.
9VAC5–500–190. Recordkeeping requirements.
9VAC5–500–200. Reporting requirements.
9VAC5–500–210. Compliance certifications.
9VAC5–500–220. Consequences of failure to remain below emissions levels.
9VAC5–500–230. Enforcement.
9VAC5–500–240. Review and evaluation of regulation.

(2) [Reserved]

* * * * *

[FR Doc. 2011–18133 Filed 7–19–11; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 65

[Docket ID FEMA–2011–0002; Internal Agency Docket No. FEMA–B–1205]

Changes in Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Interim rule.

SUMMARY: This interim rule lists communities where modification of the Base (1% annual-chance) Flood Elevations (BFEs) is appropriate because of new scientific or technical data. New flood insurance premium rates will be calculated from the modified BFEs for new buildings and their contents.

DATES: These modified BFEs are currently in effect on the dates listed in the table below and revise the Flood Insurance Rate Maps (FIRMs) in effect prior to this determination for the listed communities.

From the date of the second publication of these changes in a newspaper of local circulation, any person has ninety (90) days in which to request through the community that the Deputy Federal Insurance and Mitigation Administrator reconsider the changes. The modified BFEs may be changed during the 90-day period.

ADDRESSES: The modified BFEs for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed in the table below.

FOR FURTHER INFORMATION CONTACT: Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–4064, or (e-mail) *luis.rodriguez1@dhs.gov.*

SUPPLEMENTARY INFORMATION: The modified BFEs are not listed for each community in this interim rule. However, the address of the Chief Executive Officer of the community where the modified BFE determinations are available for inspection is provided.

Any request for reconsideration must be based on knowledge of changed conditions or new scientific or technical data.

The modifications are made pursuant to section 201 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.,* and with 44 CFR part 65.

For rating purposes, the currently effective community number is shown and must be used for all new policies and renewals.

The modified BFEs are the basis for the floodplain management measures that the community is required either to adopt or to show evidence of being already in effect in order to qualify or to remain qualified for participation in the National Flood Insurance Program (NFIP).

These modified BFEs, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. The changes in BFEs are in accordance with 44 CFR 65.4.

National Environmental Policy Act. This interim rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Consideration. An environmental impact assessment has not been prepared.

Regulatory Flexibility Act. As flood elevation determinations are not within the scope of the Regulatory Flexibility Act, 5 U.S.C. 601–612, a regulatory flexibility analysis is not required.

Regulatory Classification. This interim rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

Executive Order 13132, Federalism. This interim rule involves no policies that have federalism implications under Executive Order 13132, Federalism.

Executive Order 12988, Civil Justice Reform. This interim rule meets the applicable standards of Executive Order 12988.

List of Subjects in 44 CFR Part 65

Flood insurance, Floodplains, Reporting and recordkeeping requirements.

Accordingly, 44 CFR part 65 is amended to read as follows:

PART 65—[AMENDED]

■ 1. The authority citation for part 65 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.;* Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

§ 65.4 [Amended]

■ 2. The tables published under the authority of § 65.4 are amended as follows:

State and county	Location and case No.	Date and name of newspaper where notice was published	Chief executive officer of community	Effective date of modification	Community No.
New Mexico:					
Santa Fe	City of Santa Fe (10–06–0575P).	December 21, 2010; December 28, 2010; *The Santa Fe New Mexican.*	The Honorable David Coss Mayor, City of Santa Fe, P.O. Box 909, 200 Lincoln Avenue, Santa Fe, NM 87504.	November 22, 2010	350070
Santa Fe	Unincorporated areas of Santa Fe County (10–06–2504P).	December 29, 2010; January 5, 2011; *The Santa Fe New Mexican.*	The Honorable Harry B. Montoya, Chairman, Santa Fe County Board of Commissioners, 102 Grant Avenue, Santa Fe, NM 87501.	May 5, 2011	350069
New York:					
Monroe	Town of Irondequoit (10–02–0839P).	September 24, 2010; September 30, 2010; *The Messenger-Post.*	The Honorable Mary J. D'Aurizio, Supervisor, Town of Irondequoit, 1280 Titus Avenue, Rochester, NY 14617.	March 17, 2011	360422
Rockland	Town of Orangetown (10–02–0398P).	October 8, 2010; October 15, 2010; *The Journal News.*	The Honorable Paul Whalen, Supervisor, Town of Orangetown, 26 Orangeburg Road, Orangeburg, NY 10962.	April 4, 2011	360686
Oklahoma:					
Cleveland	City of Moore (10–06–2515P).	December 17, 2010; December 24, 2010; *The Norman Transcript.*	The Honorable Glenn Lewis, Mayor, City of Moore, 301 North Broadway Street, Moore, OK 73160.	April 25, 2011	400044
Cleveland	Unincorporated areas of Cleveland County (10–06–2515P).	December 17, 2010; December 24, 2010; *The Norman Transcript.*	Mr. Rusty Sullivan, Cleveland County Commissioner, 201 South Jones Avenue, Norman, OK 73069.	April 25, 2011	400475
Oklahoma	City of Edmond (10–06–0168P).	February 22, 2011; March 1, 2011; *The Edmond Sun.*	The Honorable Patrice Douglas, Mayor, City of Edmond, P.O. Box 2970, Edmond, OK 73083.	June 29, 2011	400252
Tulsa	City of Tulsa (10–06–2732P).	December 7, 2010; December 14, 2010; *The Tulsa World.*	The Honorable Dewey F. Bartlett, Mayor, City of Tulsa, 175 East 2nd Street, Suite 690, Tulsa, OK 74103.	April 13, 2011	405381
Texas:					
Bell	City of Temple (10–06–1855P).	May 4, 2011; May 11, 2011; *The Temple Daily Telegram.*	The Honorable William A. Jones, III, Mayor, City of Temple, 2 North Main Street, Temple, TX 76501.	September 8, 2011	480034
Bexar	Unincorporated areas of Bexar County (09–06–3226P).	November 12, 2010; November 19, 2010; *The San Antonio Express-News.*	The Honorable Nelson W. Wolff, Bexar County Judge, 100 Dolorosa Street, Suite 1.20, San Antonio, TX 78205.	November 5, 2010	480035
Bexar	Unincorporated areas of Bexar County (10–06–0377P).	September 28, 2010; October 5, 2010; *The San Antonio Express-News.*	The Honorable Nelson W. Wolff, Bexar County Judge, 100 Dolorosa Street, Suite 1.20, San Antonio, TX 78205.	February 2, 2011	480035
Brazos	City of College Station (10–06–2875P).	May 9, 2011; May 16, 2011; *The Eagle.*	The Honorable Nancy Berry, Mayor, City of College Station, 1101 Texas Avenue, College Station, TX 77840.	September 13, 2011	480083
Brazos	City of College Station (10–06–0657P).	May 11, 2011; May 18, 2011; *The Eagle.*	The Honorable Nancy Berry, Mayor, City of College Station, 1101 Texas Avenue, College Station, TX 77840.	September 15, 2011	480083

State and county	Location and case No.	Date and name of newspaper where notice was published	Chief executive officer of community	Effective date of modification	Community No.
Brazos	Unincorporated areas of Brazos County (10–06–2875P).	May 9, 2011; May 16, 2011; *The Eagle*.	The Honorable Duane Peters, Brazos County Judge, 200 South Texas Avenue, Suite 332, Bryan, TX 77803.	September 13, 2011	481195
Cherokee	City of Jacksonville (10–06–2294P).	December 17, 2010; December 24, 2010; *The Jacksonville Daily Progress*.	The Honorable Robert Haberle, D.C., Mayor, City of Jacksonville, P.O. Box 1390, Jacksonville, TX 75766.	November 29, 2010	480123
Collin	City of Allen (10–06–0342P).	September 30, 2010; October 7, 2010; *The Allen American*.	The Honorable Stephen Terrell, Mayor, City of Allen, 305 Century Parkway, Allen, TX 75013.	September 21, 2010	480131
Collin	City of McKinney (10–06–3483P).	May 12, 2011; May 19, 2011; *The McKinney Courier-Gazette*.	The Honorable Brian Loughmiller, Mayor, City of McKinney, 222 North Tennessee Street, McKinney, TX 75069.	June 6, 2011	480135
Dallas	City of Richardson (10–06–3057P).	March 15, 2011; March 22, 2011; *The Dallas Morning News*.	The Honorable Gary Slagel, Mayor, City of Richardson, P.O. Box 830309, Richardson, TX 75083.	April 6, 2011	480184
El Paso	City of El Paso (10–06–2130P).	February 1, 2011; February 8, 2011; *The El Paso Times*.	The Honorable John F. Cook, Mayor, City of El Paso, 2 Civic Center Plaza, El Paso, TX 79901.	June 8, 2011	480214
El Paso	City of El Paso (10–06–3638P).	May 20, 2011; May 27, 2011; *The El Paso Times*.	The Honorable John F. Cook, Mayor, City of El Paso, 2 Civic Center Plaza, El Paso, TX 79901.	May 13, 2011	480214
Hays	Village of Wimberley (10–06–1474P).	September 29, 2010; October 6, 2010; *The Wimberley View*.	The Honorable Bob Flocke, Mayor, Village of Wimberley, P.O. Box 2027, Wimberley, TX 78676.	January 27, 2011	481694
Montgomery	City of Conroe (10–06–1318P).	February 11, 2011; February 18, 2011; *The Conroe Courier*.	The Honorable Webb K. Melder, Mayor, City of Conroe, P.O. Box 3066, 300 West Davis, Conroe, TX 77305.	June 20, 2011	480484
Montgomery	City of Montgomery (10–06–2378P).	May 13, 2011; May 20, 2011; *The Conroe Courier*.	The Honorable Travis M. Mabry, Mayor, City of Montgomery, 101 Old Plantersville Road, Montgomery, TX 77356.	September 19, 2011	481483
Montgomery	Unincorporated areas of Montgomery County (10–06–2378P).	May 13, 2011; May 20, 2011; *The Conroe Courier*.	The Honorable Alan B. Sadler, Montgomery County Judge, 501 North Thompson, Suite 401, Conroe, TX 77301.	September 19, 2011	480483
Tarrant	City of Arlington (10–06–1764P).	December 15, 2010; December 22, 2010; *The Fort Worth Star-Telegram*.	The Honorable Robert Cluck, M.D., Mayor, City of Arlington, 101 West Abram Street, Arlington, TX 76004.	April 21, 2011	485454
Tarrant	City of Mansfield (10–06–0859P).	February 23, 2011; March 2, 2011; *The Fort Worth Star-Telegram*.	The Honorable David Cook, Mayor, City of Mansfield, 1200 East Broad Street, Mansfield, TX 76063.	March 18, 2011	480606
Tarrant	City of Saginaw (10–06–0960P).	January 12, 2011; January 19, 2011; *The Fort Worth Star-Telegram*.	The Honorable Gary Brinkley, Mayor, City of Saginaw, 333 West McLeroy Boulevard, Saginaw, TX 76179.	May 19, 2011	480610
Travis	City of Austin (10–06–1794P).	January 19, 2011; January 26, 2011; *The Austin American-Statesman*.	The Honorable Lee Leffingwell, Mayor, City of Austin, P.O. Box 1088, Austin, TX 78767.	May 20, 2011	480624
Travis	Unincorporated areas of Travis County (10–06–1794P).	January 19, 2011; January 26, 2011; *The Austin American-Statesman*.	The Honorable Samuel T. Biscoe, Travis County Judge, 314 West 11th Street, Suite 520, Austin, TX 78701.	May 20, 2011	481026
Webb	Unincorporated areas of Webb County (10–06–0114P).	May 13, 2010; May 20, 2010; *The Laredo Morning Times*.	The Honorable Danny Valdez, Webb County Judge, 1000 Houston Street, 3rd Floor, Laredo, TX 78040.	September 17, 2010	481059

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Dated: July 8, 2011.

Sandra K. Knight,

Deputy Federal Insurance and Mitigation Administrator, Mitigation, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. 2011–18303 Filed 7–19–11; 8:45 am]

BILLING CODE 9110–12–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1 and 64

[WC Docket No. 11–39; FCC 11–100]

Implementation of the Truth in Caller ID Act

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this Report and Order (Order), the Commission adopts rules to implement the Truth in Caller ID Act of 2009 (Truth in Caller ID Act, or Act). The Truth in Caller ID Act, and the Commission's implementing rules, prohibit any person or entity from knowingly altering or manipulating caller identification information with the intent to defraud, cause harm, or wrongfully obtain anything of value.

DATES: Effective August 19, 2011.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Lisa Hone, Wireline Competition Bureau, (202) 418–1580.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order (Order) in WC Docket No. 11–39, FCC 11–100, adopted June 20, 2011, and released June 22, 2011. In this Order, the Commission adopts rules to implement the Truth in Caller ID Act of 2009. Caller ID services typically identify the telephone numbers and sometimes the names associated with incoming calls, thus allowing consumers to decide whether or how to answer a phone call based on who appears to be calling. However, caller ID information can be altered or manipulated (''spoofed''). Increasingly, bad actors are spoofing caller ID information in order to facilitate a wide variety of malicious schemes. In response to the increasing use of caller ID spoofing to facilitate schemes that defraud consumers and threaten public safety, Congress passed the Truth in Caller ID Act. The Truth in Caller ID Act, and the Commission's implementing rules, prohibit any person or entity from knowingly spoofing caller identification information with the intent to defraud, cause harm, or wrongfully obtain anything of value.

Synopsis of Report and Order

I. Implementation of the Truth in Caller ID Act

1. Having considered the record in this proceeding, we adopt rules that prohibit any person or entity in the United States, acting with the intent to defraud, cause harm, or wrongfully obtain anything of value, from knowingly causing, directly or indirectly, any caller identification service to transmit or display misleading or inaccurate caller identification information. The revisions to the Commission's Calling Party Number (CPN) rules are modeled on the Act's prohibition against knowingly engaging in caller ID spoofing with fraudulent or harmful intent. The rules include exemptions based on conduct the Act identifies as exempt from its prohibitions. The revised rules also include new definitions, including several modeled after definitions in the Act. As proposed in the *Caller ID Act NPRM,* 76 FR 16367, the revised rules also specify that blocking or attempting to block one's own caller ID is not a violation of the new rules, while clarifying that telemarketers are not relieved of their obligation to transmit caller identification information.

A. Prohibited Practice

2. The principal implementing rule we adopt provides that ''no person or entity in the United States shall, with intent to defraud, cause harm, or wrongfully obtain anything of value, knowingly cause, directly or indirectly, any caller identification service to transmit or display misleading or inaccurate caller identification information.'' The wording of the prohibition in our rules generally tracks the wording of the prohibition in the Act, and is unchanged from the rule the Commission proposed in the *Caller ID Act NPRM.*

3. The Act specifies that the prohibited conduct is ''in connection with any telecommunications or IP-enabled voice service.'' Because we define the terms ''caller identification service'' and ''caller identification information'' to encompass the use of telecommunications services and ''interconnected VoIP services,'' we do not need to specify in the rule that the prohibition encompasses calls made using telecommunications services and IP-enabled voice services, as specified in the Act.

4. We also note that the Act is directed at ''any person,'' but does not define the term ''person.'' In order to make clear that the rules are not limited to natural persons and to be consistent with the Commission's current rules concerning the delivery of CPN, our amendments to the CPN rules use the phrase any ''person or entity.'' By contrast, the amendments to the Commission's forfeiture rules use the term ''person'' in order to be consistent with use of the term ''person'' in the forfeiture rules. In both cases, we intend for the entities covered to be those within the scope of the definition of ''person'' in the Communications Act. The only commenter that addressed the use of the phrase ''person or entity'' in the proposed rules supported the Commission's clarification that the rule applies to both natural persons and other entities.

5. In the *Caller ID Act NPRM,* the Commission asked about the placement of the term ''knowingly'' in the proposed rules. As with the proposed rules, the rules we adopt today provide that in order to violate the rules, the person or entity ''knowingly'' causing transmission or display of inaccurate or misleading caller identification must be the same person or entity that is acting with intent to defraud, cause harm, or wrongfully obtain anything of value. The Truth in Caller ID Act is aimed at prohibiting the use of caller ID spoofing for ill intent. Therefore, we believe that an entity subject to liability for violating the Act must knowingly spoof caller identification information and do so with intent to defraud, cause harm, or wrongfully obtain something of value.

6. Most commenters agreed with the Commission's proposal to clarify that the word ''knowingly'' modifies the action of the person or entity engaged in malicious caller ID spoofing because this is the most logical reading of placement of the word in the Truth in Caller ID Act. However, in its reply comments, the Privacy Rights Clearinghouse (PRC) recommends that the Commission change the placement of the word ''knowingly'' so that it modifies the actions of the caller identification service or modify the rule so that spoofing services are prohibited from knowingly transmitting misleading or inaccurate caller identification information for a party violating the Act. PRC argues that requiring that the same person or entity knowingly cause the transmission or display of misleading or inaccurate caller identification information and have the requisite intent to ''defraud, cause harm, or wrongfully obtain anything of value'' imposes an unnecessary hurdle to enforcement efforts.

7. We disagree with PRC's arguments. Based on our reading of the statute, it is not enough that a person or entity intend to defraud, cause harm, or wrongfully obtain anything of value to violate the Truth in Caller ID Act. Rather, the person or entity intending to defraud, cause harm or wrongfully obtain anything of value must facilitate the scheme through the manipulation or alteration of caller identification information. Moreover, adopting a rule in which ''knowingly'' modifies the action of the caller identification service would not impose liability on caller ID spoofing services for knowingly manipulating caller identification information absent intent to defraud, cause harm, or wrongfully obtain anything of value. Nor would it ease the burden on law enforcement of proving a violation of the Act. Instead, it would require law enforcers to show that the provider of the caller ID service—usually a terminating carrier or VoIP provider—knew that the incoming caller identification information was manipulated or altered. As the Commission noted in the *Caller ID Act NPRM,* ''in many instances the caller identification service has no way of knowing whether or not the caller identification information it receives has been manipulated.'' We do not believe Congress intended to impose liability on caller ID spoofers acting with malicious intent only upon proof that the provider of the call recipient's caller ID service knew that the caller identification information was manipulated or altered. That would be a perverse result, wholly inconsistent with the intent of the Act and its legislative history.

8. As for PRC's suggestion that we modify the rule to hold spoofing providers liable for transmitting

inaccurate or misleading caller identification information on behalf of someone violating the Act, as discussed below, we choose to follow Congress' lead in not imposing additional obligations on spoofing providers. We find that the proposed rules and the rules we adopt today are consistent with Congressional intent to focus on whether a person or entity has knowingly manipulated the caller identification information in order to defraud, cause harm, or wrongfully obtain anything of value, and therefore we adopt the prohibition on caller ID spoofing as proposed in the *Caller ID Act NPRM.* The person or entity that knowingly causes caller ID services to transmit or display misleading or inaccurate information may, in some cases, be a carrier, spoofing provider or other service provider, and we do not exempt such conduct from the purview of our rules. Indeed, we believe that caller ID spoofing done to wrongfully avoid payment of intercarrier compensation charges—whether by the originating provider, an intermediate carrier, or other intermediate entity—would be a violation of our rules.

9. Like the proposed rules, the rules we adopt today address both transmission and display of misleading or inaccurate caller identification information to make clear that, even if a carrier or interconnected VoIP provider transmits accurate caller identification information, it would be a violation for a person or entity to knowingly cause, directly or indirectly, a device that displays caller identification information to display inaccurate or misleading information with the intent to defraud, cause harm, or wrongfully obtain anything of value. We also note that the rules we adopt today cover situations in which a person or entity is ''directly or indirectly'' causing a caller identification service to transmit or display misleading or inaccurate caller ID. We include the concept of ''indirect'' action in our rules to foreclose those acting with the requisite harmful intent from arguing that they are not liable merely because they have engaged a third party to cause the transmission or display of inaccurate or misleading caller identification information.

10. In the *Caller ID Act NPRM,* the Commission sought comment on whether the proposed prohibition on causing any caller identification service to transmit or display ''misleading or inaccurate'' caller identification information with the ''intent to defraud, cause harm, or wrongfully obtain anything of value'' provides clear guidance about what actions are prohibited. Commenters generally agreed that the terms in the proposed rule were sufficiently clear. We agree. Although we do not believe it is necessary to offer additional definitions to clarify the meaning of the prohibited actions, we do agree with the National Network to End Domestic Violence (NNEDV) that the term ''harm'' is a broad concept that encompasses financial, physical, and emotional harm, include stalking, harassment, and the violation of protection and restraining orders. Moreover, NNEDV offers substantial evidence that abusive spouses use third-party caller ID services to harass and stalk their victims. We consider knowing manipulation or alteration of caller identification information for the purpose of harassing or stalking someone to be an egregious violation of the Act and of our rules implementing the Act. We intend to enforce our rules vigorously, including against those who engage in such malicious practices, and we encourage spoofing providers to notify their customers in no uncertain terms that such actions are illegal.

B. Exemptions

11. The Act directs the Commission to exempt from its regulations (i) any authorized activity of a law enforcement agency; and (ii) court orders that specifically authorize the use of caller identification manipulation. Separately, the Act also makes clear that it ''does not prohibit any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States, a State or a political subdivision of a State, or of an intelligence agency of the United States.'' DOJ requested that the Commission explicitly incorporate lawfully authorized investigative, protective, or intelligence activities into the exemptions to the Commission's implementing rule. In light of the statutory language specifying that such activities are not prohibited by the Act and DOJ's request that such activities be included in the exemptions to the Commission's implementing rule, the proposed rule incorporated the two exemptions specified in the Act, and expanded the exemption for law enforcement activities to cover protective and intelligence activities. No commenters objected to the proposed rule, and AT&T, the only commenter other than DOJ that addressed the exemptions in the proposed rule, supported their adoption. Thus, the record supports our decision to include those exemptions in the rule we adopt today.

12. We decline to adopt any other exemptions from the Act. Commenters have proposed a number of additional exemptions, all of which cover practices that, as described by the commenters themselves, would not violate the plain language of the Act. Some commenters assert that absent additional exemptions, the rules might be misinterpreted to prohibit normal and helpful business practices, such as those designed to facilitate communications with customers. As a result some commenters ask for broad exemptions to the Act. AT&T, for example, asks the Commission to make clear that caller ID manipulation ''for legitimate business reasons'' is exempt; inContact asks the Commission to ''exempt all uses not specifically intended to defraud or deceive consumers''; and USTelecom and Verizon ask the Commission to exempt ''any action required by law or permitted under § 64.1601(d).'' Still other commenters propose exemptions for caller identification manipulation involving specific types of practices or actors. For example, a number of commenters representing telecommunications and VoIP providers express support for an exemption for carriers and providers that transmit caller ID information they receive from their customers or other providers, even if it turns out to be inaccurate. Commenters that provide call management services for telemarketers and debt collectors, and those that provide caller ID spoofing services to the public, suggest that they should be exempt from responsibility for bad actors, unless the service provider has the necessary intent to defraud, cause harm, or wrongfully obtain anything of value. Companies that provide call management services to telemarketers and debt collectors have also asked the Commission for an exemption allowing manipulation of caller ID information so that a call recipient's caller ID displays a local number, regardless of where the calling party is located. NNEDV suggests that the Commission exempt victim service providers, and a private investigator requests that the Commission include an exemption for lawful use by licensed private investigators. We do not find any of these exemptions to be necessary or appropriate.

13. We note that those commenters that requested that the Commission exempt manipulation of caller ID information in order to display a local phone number, asked in the alternative that the Commission clarify that manipulating caller ID to display a local number is not a violation of the Act. We

agree that such a practice is not in and of itself a violation of the Act. We note, however, that if the display of a ''spoofed'' local number is done as part of a scheme to defraud, cause harm, or wrongfully obtain anything of value, then the person or entity perpetrating the scheme would be in violation of the Act.

14. The legislative history of the Act makes clear that manipulation or alteration of caller ID information done without the requisite harmful intent does not violate the Act. Nothing in our implementing rules changes that fact. Likewise, the transmission of incorrect caller ID information by carriers and providers acting without the requisite intent to defraud, cause harm or wrongfully obtain anything of value does not violate the Truth in Caller ID Act or our rules implementing the Truth in Caller ID Act. Moreover, we agree with DOJ that ''none of the commenters who advocated for a status-based exemption to the Truth in Caller ID Act were able to articulate any scenario whereby legitimate conduct would fall within the prohibitions of the Act.'' Like DOJ, we fear that allowing any such exemptions could ''create dangerous loopholes under the Act that could be exploited by criminals.'' Therefore, we decline to adopt any further exemptions from the Act at this time, primarily because the ones that have been presented to us are unnecessary.

C. Definitions

15. The *Caller ID Act NPRM* proposed adding definitions to the Commission's CPN rules for ''Interconnected VoIP service''; ''Caller identification information''; ''Caller identification service''; and ''information regarding the origination'' of a call. We adopt the proposed definitions for all four of those terms, with slight modifications to the definitions of ''Caller identification service'' and ''information regarding the origination.''

16. *Interconnected VoIP service.* The Truth in Caller ID Act covers caller ID spoofing done ''in connection with any telecommunications service or IP-enabled voice service.'' As mentioned above, the rules we adopt today use the term ''interconnected VoIP service'' instead of ''IP-enabled voice service.'' We define ''interconnected VoIP service'' to have the same meaning given that term in § 9.3 of the Commission's rules. We do this because the Act defines ''IP-enabled voice service'' by reference to § 9.3 of the Commission's regulations, as they may be amended. Section 9.3 of the Commission's rules defines ''interconnected VoIP service,'' not ''IP-enabled voice service.'' Therefore, to be consistent with the apparent intent of Congress in enacting the Truth in Caller ID act, we limit the scope of the rule's coverage to telecommunications services and interconnected VoIP services.

17. DOJ and some other commenters recommend that we adopt rules that cover VoIP services more expansively than the Commission's definition of ''Interconnected VoIP'' service in § 9.3 of its rules does. We find that the Act's incorporation of the Commission's rule defining interconnected VoIP service calls for applying the current definition found in § 9.3 (as it may be amended over time). Consequently, the rules we adopt today use the term ''interconnected VoIP service'' and specify that it has the same meaning given the term ''interconnected VoIP service'' in 47 CFR 9.3 as it currently exists or may hereafter be amended. However, we are cognizant of the importance of protecting consumers from malicious caller ID spoofing as broadly as possible. To that end, we raise this issue in the Report to Congress for further consideration.

18. *Caller identification information.* We define ''caller identification information'' to mean ''information provided by a caller identification service regarding the telephone number of, or other information regarding the origination of, a call made using a telecommunications service or interconnected VoIP service.'' This is the definition the Commission proposed in the *Caller ID Act NPRM* and no commenters offered any reason not to use this definition.

19. *Caller identification service.* We define ''caller identification service'' to mean ''any service or device designed to provide the user of the service or device with the telephone number of, or other information regarding the origination of, a call made using a telecommunications service or interconnected VoIP service.'' Unlike the proposed rule, the definition of ''caller identification service'' that we adopt today does not explicitly reference automatic number identification (ANI) because, as discussed below, we have defined ''information regarding the origination'' to include ''billing number information, including charge number, ANI, or pseudo-ANI.'' By including such billing number information in the definition of ''information regarding the origination'' we effectively include within the definition of ''caller identification service'' any service or device designed to provide the user with any form of the calling party's billing number, including charge number, ANI, or pseudo-ANI.

20. *Information regarding the origination (of a call).* The definitions of ''caller identification information'' and ''caller identification service'' in the Act and in the rules we adopt today both use the phrase ''the telephone number of, or other information regarding the origination of, a call.'' We define ''information regarding the origination'' to mean any: (1) Telephone number; (2) portion of a telephone number, such as an area code; (3) name; (4) location information; (5) billing number information, including charge number, ANI, or pseudo-ANI; or (6) other information regarding the source or apparent source of a telephone call. The definition we adopt today mirrors the proposed definition, but adds ''billing number information including charge number, ANI, or pseudo-ANI'' to the types of information that constitute ''information regarding the origination.'' We add these types of information to the definition of ''information regarding the origination'' in response to commenters' concerns about the importance of transmission of accurate billing information, including charge number, ANI and pseudo-ANI, to caller identification services used by emergency services providers.

21. Our current rules relating to the delivery of CPN services define ANI as referring to the ''delivery of the calling party's billing number by a local exchange carrier to any interconnecting carrier for billing or routing purposes, and to the subsequent delivery of such number to end users.'' The *Caller ID Act NPRM* sought comment on whether the Commission should use a different definition of ANI for purposes of the Truth in Caller ID Act, and in particular, whether the Commission should include a definition of ANI that encompasses charge party numbers delivered by interconnected VoIP providers. Some commenters requested that the Commission revise the current definition of ANI to encompass billing numbers delivered by interconnected VoIP providers. The terms ANI, calling party number, and charge number in § 64.1600 of our rules are used in sections of the rule that we have not addressed in this rulemaking; therefore we decline to amend those definitions at this time. Other commenters more generally suggested that the Commission make sure to include billing numbers, charge number, ANI and pseudo-ANI information within the ambit of the rule.

22. Spoofing caller identification information transmitted to emergency services providers is a particularly dangerous practice, and one that Congress was particularly concerned

about when adopting the Truth in Caller ID Act. ANI and pseudo-ANI are the foundations of the emergency services routing infrastructure in the United States and derive their data exclusively from information maintained in the records of the originating carrier. The delivery of accurate information for any person who dials 911 or seeks assistance via 10-digit emergency and non-emergency numbers is fundamental to ensuring that the correct identifying information is transmitted with those calls. While this information may not be subject to manipulation by callers in the ordinary course, if an individual or entity did spoof ANI, the individual could conceal his or her identity and location, and could tie up public response capacity by initiating spoofed calls designed to cause the dispatch of responders to locations where no emergency is at hand. Given the rapid evolution of technology, and the consequences of spoofing ANI and pseudo-ANI, we find that the delivery of caller identification information to E911 public safety answering points (PSAPs), which use ANI or pseudo-ANI to look up the caller's name and location information on emergency calls, should be considered a type of ''information regarding the origination'' of a call.

23. The *Caller ID Act NPRM* sought comment on whether there are other things that should be included in the definition, specifically, information transmitted in the SS7 Jurisdiction Information Parameter (JIP) code that provides information about the location of a caller who has ported his number or is calling over a mobile service. As the record demonstrates, use of the JIP code can benefit law enforcement and public safety, and can be used for improved routing for emergencies. Therefore, we clarify that ''location information'' includes information transmitted in the SS7 JIP code. However, in encompassing information transmitted in the JIP code within our definition, we do not require that any providers, including CMRS and VoIP providers, populate the JIP in signaling data.

D. Caller ID Blocking

24. The Truth in Caller ID Act specifies that it is not intended to be construed to prevent or restrict any person from blocking the transmission of caller identification information. The legislative history shows that Congress intended to protect and preserve subscribers' ability to block the transmission of their own caller identification information to called parties. Consequently, like the proposed rules, the rules we adopt today provide that a person or entity that blocks or seeks to block a caller identification service from transmitting or displaying that person or entity's own caller identification information shall not be liable for violating our rules implementing the Truth in Caller ID Act.

25. Although our rules generally allow callers to block caller ID, as discussed in the *Caller ID Act NPRM,* telemarketers are required to transmit caller identification information, and the phone number they transmit must be one that a person can call to request placement on a company-specific do-not-call list. This requirement allows consumers to more easily identify incoming telemarketing calls and to make informed decisions about whether to answer particular calls. It also facilitates consumers' ability to request placement on company-specific do-not-call lists. Additionally, the requirement assists law enforcement investigations into telemarketing complaints. Therefore, our rules make clear that persons or entities engaged in telemarketing remain obligated to transmit caller identification information.

E. Third-Party Spoofing Services

26. As discussed above, one of the reasons that it is easy for anyone to spoof their caller ID is that third-party caller ID spoofing services are widely available and inexpensive. There are typically four steps to the process of using a third-party caller ID spoofing service to spoof a call. First, the customer places a call to a company-controlled toll free or POTS line number. Second, after the first call is connected, the customer enters a personal identification number and then enters the number he or she wants to substitute as the caller ID that is transmitted to the called party. Third, the customer enters the phone number he or she wants to call; and fourth, the spoofing provider—or the carrier it uses—delivers the call to the terminating carrier serving the called number with the requested substitute number transmitted as the caller's CPN.

27. Recognizing the role spoofing providers play in facilitating caller ID spoofing, the Commission sought comment on whether the Commission may, and should, adopt rules imposing obligations on providers of caller ID spoofing services when they are not themselves acting with intent to defraud, cause harm, or wrongfully obtain anything of value. More specifically, the Commission also sought comment on whether it should impose record-keeping requirements on caller ID spoofing providers. In addition, the Commission sought comment on a proposal made by DOJ, and supported by the Minnesota Attorney General, to adopt rules requiring ''public providers of caller ID spoofing services to make a good-faith effort to verify that a user has the authority to use the substituted number, such as by placing a one-time verification call to that number.''

28. Although Itellas and Teltech, the two third-party caller ID spoofing services that commented on the *Caller ID Act NPRM,* indicate that they do maintain records of the calls they facilitate and that they cooperate with law enforcement investigations, there is little support among the commenters for the adoption of rules requiring third-party spoofing providers to maintain records. The third-party spoofing providers strongly object to any rule requiring them to verify that their customers have a right to use the phone number they choose to spoof. Itellas and TelTech both argue that requiring users of caller ID services to verify that they have authority to use the spoofed number would be pointless and ineffective, because people or entities using caller ID spoofing to carry out a criminal enterprise can purchase the software to spoof caller ID rather than use a third-party provider. They also argue that verification cannot establish a caller's intent, and absent malintent there can be no violation of the Truth in Caller ID Act. As TelTech explains, ''[u]sing a number you do not have permission to spoof is not illegal under the Act.'' In its reply comments, NNEDV agrees that verification requirements would be inconsistent with the intent expressed in the legislative history of the Act, which recognized the importance of caller ID spoofing to protect victims of domestic violence. According to NNEDV, a verification requirement ''would endanger victims and 'domestic violence shelters that provide false caller ID number (sic) to prevent call recipients from discovering the location of victims.''' Although NNEDV objects to DOJ's proposal that the Commission impose verification requirements on caller ID spoofing services, it does propose that the Commission require spoofing services to give prominent notice that use of their services in violation of the Truth in Caller ID Act is unlawful.

29. We are very concerned about the harmful effects of caller ID spoofing done with malicious intent. We also recognize that requiring caller ID spoofing services to verify that users have the authority to use the substitute number would likely reduce the use of

caller ID spoofing to further criminal schemes, and could simplify law enforcement efforts to determine who is behind a caller ID spoofing scheme. Likewise, the public would benefit from having third-party caller ID spoofing providers clearly and conspicuously notify their users about the practices prohibited by the Truth in Caller ID Act. However, we are not convinced that it is appropriate for the Commission to impose such obligations on third-party caller ID spoofing service providers at this time. In crafting the Truth in Caller ID Act, we believe that Congress intended to balance carefully the drawbacks of malicious caller ID spoofing against the benefits provided by legitimate caller ID spoofing. The Act prohibits spoofing providers, like all other persons and entities in the United States, from knowingly spoofing caller ID with malicious intent. However, the Act does not expressly impose additional obligations on providers of caller ID spoofing services. Following Congress' lead, we decline to impose additional obligations on third-party spoofing providers at this time.

30. We are cognizant of the fact that spoofing providers can, and sometimes do, detect and prevent some types of illegitimate manipulation of caller ID spoofing. Itellas, for example, noted in its comments that its system does not allow customers to call or display 911, in order to prevent use of its service for swatting. Itellas' system also prevents its customers from using a specific spoofed number when placing calls to toll free numbers in order to prevent users from using the phone number associated with a stolen credit card or with a specific bank account to activate the credit card, or to transfer money from the compromised bank account. In its comments, TelTech represents that it has closed accounts that it has identified as appearing to be used to commit crimes, including money transfer fraud, activation of stolen credit cards, or identity theft. However, spoofing services do not necessarily know the intent with which their customers place spoofed calls. Once the Commission's rules are in force, we will have the opportunity to determine whether the current rules are sufficient to deter malicious caller ID spoofing. If they are not, we can revisit the issue. In the meantime, we raise the issue of liability for third-party providers in the report the Act requires the Commission to submit to Congress.

31. We want to make clear that our decision not to impose additional obligations on third-party caller ID spoofers in no way immunizes them from the obligation to comply with the Act. Where a caller ID spoofing service causes, directly or indirectly, the transmission or display of false or misleading caller ID information with the intent to defraud, cause harm, or wrongfully obtain anything of value, such service will be in violation of the Truth in Caller ID Act and our rules. Our conclusion follows from a natural reading of the statute, which applies to any ''person'' who causes caller ID services to transmit misleading or inaccurate caller ID information. Likewise, although we do not decide the matter here, liability questions would arise if the totality of the circumstances demonstrated that a third-party spoofing provider had promoted its services to others as a means to defraud, cause harm, or wrongfully obtain anything of value.

32. *Caller ID Unmasking.* As mentioned in the *Caller ID Act NPRM,* some entities—often the same ones that offer spoofing services—also offer the ability to unmask a blocked number, effectively stripping out the privacy indicator chosen by the calling party. We remain deeply concerned about these unmasking services, which circumvent the privacy protections afforded by the Commission's CPN rules. The record reflects concern regarding these services as well. However, the record is not sufficiently robust to support amendments to our rules at this time. The Commission will consider whether to take further rulemaking action to address these services in the future. In the meantime, we take this opportunity to remind carriers of their obligations to honor callers' privacy requests.

F. Amendments to the Commission's Enforcement Rules

33. The Act provides for additional forfeiture penalties for violations of subsection 227(e) of the Communications Act, and new procedures for imposing and recovering such penalties. In order to fully implement the Truth in Caller ID Act, the Commission proposed amendments to its forfeiture rule, 47 CFR 1.80. The proposed amendments specified the forfeiture penalties the Commission proposed to assess for violations of the Truth in Caller ID Act, and proposed procedures for imposing penalties and recovering such penalties. The Commission also proposed some minor revisions to our forfeiture rules to address issues not directly related to the Truth in Caller ID Act. For the reasons discussed below, we now adopt the proposed amendments to our forfeiture rules, with some minor modifications.

34. *Amount of Penalties.* The Act specifies that the penalty for a violation of the Act ''shall not exceed $10,000 for each violation, or 3 times that amount for each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $1,000,000 for any single act or failure to act.'' These forfeitures are in addition to penalties provided for elsewhere in the Communications Act. Therefore, to implement these provisions of the Truth in Caller ID Act, we adopt the Commission's proposal to amend section 1.80(b) of our rules to include a provision specifying the maximum amount of additional fines that can be assessed for violations of the Truth in Caller ID Act. In the interest of consistency and clarity, we also amend the text and chart in Section III of what is now the ''Note to Paragraph (b)(5)'' to include information about the maximum additional forfeitures provided for by the Truth in Caller ID Act.

35. The Truth in Caller ID Act establishes the maximum amount of additional forfeiture penalties the Commission can assess for a violation of the Act, but it does not specify how the Commission should determine the forfeiture amount in any particular situation. In order to provide guidance about the factors the Commission will use in determining the amount of penalty it will assess for violations of the Truth in Caller ID Act, we adopt the Commission's proposal to employ the balancing factors the Commission typically considers when determining the amount of a forfeiture penalty. Those factors are set out in section 503(b)(2)(E) of the Communications Act and § 1.80(b)(4) of the Commission's rules. The balancing factors include ''the nature, circumstances, extent, and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.'' These factors allow the Commission to properly consider the specific facts of each case when determining an appropriate forfeiture penalty.

36. *Procedure for Determining Penalties.* With respect to the procedure for determining or imposing a penalty, the Act provides that ''[a]ny person that is determined by the Commission, in accordance with paragraphs (3) and (4) of section 503(b) [of the Communications Act], to have violated this subsection shall be liable to the United States for a forfeiture penalty.'' It also states that ''[n]o forfeiture penalty shall be determined under clause (i) against any person unless such person

receives the notice required by section 503(b)(3) or section 503(b)(4) [of the Communications Act].'' As the Commission indicated in the *Caller ID Act NPRM,* taken together, sections 503(b)(3) and 503(b)(4) allow the Commission to impose a forfeiture penalty against a person through either a hearing or a written notice of apparent liability (NAL), subject to certain procedures. The Truth in Caller ID Act makes no reference to section 503(b)(5) of the Communications Act, which states that the Commission may not assess a forfeiture under any provision of section 503(b) against any person, who: (i) ''Does not hold a license, permit, certificate, or other authorization issued by the Commission''; (ii) ''is not an applicant for a license, permit, certificate, or other authorization issued by the Commission''; or (iii) is not ''engaging in activities for which a license, permit, certificate, or other authorization is required,'' unless the Commission first issues a citation to such person in accordance with certain procedures. As the Commission explained in the *Caller ID Act NPRM,* that omission suggests that Congress intended to give the Commission the authority to proceed expeditiously to stop and, where appropriate, assess a forfeiture penalty against, any person or entity engaged in prohibited caller ID spoofing without first issuing a citation. Having received no comments disagreeing with the Commission's proposed approach, we find that it is appropriate and consistent with Congressional intent to adopt rules that allow the Commission to determine or impose a forfeiture penalty for a violation of section 227(e) against ''any person,'' regardless of whether that person holds a license, permit, certificate, or other authorization issued by the Commission; is an applicant for any of the identified instrumentalities; or is engaged in activities for which one of the instrumentalities is required.

37. We also adopt rules that amend § 1.80(a) of our rules to add a new subsection (4) providing that forfeiture penalties may be assessed against any person found to have ''violated any provision of section 227(e) of the Communications Act or of the rules issued by the Commission under section 227(e) of that Act.'' In contrast to section 503(b)(1)(B) of the Communications Act, which provides for a forfeiture penalty against anyone who has ''willfully or repeatedly'' failed to comply with any provisions of the Communications Act, or any regulations issued by the Commission under the Act, the Truth in Caller ID Act does not require ''willful'' or ''repeated'' violations to justify imposition of a penalty. Therefore, we adopt new § 1.80(a)(4), in accordance with Congressional direction that the Commission have authority to assess a forfeiture penalty for all violations of section 227(e) or of the rules issued by the Commission under that section of the Act.

38. *Statute of Limitations.* The Truth in Caller ID Act specifies that ''[n]o forfeiture penalty shall be determined or imposed against any person under [section 227(e)(5)(i)] if the violation charged occurred more than 2 years prior to the date of issuance of the required notice or notice of apparent liability.'' We note that this differs from the more general limitations provision of section 503(b)(6) of the Communications Act, which provides for a one-year statute of limitations in most cases. Given the explicit language of the Truth in Caller ID Act, however, we find that the longer two-year statute of limitations applies to enforcement of the Truth in Caller ID Act.

39. *Miscellaneous.* We also take this opportunity to revise the undesignated paragraph in § 1.80(a) to address issues not directly related to implementation of the Truth in Caller ID Act and to redesignate that undesignated text as ''Note to paragraph 1.80(a).'' First, with respect to the proposed revisions, in order to ensure that the language in the rule encompasses the language used in all of the statutory provisions, we amend the rule to specify that the forfeiture amounts set forth in § 1.80(b) are inapplicable ''to conduct which is subject to a forfeiture penalty *or fine''* under the various statutory provisions listed. (Emphasis added.) Second, we amend the rule to change the references to sections 362(a) and 362(b) to sections 364(a) and 364(b) respectively, in order that the statutory provision references match those used in the Communications Act, rather than the sections of the U.S. Code. Third, we delete section 503(b) from the list of statutory provisions to which the forfeiture amounts in § 1.80(b) do not apply, because the inclusion was in error; § 1.80(b) implements the forfeiture amounts of section 503(b), and so the penalties set forth in § 1.80(b) apply to forfeiture under section 503(b).

Procedural Issues

A. Paperwork Reduction Act

40. This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. In addition, therefore, it does not contain any new or modified information collection burdens for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4).

B. Congressional Review Act

41. The Commission will send a copy of this Report and Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A).

C. Final Regulatory Flexibility Certification

42. The Regulatory Flexibility Act of 1980, as amended (RFA) requires that a regulatory flexibility analysis be prepared for rulemaking proceedings, unless the agency certifies that ''the rule will not have a significant economic impact on a substantial number of small entities.'' The RFA generally defines ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).

43. In this Report and Order, the Commission adopts rules implementing the Truth in Caller ID Act. The Truth in Caller ID Act and the implementing rules we adopt today prohibit any person or entity in the United States from knowingly altering or manipulating caller identification information with the intent to defraud, cause harm, or wrongfully obtain anything of value. The *Caller ID Act NPRM* sought comment on benefits and burdens that would be imposed on small entities by the proposed rules and sought comment on an initial regulatory flexibility analysis (IRFA). No commenters sought to argue that the proposed rules would have a significant impact on a substantial number of small entities. Indeed, no commenters raised any concerns about the impact of the proposed rules on small entities, as such.

44. The NPRM also sought comment on whether the Commission may, and should, adopt rules imposing obligations on providers of caller ID spoofing services when they are not themselves acting with intent to defraud, cause harm, or wrongfully obtain anything of value. It also sought

comment more specifically on whether the Commission should impose recordkeeping requirements on caller ID spoofing providers, as well as on a proposal made by DOJ and supported by the Minnesota Attorney General to adopt rules requiring ''public providers of caller ID spoofing services to make a good-faith effort to verify that a user has the authority to use the substituted number, such as by placing a one-time verification call to that number. In this Order, we decline to impose any additional obligations on providers of caller ID spoofing services at this time. Therefore, to the extent that such requirements would have had an economic impact on some small entities, that impact will not occur. Indeed, the record contains nothing showing that the cost of compliance obligations would be economically significant or would affect a substantial number of small entities. Indeed, based on the record before us, we are persuaded that a substantial number of small businesses do not engage in caller ID spoofing with the intent to defraud, cause harm, or wrongfully obtain anything of value, and those that do are already prohibited from doing so by the Truth in Caller ID Act. Therefore, we certify that the requirements of this Report and Order will not have a significant economic impact on a substantial number of small entities. The Commission will send a copy of the Report and Order including a copy of this final certification, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996. *See* 5 U.S.C. 801(a)(1)(A). In addition, the Report and Order and this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration, and will be published in the **Federal Register**. *See* 5 U.S.C. 605(b).

Ordering Clauses

45. Accordingly, *it is ordered* that, pursuant to section 2 of the Truth in Caller ID Act of 2009, Public Law 11–331, and sections 1, 4(i), 4(j), 227, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(j), 227 and 303(r), this Report and Order, with all attachments, is adopted.

46. *It is further ordered* that parts 1 and 64 of the Commission's rules are amended.

47. *It is further ordered* that pursuant to §§ 1.4(b)(1) and 1.103(a) of the Commission's rules, 47 CFR 1.4(b)(1), 1.103(a), this Report and order shall be effective 30 days after publication of a summary in the **Federal Register.**

48. *It is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, shall send a copy of this Report and Order, including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects

47 CFR Part 1

Penalties.

47 CFR Part 64

Communications common carriers, Caller identification information, Telecommunications, Telegraph, Telephone.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR parts 1 and 64 as follows:

PART 1—PRACTICE AND PROCEDURE

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

Authority: 15 U.S.C. 79 *et seq.;* 47 U.S.C. 151, 154(i), 154(j), 155, 157, 225, 227, 303(r), and 309.

■ 2. Amend § 1.80 as follows:
■ a. Revise paragraph (a)(3)
■ b. Designate the undesignated paragraph following (a)(4) as ''Note to Paragraph (a)'' and revise it;
■ c. Redesignate paragraphs (a)(4), (b)(3), (b)(4), (b)(5), and (c)(3), as paragraphs (a)(5), (b)(4), (b)(5), (b)(6), and (c)(4), respectively;
■ d. Redesignate ''Note to Paragraph (b)(4)'' as ''Note to paragraph (b)(5)'' and revise it;
■ e. Add new paragraphs (a)(4), (b)(3), and (c)(3);
■ f. Revise redesignated paragraph (b)(4); and
■ g. Revise paragraph (d).

§ 1.80 Forfeiture proceedings.

(a) * * *

(3) Violated any provision of section 317(c) or 508(a) of the Communications Act;

(4) Violated any provision of section 227(e) of the Communications Act or of the rules issued by the Commission under section 227(e) of that Act; or

* * * * *

Note to paragraph (a): A forfeiture penalty assessed under this section is in addition to any other penalty provided for by the Communications Act, except that the penalties provided for in paragraphs (b)(1) through (4) of this section shall not apply to conduct which is subject to a forfeiture penalty or fine under sections 202(c), 203(e), 205(b), 214(d), 219(b), 220(d), 223(b), 364(a), 364(b), 386(a), 386(b), 506, and 634 of the Communications Act. The remaining provisions of this section are applicable to such conduct.

(b) * * *

(3) Any person determined to have violated section 227(e) of the Communications Act or the rules issued by the Commission under section 227(e) of the Communications Act shall be liable to the United States for a forfeiture penalty of not more than $10,000 for each violation or three times that amount for each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $1,000,000 for any single act or failure to act. Such penalty shall be in addition to any other forfeiture penalty provided for by the Communications Act.

(4) In any case not covered by paragraphs (b)(1), (b)(2) or (b)(3) of this section, the amount of any forfeiture penalty determined under this section shall not exceed $16,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $112,500 for any single act or failure to act described in paragraph (a) of this section.

* * * * *

Note to paragraph (b)(5): *Guidelines for Assessing Forfeitures.* The Commission and its staff may use these guidelines in particular cases. The Commission and its staff retain the discretion to issue a higher or lower forfeiture than provided in the guidelines, to issue no forfeiture at all, or to apply alternative or additional sanctions as permitted by the statute. The forfeiture ceilings per violation or per day for a continuing violation stated in section 503 of the Communications Act and the Commission's rules are described in § 1.80(b)(5)(iii). These statutory maxima became effective September 2, 2008. Forfeitures issued under other sections of the Act are dealt with separately in section III of this note.

Section I. Base Amounts for Section 503 Forfeitures

Forfeitures	Violation amount
Misrepresentation/lack of candor	(1)
Construction and/or operation without an instrument of authorization for the service	$10,000
Failure to comply with prescribed lighting and/or marking	10,000
Violation of public file rules	10,000
Violation of political rules: reasonable access, lowest unit charge, equal opportunity, and discrimination	9,000
Unauthorized substantial transfer of control	8,000
Violation of children's television commercialization or programming requirements	8,000
Violations of rules relating to distress and safety frequencies	8,000
False distress communications	8,000
EAS equipment not installed or operational	8,000
Alien ownership violation	8,000
Failure to permit inspection	7,000
Transmission of indecent/obscene materials	7,000
Interference	7,000
Importation or marketing of unauthorized equipment	7,000
Exceeding of authorized antenna height	5,000
Fraud by wire, radio or television	5,000
Unauthorized discontinuance of service	5,000
Use of unauthorized equipment	5,000
Exceeding power limits	4,000
Failure to respond to Commission communications	4,000
Violation of sponsorship ID requirements	4,000
Unauthorized emissions	4,000
Using unauthorized frequency	4,000
Failure to engage in required frequency coordination	4,000
Construction or operation at unauthorized location	4,000
Violation of requirements pertaining to broadcasting of lotteries or contests	4,000
Violation of transmitter control and metering requirements	3,000
Failure to file required forms or information	3,000
Failure to make required measurements or conduct required monitoring	2,000
Failure to provide station ID	1,000
Unauthorized pro forma transfer of control	1,000
Failure to maintain required records	1,000

[1] Statutory Maximum for each Service.

VIOLATIONS UNIQUE TO THE SERVICE

Violation	Services affected	Amount
Unauthorized conversion of long distance telephone service	Common Carrier	$40,000
Violation of operator services requirements	Common Carrier	7,000
Violation of pay-per-call requirements	Common Carrier	7,000
Failure to implement rate reduction or refund order	Cable	7,500
Violation of cable program access rules	Cable	7,500
Violation of cable leased access rules	Cable	7,500
Violation of cable cross-ownership rules	Cable	7,500
Violation of cable broadcast carriage rules	Cable	7,500
Violation of pole attachment rules	Cable	7,500
Failure to maintain directional pattern within prescribed parameters	Broadcast	7,000
Violation of main studio rule	Broadcast	7,000
Violation of broadcast hoax rule	Broadcast	7,000
AM tower fencing	Broadcast	7,000
Broadcasting telephone conversations without authorization	Broadcast	4,000
Violation of enhanced underwriting requirements	Broadcast	2,000

Section II. Adjustment Criteria for Section 503 Forfeitures

Upward Adjustment Criteria

(1) Egregious misconduct.
(2) Ability to pay/relative disincentive.
(3) Intentional violation.
(4) Substantial harm.
(5) Prior violations of any FCC requirements.
(6) Substantial economic gain.
(7) Repeated or continuous violation.

Downward Adjustment Criteria

(1) Minor violation.
(2) Good faith or voluntary disclosure.
(3) History of overall compliance.
(4) Inability to pay.

Section III. Non-Section 503 Forfeitures That Are Affected by the Downward Adjustment Factors

Unlike section 503 of the Act, which establishes maximum forfeiture amounts, other sections of the Act, with two exceptions, state prescribed amounts of forfeitures for violations of the relevant section. These amounts are then subject to mitigation or remission under section 504 of the Act. One exception is section 223 of the Act, which provides a maximum forfeiture per day. For convenience, the Commission will treat this amount as if it were a prescribed base amount, subject to downward adjustments. The other exception is section 227(e) of the Act, which provides maximum forfeitures per violation, and for continuing violations. The Commission will apply the factors set forth in section 503(b)(2)(E) of the Act and section III of this note to determine the amount of the penalty to assess in any particular situation. The following amounts are adjusted for inflation pursuant to the Debt Collection Improvement Act of 1996 (DCIA), 28 U.S.C. 2461. These non-section 503 forfeitures may be adjusted downward using the ''Downward Adjustment Criteria'' shown for section 503 forfeitures in section II of this note.

Violation	Statutory amount ($)
Sec. 202(c) Common Carrier Discrimination	9,600, 530/day.
Sec. 203(e) Common Carrier Tariffs	9,600, 530/day.
Sec. 205(b) Common Carrier Prescriptions	18,200.
Sec. 214(d) Common Carrier Line Extensions	1,320/day.
Sec. 219(b) Common Carrier Reports	1,320.
Sec. 220(d) Common Carrier Records & Accounts	9,600/day.
Sec. 223(b) Dial-a-Porn	75,000/day.
Sec. 227(e)	10,000/violation.
	30,000/day for each day of continuing violation, up to 1 million for any single act or failure to act.
Sec. 364(a) Forfeitures (Ships)	7,500 (owner).
Sec. 364(b) Forfeitures (Ships)	1,100 (vessel master).
Sec. 386(a) Forfeitures (Ships)	7,500/day (owner).
Sec. 386(b) Forfeitures (Ships)	1,100 (vessel master).
Sec. 634 Cable EEO	650/day.

* * * * *

(c) * * *

(3) In the case of a forfeiture imposed under section 227(e), no forfeiture will be imposed if the violation occurred more than 2 years prior to the date on which the appropriate notice is issued.

* * * * *

(d) *Preliminary procedure in some cases; citations.* Except for a forfeiture imposed under subsection 227(e)(5) of the Act, no forfeiture penalty shall be imposed upon any person under this section of the Act if such person does not hold a license, permit, certificate, or other authorization issued by the Commission, and if such person is not an applicant for a license, permit, certificate, or other authorization issued by the Commission, unless, prior to the issuance of the appropriate notice, such person:

(1) Is sent a citation reciting the violation charged;

(2) Is given a reasonable opportunity (usually 30 days) to request a personal interview with a Commission official, at the field office which is nearest to such person's place of residence; and

(3) Subsequently engages in conduct of the type described in the citation. However, a forfeiture penalty may be imposed, if such person is engaged in (and the violation relates to) activities for which a license, permit, certificate, or other authorization is required or if such person is a cable television operator, or in the case of violations of section 303(q), if the person involved is a nonlicensee tower owner who has previously received notice of the obligations imposed by section 303(q) from the Commission or the permittee or licensee who uses that tower. Paragraph (c) of this section does not limit the issuance of citations. When the requirements of this paragraph have been satisfied with respect to a particular violation by a particular person, a forfeiture penalty may be imposed upon such person for conduct of the type described in the citation without issuance of an additional citation.

* * * * *

PART 64—MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

■ 3. The authority citation for part 64 is revised to read as follows:

Authority: 47 U.S.C. 154, 254(k), 227; secs. 403(b)(2)(B), (c), Pub. L. 104–104, 100 Stat. 56. Interpret or apply 47 U.S.C. 201, 218, 222, 225, 226, 207, 228, and 254(k) unless otherwise noted.

■ 4. Section 64.1600 is amended by redesignating paragraphs (c), (d), (e), and (f) as paragraphs (e), (f), (i), and (j) respectively and by adding new paragraphs (c), (d), (g), and (h) to read as follows:

§ 64.1600 Definitions.

* * * * *

(c) *Caller identification information.* The term ''caller identification information'' means information provided by a caller identification service regarding the telephone number of, or other information regarding the origination of, a call made using a telecommunications service or interconnected VoIP service.

(d) *Caller identification service.* The term ''caller identification service'' means any service or device designed to provide the user of the service or device with the telephone number of, or other information regarding the origination of, a call made using a telecommunications service or interconnected VoIP service.

* * * * *

(g) *Information regarding the origination.* The term ''information regarding the origination'' means any:

(1) Telephone number;

(2) Portion of a telephone number, such as an area code;

(3) Name;

(4) Location information;

(5) Billing number information, including charge number, ANI, or pseudo-ANI; or

(6) Other information regarding the source or apparent source of a telephone call.

(h) *Interconnected VoIP service.* The term ''interconnected VoIP service'' has the same meaning given the term ''interconnected VoIP service'' in 47 CFR 9.3 as it currently exists or may hereafter be amended.

* * * * *

§ 64.1604 [Redesignated as § 64.1605]

■ 5. Section 64.1604 is redesignated as section 64.1605, and a new section 64.1604 is added to read as follows:

§ 64.1604 Prohibition on transmission of inaccurate or misleading caller identification information.

(a) No person or entity in the United States shall, with the intent to defraud, cause harm, or wrongfully obtain anything of value, knowingly cause, directly or indirectly, any caller identification service to transmit or display misleading or inaccurate caller identification information.

(b) *Exemptions.* Paragraph (a) of this section shall not apply to:

(1) Lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States, a State, or a political subdivision of a State, or of an intelligence agency of the United States; or

(2) Activity engaged in pursuant to a court order that specifically authorizes the use of caller identification manipulation.

(c) A person or entity that blocks or seeks to block a caller identification service from transmitting or displaying that person or entity's own caller identification information pursuant to § 64.1601(b) of this part shall not be liable for violating the prohibition in paragraph (a) of this section. This paragraph (c) does not relieve any person or entity that engages in telemarketing, as defined in § 64.1200(f)(10) of this part, of the obligation to transmit caller identification information under § 64.1601(e).

[FR Doc. 2011–18165 Filed 7–19–11; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 61 and 64

[WC Docket No. 10–141; FCC 11–92]

Electronic Tariff Filing System (ETFS)

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission (Commission) adopts rule revisions enabling all tariff filers to file tariffs electronically over the Internet, using the Electronic Tariff Filing System (ETFS). Additionally, the Commission clarifies and makes more consistent certain technical rules related to tariff filings. The Commission concludes that it is appropriate to apply the same electronic filing requirements to all tariff filers and expands the applicability of the Commission's rules to include all tariff filers. The Commission also concludes that the Commission's rules, which require specific formatting and composition of tariffs, will now apply to all tariff filers. The Chief of the Wireline Competition Bureau will be responsible for administering the adoption of electronic tariff filing requirements for all tariff filers.

DATES: This rule contains information collection requirements that have not been approved by Office of Management and Budget. The Commission will publish a document in the **Federal Register** announcing the effective date for the revised rules. Tariff filers will then have a 60-day window in which to file their first electronic tariff.

FOR FURTHER INFORMATION CONTACT: Pamela Arluk, Wireline Competition Bureau, Pricing Policy Division, 202–418–1520. For additional information concerning the Paperwork Reduction Act information collection requirements contained in this document, send an e-mail to *PRA@fcc.gov* or contact Judith B. Herman at 202–418–0214.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Report and Order* (Order), FCC 11–92, adopted and released on June 9, 2011. The full text of the Order is available for inspection and copying during regular business hours in the FCC Reference Center, 445 Twelfth Street, SW., Room CY–A257, Portals II, Washington, DC 20554, and may also be purchased from the Commission's copy contractor, BCPI, Inc., Portals II, 445 Twelfth Street, SW., Room CY–B402, Washington, DC 20554. Customers may contact BCPI, Inc. via their Web site, *http://www.bcpi.com,* or call 1–800–378–3160. This document is available in alternative formats (computer diskette, large print, audio record, and Braille). Persons with disabilities who need documents in these formats may contact the FCC by *e-mail: FCC504@fcc.gov or phone:* 202–418–0530 or TTY: 202–418–0432.

Synopsis of Report and Order

1. In the ETFS Notice of Proposed rulemaking (NPRM), the Commission provided a detailed description of the Commission's implementation of the statutory tariff streamlining requirements and the development and implementation of the ETFS. To summarize briefly, on September 6, 1996, the Commission released the *Tariff Streamlining NPRM,* 61 FR 49,987, September 24, 1996, proposing measures to implement the tariff streamlining requirements of section 204(a)(3) of the Communications Act of 1934, as amended (Act), including a proposal that would require LECs to file tariffs electronically. The Commission began implementing the electronic filing of tariffs on January 31, 1997, when it released the *Streamlined Tariff Order.* On May 28, 1998, the Common Carrier Bureau (Bureau) released the *ETFS Order,* 63 FR 35,539, June 30, 1998, in which it established July 1, 1998, as the date after which incumbent LECs would be required to use the ETFS to file tariffs and associated documents. Although the *Tariff Streamlining NPRM* proposed mandatory electronic filing by all local exchange carriers, the Bureau limited the scope of the *ETFS Order* to incumbent LECs.

2. In 1996, the Commission ordered mandatory detariffing of most interstate, domestic interexchange services of nondominant interexchange carriers, but permitted some exceptions to the mandatory detariffing requirement. In addition, nondominant carriers continued to file tariffs for other services that were unaffected by the *Detariffing Order.* Competitive LECs are permitted to tariff interstate switched access charges if the charges are no higher than the rate charged for such services by the competing incumbent LEC except where the rural exemption applies. Competitive LECs are also permitted to tariff other interstate access services such as special access. In contrast to tariff filings by incumbent LECs, tariff filings by nondominant carriers are currently submitted on diskette, CD–ROM accompanied by a cover letter, and paper for informational tariffs, all of which are cumbersome and costly for the carrier and the Commission, and make it difficult for interested parties to review the documents due to internal distribution and storage barriers.

3. On July 15, 2010, the Commission released the *ETFS NPRM,* 75 FR 48,629, August 11, 2010, which proposed to modify the Commission's rules to require all tariff filers to file tariffs and other associated documents via the ETFS. The Commission requested comments on the benefits these rule modifications would produce. The Commission also requested comment on a number of technical rule modifications that would be necessary to implement the new electronic filing requirements. Four comments were received, all urging the Commission to quickly adopt the proposed rules.

4. As shown below, electronic filing for all tariff filers will greatly benefit the public, carriers, and the Commission. Accordingly, we adopt rule modifications that require electronic tariff filing for all tariff filers. Specifically, we require all tariff filers to follow the Commission's rules for electronic tariff filing and file using the ETFS for their tariffs, tariff revisions, Base Documents, and associated documents, including applications for special permission, and petitions and replies to petitions against tariff filings.

5. After review of the record, we conclude that electronic filing of all tariffs and associated documents will facilitate the administration of nondominant tariffs and therefore is in

the public interest. We also find that the same benefits realized from electronic tariff filing by incumbent LECs, as outlined in the *Tariff Streamlining NPRM,* will be realized by enabling electronic filing of tariffs and associated documents by nondominant carriers. These anticipated benefits include: reducing burdens on carriers and the Commission; facilitating access to tariffs and associated documents by the public; increasing the ease with which interested parties can review all tariffs; making all tariff information available to state and other federal regulators; and facilitating the compilation of aggregate carrier data for industry analysis purposes. In addition, electronic filing of tariffs should enable the Commission and interested parties to more efficiently identify tariffs that may be unlawful and/or in violation of Commission rules and precedent. We conclude that including all tariffs on the ETFS will improve public access to these filings and will greatly enhance the transparency and efficiency of the tariff filing process. For these reasons, we also require international dominant carriers filing pursuant to section 61.28 of the Commission's rules to be subject to electronic filing.

6. *Filing Requirements.* In the *ETFS NPRM,* we proposed that all tariff filers file electronically subject to §§ 61.14, 61.15, and 61.16 of the Commission's rules. No comments were filed opposing this proposal. Accordingly, we conclude that it is appropriate to apply the same electronic filing requirements to all tariff filers and we expand the applicability of §§ 61.14, 61.15, and 61.16 of the Commission's rules to include all tariff filers.

7. We also adopt our proposals with regard to § 61.15's FCC Registration Number (FRN) requirements. We require that, consistent with this rule, each letter of transmittal must contain the filing carrier's FRN. If more than one carrier participates in the tariff, the FRN for the filing carrier and the FRNs for each individual carrier that participates in the tariff must be included in the letter of transmittal. This will ensure that it is clear to Commission staff and the public which issuing, concurring, and other carriers are participating in a tariff. We also conclude that the use of consecutive transmittal numbers for letters of transmittal pursuant to the proposed revision of § 61.15 facilitates the Commission's ability to electronically match the mandatory tariff filing fee with the appropriate carrier's filing.

8. In the *ETFS NPRM,* we invited specific comment on the use of transmittal numbers if mandatory electronic filing is required. For carriers converting from non-electronic filing, we asked whether transmittal numbers should continue sequentially from the last non-electronic tariff or associated document transmission or whether transmittal numbers should start anew at the number one. Similarly for special permission applications, we asked whether the first special permission application filed electronically for a carrier should start with number one or whether the special permission application should continue to be numbered sequentially from the last non-electronically filed special permission request.

9. Commenters recommend that the existing sequential numbering be followed for both transmittal numbers and special permission applications. For example, Sprint argues that it would be confusing for the Commission and customers who review tariff filings to have the numbering restart at number one for the electronic filings because there would be duplicate transmittal and application numbers. We agree and clarify that for carriers converting from non-electronic filings, transmittal numbers must continue sequentially from the last non-electronic filing, consistent with § 61.15 of our rules. Special permission application numbers must also continue to be numbered sequentially from the last non-electronically filed application.

10. Currently, §§ 61.52 and 61.54 of our rules, which require specific formatting and composition of tariffs, apply only to dominant carriers. Because we will be requiring all carriers to file tariffs electronically, in the ETFS NPRM, we proposed that all carriers be required to comply with the formatting and composition requirements of our rules. This would ensure that all tariffs have a basic uniformity that will facilitate an ease of review for customers and other entities examining such tariffs. In its comments, Sprint argues that certain of the § 61.54 requirements would be burdensome for nondominant carriers. For example, Sprint argues that nondominant carriers should not be required to comply with § 61.54(b)(2), which requires the exact name of the carrier, a brief statement showing each class of service provided, the geographic application, and the type of facilities used to provide service be included in the tariff. Sprint also expresses concern about nondominant carriers having to comply with § 61.54(c)(3)(ii), which requires the carrier to ''indicate the transmittal number under which that page was submitted.''

11. We provide the following clarifications to address Sprint's concerns that the filing requirements, particularly the requirements of § 61.54, would be overly burdensome for nondominant carriers. Section 61.54(b)(2) requires the following information: (1) The exact name of the carrier; (2) a brief statement showing each class of service provided; (3) the geographical application; and (4) the type of facilities used to provide service to be included in the tariff. We note that most incumbent LECs comply with this requirement by including a brief statement on the Title page of the tariff, and we would expect that nondominant carriers would comply in a similar manner. Thus, we conclude that this is not an overly burdensome requirement and is helpful to Commission staff and the public reviewing the tariff by including some descriptive information on the Title page of the tariff. Therefore, we require that nondominant tariffs comply with § 61.54(b)(2), as proposed in the *ETFS NPRM.* With regard to the § 61.54(c)(3)(ii) transmittal number requirement, we clarify that this will be applied to nondominant carriers filing revisions to their tariff, on a prospective basis, once their initial Base Document has been filed electronically. This information is helpful in tracing modifications made to tariffs, so we conclude that it must be applied to all tariff filers. However, we do not expect nondominant carriers to research their previously filed tariff revisions to include different transmittal numbers on the initial Base Document. In the future, if a page is modified, the carrier must include the transmittal number under which the revised page is being submitted.

12. In the *ETFS NPRM,* we proposed amending the notice requirements of § 61.58 of our rules to add a provision requiring nondominant carriers that are eligible to file pursuant to the streamlining requirements of section 204(a)(3) of the Act, but choose not to file using these statutory timeframes, to file tariffs on at least one day's notice. This addition to § 61.58 would permit us to delete § 61.23 as duplicative, and instead require all carriers to comply with the general notice requirements of § 61.58. No carriers filed comments objecting to this proposal. To streamline our rules, we adopt this proposal to require all carriers to comply with § 61.58 of the Commission's rules and we delete § 61.23 as duplicative.

13. In the *ETFS NPRM,* we noted that a number of nondominant carriers operate under a ''doing business as'' or d/b/a name, and proposed to clarify that § 61.54 of the Commission's rules requires carriers to use their legal names in tariffs and associated documents

when filing via the ETFS. If carriers use a d/b/a name in addition to their legal name, we proposed that the d/b/a name be noted on the Title page of the tariff in addition to the ''exact name of the carrier.'' No commenters objected, and we adopt this proposal to ensure that the legal name of the carrier is clear.

14. *Compliance Deadline.* We note that ETFS has been available for use since November 17, 1997 and its use has been mandatory for incumbent LECs since July 1, 1998. Given that the ETFS has been used by the public for more than a decade, in the *ETFS NPRM,* we sought comment on the amount of time parties believe all tariff filers will need before they can comply with the mandatory tariff filing requirement. Specifically, we proposed that all tariff filers must use the ETFS for all tariff and associated document filing 120 days after a final order in this docket implementing such a requirement (or summary thereof) is published in the **Federal Register.** We also proposed that affected carriers must file their currently effective tariffs on the ETFS no later than 120 days after the revised rules become effective, which will be the carrier's initial Base Document.

15. Commenters generally supported this time period. For example, Sprint stated that 120 days should be sufficient for carriers to modify and file their tariffs. Qwest also noted that the time period was reasonable. We reject AT&T's proposal that the time period for filing electronic tariffs should be shortened to 30 days after the Commission has upgraded the ETFS to accept competitive LEC filings. We want to ensure that nondominant carriers have sufficient time to prepare for the change and Commission staff has sufficient time to respond to nondominant carrier inquiries. Accordingly, we adopt our proposal to provide a 120-day transition period, but to ensure that the ETFS will be able to process all of the new tariff filings, we also provide a window to allow carriers time to file their tariffs using the ETFS. We, therefore, conclude that the revised rules will become effective 120 days after this order is published in the **Federal Register**. Once the rules are effective, we require all tariff filers to use ETFS to file their currently effective tariffs within 60 days after the revised rules become effective. This filing will be the carrier's initial Base Document. The two-stage process will provide nondominant carriers with sufficient notice to prepare for electronic filing, and will allow greater flexibility as to the timing of the filings and help ensure that the ETFS can handle all of the new incoming filings. Therefore, once the revised rules become effective, nondominant tariff filers may file their initial Base Document any time within the 60-day period.

16. We encourage tariff filers to plan appropriately and not wait until the last day of the 60-day period, to ensure that the ETFS will be able to accept their filing. Once the initial Base Documents are filed on the ETFS, all future tariff revisions also are required to be filed electronically on the ETFS. To ensure that carriers will not continue to rely on manually filed tariffs, all tariffs previously filed with the Commission not using ETFS will be cancelled pursuant to § 61.87 of the Commission's rules. Cancellation will be effective on filing of the initial Base Document replacing the tariff or at the end of the 60-day filing window if no initial Base Document has been filed in ETFS. Because § 61.87 requires carriers, once they cancel a tariff, to revise the Title page to indicate the tariff is no longer effective, for the purpose of this initial Base Document filing only, we waive, on our own motion, the requirements to file new Title pages when a carrier cancels a tariff pursuant to § 61.87 of the Commission's rules. After the rules become effective, tariff filers will no longer be permitted to file diskette, CD–ROM and/or paper copies of tariffs and associated documents that otherwise would be filed with the Secretary, the Chief of the Pricing Policy Division of the Wireline Competition Bureau, and the Commission's commercial contractor.

17. For consistency and administrative clarity, we proposed changes to additional sections in Part 61 of the Commission's rules as shown in Appendix A of the *ETFS NPRM.* For example, we proposed consolidating the requirements for letters of transmittal and cover letters in § 61.15 of the Commission's rules, and therefore, proposed to delete §§ 61.21 and 61.33 of our rules because those rules would be duplicative of § 61.15. Commenters did not object to these proposals, and we adopt the rule revisions in Appendix A.

18. *Administration.* As we proposed in the *ETFS NPRM* and consistent with the *Streamlined Tariff Order,* we conclude that the Chief of the Wireline Competition Bureau will be responsible for administering the adoption of electronic tariff filing requirements for all tariff filers.

Final Regulatory Flexibility Analysis

19. An initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *ETFS NPRM.* The Commission sought written public comment on the proposals in the *ETFS NPRM,* including comment on the IRFA. No comments were received. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

A. Need for, and Objectives of, the Proposed Rules

20. Today, the Commission adopts a Report and Order to extend the requirement to file tariffs and associated documents electronically via the Electronic Tariff Filing System (ETFS) to all tariff filing entities. The Commission concludes that requiring the electronic filing of all tariffs and associated documents would benefit the public. The Commission concludes that the proposed rules will become effective, and therefore, the ETFS will be available for all tariff filers to use 120 days after a final order in this docket implementing such a requirement (or summary thereof) is published in the **Federal Register**. After the final rules are effective, tariff filers will have a 60-day transition to begin using the ETFS system to file their tariffs and associated documents. The Commission also concluded that the Chief of the Wireline Competition Bureau would administer the adoption of this extended electronic filing requirement.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

21. There were no comments raised that specifically addressed the rules and policies proposed in the IRFA.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules May Apply

22. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small-business concern'' under the Small Business Act. A ''small-business concern'' is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration.

23. *Total Number of Telephone Companies Affected.* The United States Bureau of the Census (Census Bureau) reports that, at the end of 1992, there were 3,497 firms engaged in providing telephone services, as defined therein, for at least one year. This number

contains a variety of different categories of carriers, including local exchange carriers, interexchange carriers, competitive access providers, cellular carriers, mobile service carriers, operator service providers, pay telephone operators, covered specialized mobile radio providers, and resellers. It seems certain that some of these 3,497 telephone service firms may not qualify as small entities or small incumbent LECs because they are not ''independently owned and operated.'' For example, a personal communications service (PCS) provider that is affiliated with an interexchange carrier having more than 1,500 employees would not meet the definition of a small business. It is reasonable to conclude that fewer than 3,497 telephone service firms are small entity telephone service firms or small incumbent LECs that may be affected by the proposed rules, herein adopted.

24. *Competitive Access Providers.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to competitive access services providers (CAPs). The closest applicable definition under the SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. According to the most recent data, there are 349 CAPs and competitive LECs engaged in the provision of competitive local exchange services. We do not have data specifying the number of these carriers that are not independently owned and operated, or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of CAPs that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are less than 349 small entity CAPs providing competitive local exchange services that may be affected by the Report and Order.

25. *Interexchange Carriers.* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to interexchange services (IXCs). The closest applicable definition under the SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. According to the most recent data, there are 204 carriers engaged in the provision of interexchange services. We do not have data specifying the number of these carriers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of IXCs that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are less than 204 small entity IXCs that may be affected by the Report and Order.

26. *Operator Service Providers (OSPs).* Neither the Commission nor the SBA has developed a small business size standard specifically for operator service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 28 carriers have reported that they are engaged in the provision of operator services. Of these, an estimated 27 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that the majority of OSPs are small entities.

D. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

27. In this Report and Order, the Commission is expanding mandatory electronic filing to all tariff filers, which include competitive LECs. The Report and Order requires that all tariff filers must follow the Commission's rules for electronic tariff filing and file via ETFS their tariffs, tariff revisions, base documents and associated documents, including applications for special permission. Moreover, in order to provide uniformity for tariff filings, the Report and Order extends certain procedural requirements to all tariff filing entities, including: specific formatting and composition requirements, the use of FCC registration numbers and the use of transmittal numbers.

E. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

28. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): ''(1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rules for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.''

29. In the *ETFS NPRM,* we sought comment from all interested parties and no parties objected to the electronic filing proposals. The Commission believes that most carriers are familiar with the Electronic Tariff Filing System, if not currently using it. As such, the Commission believes the burden on small entities will be minimal. In addition, to assist tariff filers that have not used ETFS previously, including small entity filers, the Commission is allowing carriers a 180-day transition period before they will be required to begin using ETFS.

F. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

30. None.

Final Paperwork Reduction Act of 1995 Analysis

31. This order contains new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. It has been submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new or modified information collection requirements contained in this proceeding. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might further reduce the information collection burden for small business concerns with fewer than 25 employees.

32. In this order, we have assessed the effects of electronic filing on small entities and believe the burden will be minimal. In addition, to assist tariff filers that have not used the ETFS previously, including small entity filers, the Commission is allowing carriers a 180-day transition period to begin using the ETFS.

Congressional Review Act

33. The Commission will send a copy of this Report and Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

34. Accordingly, *it is ordered,* pursuant to Sections 1, 4(i), 201–205, and 226(h)(1)(A) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 201–205, 226(h)(1)(A), that this Report and Order *is adopted.*

35. *It is further ordered* that the final rules and rule revisions adopted in this Report and Order *shall become effective* either November 17, 2011 or following

approval by the Office of Management and Budget, whichever date is later. The Commission will publish a document at a later date establishing the effective date.

36. *It is further ordered* that nondominant carriers *shall file* their initial Base Document using the Electronic Tariff Filing System no later than sixty (60) days after the final rules and revisions adopted in this Report and Order become effective.

37. *It is further ordered,* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Parts 61 and 64

Communications common carrier, Reporting and recordkeeping requirements.

Federal Communications Commission.

Bulah P. Wheeler,

Deputy Manager.

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR parts 61 and 64 as follows:

PART 61—TARIFFS

■ 1. The authority citation for part 61 continues to read as follows:

Authority: Secs. 1, 4(i), 4(j), 201–205 and 403 of the Communications Act of 1934, as amended; 47 U.S.C. 151, 154(i), 154(j), 201–205 and 403, unless otherwise noted.

■ 2. Section 61.3 is amended by redesignating paragraphs (t) through (y) as paragraphs (u) through (z) and by adding paragraph (t) to read as follows:

§ 61.3 Definitions.

* * * * *

(t) *Incumbent Local Exchange Carrier.* ''*Incumbent Local Exchange Carrier*'' or ''ILEC'' has the same meaning as that term is defined in 47 U.S.C. 251(h).

* * * * *

■ 3. Section 61.13 is amended by revising paragraphs (a) and (b) to read as follows:

§ 61.13 Scope.

(a) This applies to all tariff publications of issuing carriers required to file tariff publications electronically, and any tariff publication that a carrier chooses to file electronically.

(b) All issuing carriers that file tariffs are required to file tariff publications electronically.

* * * * *

■ 4. Section 61.14 is amended by revising paragraphs (b) and (e) to read as follows:

§ 61.14 Method of filing publications.

* * * * *

(b) In addition, except for issuing carriers filing tariffing fees electronically, for all tariff publications requiring fees as set forth in part 1, subpart G of this chapter, issuing carriers must submit the original of the cover letter (without attachments), FCC Form 159, and the appropriate fee to the address set forth in § 1.1105 of this chapter.

* * * * *

(e) Carriers that are required to file publications electronically must comply with the format requirements set forth in §§ 61.52 and 61.54, with the exception of the informational tariffs filed pursuant to 47 U.S.C. 226(h)(1)(A).

■ 5. Section 61.15 is revised to read as follows:

§ 61.15 Letters of transmittal and cover letters.

(a) All tariff publications filed with the Commission electronically must be accompanied by a letter of transmittal. All letters of transmittal filed with the Commission must be numbered consecutively by the issuing carrier beginning with Number 1. All letters of transmittal must also:

(1) Concisely explain the nature and purpose of the filing;

(2) Specify whether supporting information is required for the new tariff or tariff revision, and specify the Commission rule or rules governing the supporting information requirements for that filing;

(3) Contain a statement indicating the date and method of filing of the original of the transmittal as required by § 61.14(b);

(4) Include the FCC Registration Number (FRN) of the carrier(s) on whose behalf the cover letter is submitted. See subpart W of part 1 of this title.

(b) Local exchange carriers filing tariffs electronically pursuant to the notice requirements of section 204(a)(3) of the Communications Act shall display prominently, in the upper right hand corner of the letter of transmittal, a statement that the filing is made pursuant to that section and whether the tariff is filed on 7 or 15 days notice.

(c) Any carrier filing a new or revised tariff made on 15 days' notice or less shall include in the letter of transmittal the name, room number, street address, telephone number, and facsimile number of the individual designated by the filing carrier to receive personal or facsimile service of petitions against the filing as required under § 1.773(a)(4) of this chapter.

(d) International carriers must certify that they are authorized under Section 214 of the Communications Act of 1934, as amended, to provide service, and reference the FCC file number of that authorization.

(e) In addition to the requirements set forth in paragraph (a) of this section, any incumbent local exchange carrier choosing to file an Access Tariff under § 61.39 must include in the transmittal:

(1) A summary of the filing's basic rates, terms and conditions;

(2) A statement concerning whether any prior Commission facility authorization necessary to the implementation of the tariff has been obtained; and

(3) A statement that the filing is made pursuant to § 61.39.

(f) In addition to the requirements set forth in paragraph (a) of this section, any price cap local exchange carrier filing a price cap tariff must include in the letter of transmittal a statement that the filing is made pursuant to § 61.49.

(g) The letter of transmittal must specifically reference by number any special permission necessary to implement the tariff publication. Special permission must be granted prior to the filing of the tariff publication and may not be requested in the transmittal letter.

(h)(1) The letter of transmittal must be substantially in the following format:

____

(Exact name of carrier in full)

____

(Post Office Address)

____

(Date)

____

Transmittal No.

Secretary, Federal Communications Commission; Washington, DC 20554

Attention: Wireline Competition Bureau

The accompanying tariff (or other publication) issued by ________, and bearing FCC No. ________, effective ________, 20__, is sent to you for filing in compliance with the requirements of the Communications Act of 1934, as amended. (Here give the additional information required.)

____

(Name of issuing officer or agent)

____

(Title)

(2) A separate letter of transmittal may accompany each publication, or the above format may be modified to provide for filing as many publications as desired with one transmittal letter.

(i) All submissions of documents other than a new tariff or revisions to an existing tariff, such as Base Documents or Tariff Review Plans, must be accompanied by a cover letter that concisely explains the nature and purpose of the filing. Publications submitted under this paragraph are not required to submit a tariffing fee.

■ 6. Section 61.16 is revised to read as follows:

§ 61.16 Base documents.

(a) The Base Document is a complete tariff which incorporates all effective revisions, as of the last day of the preceding month. The Base Document should be submitted with a cover letter as specified in § 61.15(i) and identified as the *Monthly Updated Base Document.*

(b) If there have been revisions that became effective up to and including the last day of the preceding month, a new Base Document must be submitted within the first five business days of the current month that will incorporate those revisions.

■ 7. Section 61.17 is revised to read as follows:

§ 61.17 Applications for special permission.

(a) All issuing carriers that file applications for special permission, associated documents, such as transmittal letters, requests for special permission, and supporting information, shall file those documents electronically.

(b) Applications for special permission must contain:

(1) A detailed description of the tariff publication proposed to be put into effect;

(2) A statement citing the specific rules and the grounds on which waiver is sought;

(3) A showing of good cause; and

(4) The appropriate Illustrative tariff pages the issuing carrier wishes to either revise or add as new pages to its tariff.

(c) An application for special permission must be addressed to ''Secretary, Federal Communications Commission, Washington, DC 20554.'' The Electronic Tariff Filing System will accept filings 24 hours a day, seven days a week. The official filing date of a publication received by the Electronic Tariff Filing System will be determined by the date and time the transmission ends. If the transmission ends after the close of a business day, as that term is defined in § 1.4(e)(2) of this chapter, the filing will be date and time stamped as of the opening of the next business day.

(d) In addition, except for issuing carriers filing tariffing fees electronically, for special permission applications requiring fees as set forth in part 1, subpart G of this chapter, issuing carriers must submit the original of the application letter (without attachments), FCC Form 159, and the appropriate fee to the address set forth in § 1.1105 of this chapter.

(e) In addition, if an issuing carrier applies for special permission to revise joint tariffs, the application must state that it is filed on behalf of all carriers participating in the affected service. Applications must be numbered consecutively in a series separate from FCC tariff numbers and Letters of Transmittal, bear the signature of the officer or agent of the carrier, and be in the following format:

Application No. ________________

(Date) ________________

Secretary, Federal Communications Commission, Washington, DC 20554.

Attention: Wireline Competition Bureau (here provide the statements required by section 61.17(b)).

(Exact name of carrier) ________________

(Name of officer or agent) ________________

(Title of officer or agent) ________________

(f) If approved, the issuing carrier must comply with all terms and use all authority specified in the grant. If a carrier elects to use less than the authority granted, it must apply to the Commission for modification of the original grant. If a carrier elects not to use the authority granted within sixty days of its effective date, the original grant will be automatically cancelled by the Commission.

■ 8. Section 61.20 is revised to read as follows:

§ 61.20 Method of filing publications.

(a) All issuing carriers that file tariffs shall file all tariff publications and associated documents, such as transmittal letters, requests for special permission, and supporting information, electronically in accordance with the requirements set forth in § 61.13 through § 61.17.

(b) In addition, except for issuing carriers filing tariffing fees electronically, for all tariff publications requiring fees as set forth in part 1, subpart G of this chapter, issuing carriers must submit the original of the cover letter (without attachments), FCC Form 159, and the appropriate fee to the address set forth in § 1.1105 of this chapter.

§§ 61.21 through 61.23 [Removed]

■ 9. Remove §§ 61.21 though 61.23.

§§ 61.32 and 61.33 [Removed]

■ 10. Remove §§ 61.32 and 61.33.

■ 11. Section 61.38 is revised to read as follows:

§ 61.38 Supporting information to be submitted with letters of transmittal.

(a) *Scope.* This section applies to dominant carriers whose gross annual revenues exceed $500,000 for the most recent 12 month period of operations or are estimated to exceed $500,000 for a representative 12 month period. Incumbent Local Exchange Carriers serving 50,000 or fewer access lines in a given study area that are described as subset 3 carriers in § 69.602 of this chapter may submit Access Tariff filings for that study area pursuant to either this section or § 61.39. However, the Commission may require any issuing carrier to submit such information as may be necessary for a review of a tariff filing. This section (other than the preceding sentence of this paragraph) shall not apply to tariff filings proposing rates for services identified in § 61.42 (d), (e), and (g).

(b) *Explanation and data supporting either changes or new tariff offerings.* The material to be submitted for a tariff change which affects rates or charges or for a tariff offering a new service, must include an explanation of the changed or new matter, the reasons for the filing, the basis of ratemaking employed, and economic information to support the changed or new matter.

(1) For a tariff change the issuing carrier must submit the following, including complete explanations of the bases for the estimates.

(i) A cost of service study for all elements for the most recent 12 month period;

(ii) A study containing a projection of costs for a representative 12 month period;

(iii) Estimates of the effect of the changed matter on the traffic and revenues from the service to which the changed matter applies, the issuing carrier's other service classifications, and the carrier's overall traffic and revenues. These estimates must include the projected effects on the traffic and revenues for the same representative 12 month period used in (b)(1)(ii) above.

(2) For a tariff filing offering a new service, the issuing carrier must submit the following, including complete explanations of the bases for the estimates.

(i) A study containing a projection of costs for a representative 12 month period; and

(ii) Estimates of the effect of the new matter on the traffic and revenues from the service to which the new matter applies, the issuing carrier's other service classifications, and the issuing carrier's overall traffic and revenues. These estimates must include the projected effects on the traffic and revenues for the same representative 12 month period used in paragraph (b)(2)(i) of this section.

(3) [Reserved]

(4) For a tariff that introduces a system of density pricing zones, as described in § 69.123 of this chapter, the issuing carrier must, before filing its tariff, submit a density pricing zone plan including, *inter alia,* documentation sufficient to establish that the system of zones reasonably reflects cost-related characteristics, such as the density of total interstate traffic in central offices located in the respective zones, and receive approval of its proposed plan.

(c) *Working papers and statistical data.* (1) Concurrently with the filing of any tariff change or tariff filing for a service not previously offered, the issuing carrier must file the working papers containing the information underlying the data supplied in response to paragraph (b) of this section, and a clear explanation of how the working papers relate to that information.

(2) All statistical studies must be submitted and supported in the form prescribed in § 1.363 of this chapter.

(d) *Form and content of additional material to be submitted with certain rate increases.* In the circumstances set out in paragraphs (d)(1) and (2) of this section, the issuing carrier must submit all additional cost, marketing and other data underlying the working papers to justify a proposed rate increase. The issuing carrier must submit this information in suitable form to serve as the carrier's direct case in the event the rate increase is set by the Commission for investigation.

(1) Rate increases affecting single services or tariffed items.

(i) A rate increase in any service or tariffed item which results in more than $1 million in additional annual revenues, calculated on the basis of existing quantities in service, without regard to the percentage increase in such revenues; or

(ii) A single rate increase in any service or tariffed item, or successive rate increases in the same service or tariffed item within a 12 month period, either of which results in:

(A) At least a 10 percent increase in annual revenues from that service or tariffed item, and

(B) At least $100,000 in additional annual revenues, both calculated on the basis of existing quantities in service.

(2) Rate increases affecting more than one service or tariffed item.

(i) A general rate increase in more than one service or tariffed item occurring at one time, which results in more than $1 million in additional revenues calculated on the basis of existing quantities in service, without regard to the percentage increase in such revenues; or

(ii) A general rate increase in more than one service or tariffed item occurring at one time, or successive general rate increases in the same services or tariffed items occurring within a 12 month period, either of which results in:

(A) At least a 10 percent increase in annual revenues from those services or tariffed items, and

(B) At least $100,000 in additional annual revenues, both calculated on the basis of existing quantities in service.

(e) *Submission of explanation and data by connecting carriers.* If the changed or new matter is being filed by the issuing carrier at the request of a connecting carrier, the connecting carrier must provide the data required by paragraphs (b) and (c) of this section on the date the issuing carrier files the tariff matter with the Commission.

(f) *Copies of explanation and data to customers.* Concurrently with the filing of any rate for special construction (or special assembly equipment and arrangements) developed on the basis of estimated costs, the issuing carrier must transmit to the customer a copy of the explanation and data required by paragraphs (b) and (c) of this section.

(g) On each page of cost support material submitted pursuant to this section, the issuing carrier shall indicate the transmittal number under which that page was submitted.

■ 12. Section 61.39 is revised to read as follows:

§ 61.39 Optional supporting information to be submitted with letters of transmittal for Access Tariff filings by incumbent local exchange carriers serving 50,000 or fewer access lines in a given study area that are described as subset 3 carriers in § 69.602.

(a) *Scope.* This section provides for an optional method of filing for any incumbent local exchange carrier that is described as subset 3 carrier in § 69.602 of this chapter, which elects to issue its own Access Tariff for a period commencing on or after April 1, 1989, and which serves 50,000 or fewer access lines in a study area as determined under § 36.611(a)(8) of this chapter. However, the Commission may require any issuing carrier to submit such information as may be necessary for review of a tariff filing. This section (other than the preceding sentence of this paragraph) shall not apply to tariff filings of price cap local exchange carriers.

(b) *Explanation and data supporting tariff changes.* The material to be submitted to either a tariff change or a new tariff which affects rates or charges must include an explanation of the filing in the transmittal as required by § 61.15. The basis for ratemaking must comply with the following requirements. Except as provided in paragraph (b)(5) of this section, it is not necessary to submit this supporting data at the time of filing. However, the incumbent local exchange carrier should be prepared to submit the data promptly upon reasonable request by the Commission or interested parties.

(1) For a tariff change, the incumbent local exchange carrier that is a cost schedule carrier must propose Traffic Sensitive rates based on the following:

(i) For the first period, a cost of service study for Traffic Sensitive elements for the most recent 12-month period with related demand for the same period.

(ii) For subsequent filings, a cost of service study for Traffic Sensitive elements for the total period since the incumbent local exchange carrier's last annual filing, with related demand for the same period.

(2) For a tariff change, the incumbent local exchange carrier that is an average schedule carrier must propose Traffic Sensitive rates based on the following:

(i) For the first period, the incumbent local exchange carrier's most recent annual Traffic Sensitive settlement from the National Exchange Carrier Association pool.

(ii) For subsequent filings, an amount calculated to reflect the Traffic Sensitive average schedule pool settlement the carrier would have received if the carrier had continued to participate, based upon the most recent average schedule formulas approved by the Commission.

(3) For a tariff change, the incumbent local exchange carrier that is a cost schedule carrier must propose Common Line rates based on the following:

(i) For the first biennial filing, the common line revenue requirement shall be determined by a cost of service study for the most recent 12-month period. Subscriber line charges shall be based on cost and demand data for the same period. Carrier common line rates shall be determined by the following formula:

$$\frac{CCL \text{ Rev Req}}{\text{CCL MOU}_b * (1{+}h/2)^2}$$

Where:

$$h = \frac{CCL \text{ MOU}_1}{\text{CCL MOU}_0} - 1$$

And where:

CCL Rev Req = carrier common line revenue requirement for the most recent 12-month period;

CCL MOU_b = carrier common line minutes of use for the most recent 12-month period;

CCL MOU_1 = CCL MOU_b; and

CCL MOU_0 = carrier common line minutes of use for the 12-month period preceding the most recent 12-month period.

(ii) For subsequent biennial filings, the common line revenue requirement shall be determined by a cost of service study for the most recent 24-month period. Subscriber line charges shall be based on cost and demand data for the same period. Carrier common line rates shall be determined by the following formula:

$$\frac{CCL \text{ Rev Req}}{\text{CCL MOU}_b * (1{+}h/2)^{5/2}}$$

Where:

$$h = \frac{CCL \text{ MOU}_1}{\text{CCL MOU}_0} - 1$$

And where:

CCL Rev Req = carrier common line revenue requirement for the most recent 24-month period;

CCL MOU_b = carrier common line minutes of use for the most recent 24-month period;

CCL MOU_1 = carrier common line minutes of use for the 12-month period; and

CCL MOU_0 = carrier common line minutes of use for the 12-month period preceding the most recent 12-month period.

(4) For a tariff change, the incumbent local exchange carrier which is an average schedule carrier must propose common line rates based on the following:

(i) For the first biennial filings, the common line revenue requirement shall be determined by the incumbent local exchange carrier's most recent annual Common Line settlement from the National Exchange Carrier Association. Subscriber line charges shall be based on cost and demand data for the same period. Carrier common line rates shall be determined by the following formula:

$$\frac{CCL \text{ Rev Req}}{\text{CCL MOU}_b * (1{+}h/2)^2}$$

Where:

$$h = \frac{CCL \text{ MOU}_1}{\text{CCL MOU}_0} - 1$$

And where:

CCL Rev Req = carrier common line settlement for the most recent 12-month period;

CCL MOU_b = carrier common line minutes of use for the most recent 12-month period;

CCL MOU_1 = CCL MOU_b; and

CCL MOU_0 = carrier common line minutes of use for the 12-month period preceding the most recent 12-month period.

(ii) For subsequent biennial filings, the common line revenue requirement shall be an amount calculated to reflect the average schedule pool settlements the carrier would have received if the carrier had continued to participate in the carrier common line pool, based upon the average schedule Common Line formulas developed by the National Exchange Carrier Association for the most recent 24-month period. Subscriber line charges shall be based on cost and demand data for the same period. Carrier common line rates shall be determined by the following formula:

$$\frac{CCL \text{ Rev Req}}{\text{CCL MOU}_b * (1{+}h/2)^{5/2}}$$

Where:

$$h = \frac{CCL \text{ MOU}_1}{\text{CCL MOU}_0} - 1$$

And where:

CCL Rev Req = carrier common line settlement for the most recent 24-month period;

CCL MOU_b = carrier common line minutes of use for the most recent 24-month period;

CCL MOU_1 = carrier common line minutes of use for the most recent 12-month period; and

CCL MOU_0 = carrier common line minutes of use for the 12-month period preceding the most recent 12-month period.

(5) For End User Common Line charges included in a tariff pursuant to this Section, the incumbent local exchange carrier must provide supporting information for the two-year historical period with its letter of transmittal in accordance with § 61.38.

(c) *Maximum allowable rate of return.* Incumbent Local exchange carriers filing tariffs under this section are not required to comply with §§ 65.700 through 65.701 of this chapter, except with respect to periods during which tariffs were not subject to this section. The Commission may require any carrier to submit such information if it deems it necessary to monitor the carrier's earnings. However, rates must be calculated based on the incumbent local exchange carrier's prescribed rate of return applicable to the period during which the rates are effective.

(d) Rates for a new service that is the same as that offered by a price cap local exchange carrier providing service in an adjacent serving area are deemed presumptively lawful, if the proposed rates, in the aggregate, are no greater than the rates established by the price cap local exchange carrier. Tariff filings made pursuant to this paragraph must include the following:

(1) A brief explanation of why the service is like an existing service offered by a geographically adjacent price cap local exchange carrier; and

(2) Data to establish compliance with this paragraph that, in aggregate, the proposed rates for the new service are no greater than those in effect for the same or comparable service offered by that same geographically adjacent price cap regulated local exchange carrier. Compliance may be shown through submission of applicable tariff pages of the adjacent carrier; a showing that the serving areas are adjacent; any necessary explanations and work sheets.

(e) Average schedule companies filing pursuant to this section shall retain their status as average schedule companies.

(f) On each page of cost support material submitted pursuant to this section, the issuing carrier shall indicate the transmittal number under which that page was submitted.

13. Section 61.40 is amended by revising paragraph (a) introductory text to read as follows:

§ 61.40 Private line rate structure guidelines.

(a) The Commission uses a variety of tools to determine whether a dominant carrier's private line tariffs are just, reasonable, and nondiscriminatory. The dominant carrier's burden of cost justification can be reduced when its private line rate structures comply with the following five guidelines.

* * * * *

■ 14. Section 61.41 is amended by revising paragraph (a)(2) to read as follows:

§ 61.41 Price cap requirements generally.

(a) * * *

(2) To such price cap local exchange carriers as specified by Commission

order, and to all local exchange carriers, other than average schedule companies, that are affiliated with such carriers; and

* * * * *

■ 15. Section 61.42 is amended by revising paragraphs (d) introductory text, (d)(4), (e)(1) introductory text, and (f) to read as follows:

§ 61.42 Price cap baskets and service categories.

* * * * *

(d) Each price cap local exchange carrier shall establish baskets of services as follows:

* * * * *

(4)(i) To the extent that a price cap local exchange carrier specified in § 61.41(a)(2) or (a)(3) offers interstate interexchange services that are not classified as access services for the purpose of part 69 of this chapter, such exchange carrier shall establish a fourth basket for such services. For purposes of §§ 61.41 through 61.49, this basket shall be referred to as the ''interexchange basket.''

(ii) If a price cap local exchange carrier has implemented interLATA and intraLATA toll dialing parity everywhere it provides local exchange services at the holding company level, that price cap carrier may file a tariff revision to remove corridor and interstate intraLATA toll services from its interexchange basket.

* * * * *

(e)(1) The traffic sensitive switched interstate access basket shall contain such services as the Commission shall permit or require, including the following service categories:

* * * * *

(f) Each price cap local exchange carrier shall exclude from its price cap baskets such services or portions of such services as the Commission has designated or may hereafter designate by order.

* * * * *

■ 16. Section 61.43 is revised to read as follows:

§ 61.43 Annual price cap filings required.

Price cap local exchange carriers shall submit annual price cap tariff filings that propose rates for the upcoming tariff year, that make appropriate adjustments to their PCI, API, and SBI values pursuant to §§ 61.45 through 61.47, and that incorporate new services into the PCI, API, or SBI calculations pursuant to §§ 61.45(g), 61.46(b), and 61.47(b) and (c). Price cap local exchange carriers may propose rate, PCI, or other tariff changes more often than annually, consistent with the requirements of § 61.59.

■ 17. Section 61.45 is amended by revising paragraphs (a), (b)(1)(i) introductory text, and (d)(2) to read as follows:

§ 61.45 Adjustments to the PCI for Local Exchange Carriers.

(a) Price cap local exchange carriers shall file adjustments to the PCI for each basket as part of the annual price cap tariff filing, and shall maintain updated PCIs to reflect the effect of mid-year exogenous cost changes.

(b)(1)(i) Adjustments to price cap local exchange carrier PCIs, in those carriers' annual access tariff filings, the traffic sensitive basket described in § 61.42(d)(2), the trunking basket described in § 61.42(d)(3), the special access basket described in § 61.42(d)(5) and the Interexchange Basket described in § 61.42(d)(4)(i), shall be made pursuant to the following formula:

* * * * *

(d) * * *

(2) Price cap local exchange carriers specified in §§ 61.41(a)(2) or (a)(3) shall, in their annual access tariff filing, recognize all exogenous cost changes attributable to modifications during the coming tariff year in their Subscriber Plant Factor and the Dial Equipment Minutes factor, and completions of inside wire amortizations and reserve deficiency amortizations.

* * * * *

■ 18. Section 61.46 is amended by revising paragraph (a) introductory text to read as follows:

§ 61.46 Adjustments to the API.

(a) Except as provided in paragraphs (d) and (e) of this section, in connection with any price cap tariff filing proposing rate changes, the price cap local exchange carrier must calculate an API for each affected basket pursuant to the following methodology:

* * * * *

■ 19. Section 61.47 is amended by revising paragraphs (f), (i)(2), and (i)(5) to read as follows:

§ 61.47 Adjustments to the SBI; pricing bands.

* * * * *

(f) A price cap local exchange carrier may establish density zones pursuant to the requirements set forth in § 69.123 of this chapter, for any service in the trunking and special access baskets, other than the interconnection charge set forth in § 69.124 of this chapter. The pricing flexibility of each zone shall be limited to an annual increase of 15 percent, relative to the percentage change in the PCI for that basket, measured from the levels in effect on the last day of the preceding tariff year. There shall be no lower pricing band for any density zone.

* * * * *

(i) * * *

(2) Effective January 1, 1998, notwithstanding the requirements of paragraph (a) of this section, if a price cap local exchange carrier is recovering interconnection charge revenues through per-minute rates pursuant to § 69.155 of this chapter, any reductions to the PCI for the basket designated in § 61.42(d)(3) resulting from the application of the provisions of § 61.45(b)(1)(i) and from the application of the provisions of §§ 61.45(i)(1) and 61.45(i)(2) shall be directed to the SBI of the service category designated in § 61.42(d)(i).

* * * * *

(5) Effective July 1, 2000, notwithstanding the requirements of paragraph (a) of this section and subject to the limitations of § 61.45(i), if a price cap local exchange carrier is recovering an ATS charge greater than its Target Rate as set forth in § 61.3(qq), any reductions to the PCI for the traffic sensitive or trunking baskets designated in §§ 61.42(d)(2) and 61.42(d)(3) resulting from the application of the provisions of § 61.45(b), and the formula in § 61.45(b) and from the application of the provisions of §§ 61.45(i)(1), and 61.45(i)(2) shall be directed to the SBIs of the service categories designated in §§ 61.42(e)(1) and 61.42(e)(2).

* * * * *

■ 20. Section 61.48 is amended by revising paragraphs (i)(2), (i)(3) introductory text, (i)(4), and (l)(2) to read as follows:

§ 61.48 Transition rules for price cap formula calculations.

* * * * *

(i) * * *

(2) *Simultaneous Introduction of Special Access and Transport Zones.* Price cap local exchange carriers that have established density pricing zones pursuant to § 69.123 of this chapter, and whose special access zone date and transport zone date occur on the same date, shall initially establish density pricing zone SBIs and bands pursuant to the methodology in §§ 61.47(e) through (f).

(3) *Sequential Introduction of Zones in the Same Tariff Year.* Notwithstanding §§ 61.47(e) through (f), price cap local exchange carriers that have established density pricing zones pursuant to § 69.123 of this chapter, and whose special access zone date and transport zone date occur on different dates during the same tariff year, shall,

on the earlier date, establish density pricing zone SBIs and pricing bands using the methodology described in §§ 61.47(e) through (f), but applicable to the earlier service only. On the later date, such carriers shall recalculate the SBIs and pricing bands to limit the pricing flexibility of the services included in each density pricing zone category, as reflected in its SBI, as follows:

* * * * *

(4) *Introduction of Zones in Different Tariff Years.* Notwithstanding §§ 61.47(e) through (f), those price cap local exchange carriers that have established density pricing zones pursuant to § 69.123 of this chapter, and whose special access zone date and transport zone date do not occur within the same tariff year, shall, on the earlier date, establish density pricing zone SBIs and pricing bands using the methodology described in §§ 61.47(e) through (f), but applicable to the earlier service only.

* * * * *

(l) * * *

(2) Once the reductions in paragraph (l)(1)(i) and paragraphs (l)(1)(ii)(A) and (l)(1)(ii)(B) of this section are identified, the difference between those reductions and $2.1 billion is the total amount of additional reductions that would be made to ATS rates of price cap local exchange carriers. This amount will then be restated as the percentage of total price cap local exchange carrier Local Switching revenues as of June 30, 2000 using 2000 annual filing base period demand (''June 30 Local Switching revenues'') necessary to yield the total amount of additional reductions and taking into account the fact that, if participating, a price cap local exchange carrier would not reduce ATS rates below its Target Rate as set forth in § 61.3(qq).

Each price cap local exchange carrier then reduces ATS rate elements, and associated SBI upper limits and PCIs, by a dollar amount equivalent to the percentage times the June 30 Local Switching revenues for that filing entity, provided that no price cap local exchange carrier shall be required to reduce its ATS rates below its Target Rate as set forth in § 61.3(qq). Each price cap local exchange carrier can take its additional reductions against any of the ATS rate elements, provided that at least a proportional share must be taken against Local Switching rates.

* * * * *

■ 21. Section 61.49 is amended by revising paragraphs (f)(2) through (f)(4), (g) introductory text, (g)(2), (h), (k) and (l) to read as follows:

§ 61.49 Supporting information to be submitted with letters of transmittal for tariffs of carriers subject to price cap regulation.

* * * * *

(f) * * *

(2) Each tariff filing submitted by a price cap local exchange carrier that introduces a new loop-based service, as defined in § 61.3(pp) of this part—including a restructured unbundled basic service element (BSE), as defined in § 69.2(mm) of this chapter, that constitutes a new loop-based service—that is or will later be included in a basket, must be accompanied by cost data sufficient to establish that the new loop-based service or unbundled BSE will not recover more than a just and reasonable portion of the carrier's overhead costs.

(3) A price cap local exchange carrier may submit without cost data any tariff filings that introduce new services, other than loop-based services.

(4) A price cap local exchange carrier that has removed its corridor or interstate ntraLATA toll services from its interexchange basket pursuant to § 61.42(d)(4)(ii), may submit its tariff filings for corridor or interstate intraLATA toll services without cost data.

(g) Each tariff filing submitted by a price cap local exchange carrier that introduces a new loop-based service or a restructured unbundled basic service element (BSE), as defined in § 69.2(mm) of this chapter, that is or will later be included in a basket, or that introduces or changes the rates for connection charge subelements for expanded interconnection, as defined in § 69.121 of this chapter, must also be accompanied by:

* * * * *

(2) *Working papers and statistical data.* (i) Concurrently with the filing of any tariff change or tariff filing for a service not previously offered, the issuing carriers must file the working papers containing the information underlying the data supplied in response to paragraph (h)(1) of this section, and a clear explanation of how the working papers relate to that information.

(ii) All statistical studies must be submitted and supported in the form prescribed in § 1.363 of the Commission's rules.

(h) Each tariff filing submitted by a price cap local exchange carrier that introduces or changes the rates for connection charge subelements for expanded interconnection, as defined in § 69.121 of this chapter, must be accompanied by cost data sufficient to establish that such charges will not recover more than a just and reasonable portion of the carrier's overhead costs.

* * * * *

(k) In accordance with §§ 61.41 through 61.49, price cap local exchange carriers that elect to file their annual access tariff pursuant to section 204(a)(3) of the Communications Act shall submit supporting material for their interstate annual access tariffs, absent rate information, 90 days prior to July 1 of each year.

(l) On each page of cost support material submitted pursuant to this section, the issuing carrier shall indicate the transmittal number under which that page was submitted.

Subpart H—[Removed]

■ 22. Remove Subpart H consisting of §§ 61.151 through 61.153.

Subpart G—[Redesignated as Subpart H]

■ 23. Redesignate Subpart G (§§ 61.131 to 61.136) as Subpart H.

Subpart F—[Redesignated as Subpart G]

■ 24. Redesignate Subpart F (§§ 61.66 to 61.87) as Subpart G.

■ 25. Designate §§ 61.51 through 61.59 as subpart F, and add a new subpart F heading to read as follows:

Subpart F—Formatting and Notice Requirements for Tariff Publications

■ 26. Section 61.51 is added to read as follows:

§ 61.51 Scope.

The rules in this subpart apply to tariffs filed by issuing carriers, with the exception of the informational tariffs filed pursuant to 47 U.S.C. 226(h)(1)(A), unless otherwise noted.

■ 27. Section 61.52 is amended by removing paragraph (a), redesignating paragraphs (b) and (c) as paragraphs (a) and (b) and revising new paragraph (a) introductory text, and paragraph (b) to read as follows:

§ 61.52 Form, size, type, legibility, etc.

(a) Pages of tariffs must be numbered consecutively and designated as ''Original title page,'' ''Original page 1,'' ''Original page 2,'' etc.

* * * * *

(b) All issuing carriers shall file all tariff publications and associated documents, such as transmittal letters, requests for special permission, and supporting information, electronically in accordance with the requirements set forth in § 61.13 through § 61.17.

■ 28. Section 61.55 is amended by revising paragraph (a) to read as follows:

§ 61.55 Contract-based tariffs.

(a) This section shall apply to price cap local exchange carriers permitted to offer contract-based tariffs under § 69.727(a) of this chapter.

* * * * *

■ 29. Section 61.58 is amended by revising paragraphs (a)(2)(ii), (d), and (e)(1) introductory text, and adding new paragraph (f) to read as follows:

§ 61.58 Notice requirements.

(a) * * *

(2) * * *

(ii) Local exchange carriers may elect not to file tariffs pursuant to section 204(a)(3) of the Communications Act. For dominant carriers, any such tariffs shall be filed on at least 16 days' notice. For nondominant carriers, any such tariffs shall be filed on at least one days' notice.

* * * * *

(d)(1) A price cap local exchange carrier that is filing a tariff revision to remove its corridor or interstate intraLATA toll services from its interexchange basket pursuant to § 61.42(d)(4)(ii) shall submit such filing on at least fifteen days' notice.

(2) A price cap local exchange carrier that has removed its corridor and interstate intraLATA toll services from its interexchange basket pursuant to § 61.42(d)(4)(ii) shall file subsequent tariff filings for corridor or interstate intraLATA toll services on at least one day's notice.

(e) *Non-price cap local exchange carriers and/or services.* (1) Tariff filings in the instances specified in paragraphs (e)(1) (i), (ii), and (iii) of this section by dominant carriers must be made on at least 15 days' notice.

* * * * *

(f) All tariff filings of domestic and international non-dominant carriers must be made on at least one days' notice.

■ 30. Section 61.59 is amended by revising paragraphs (b) and (c) to read as follows:

§ 61.59 Effective period required before changes.

* * * * *

(b) Changes to rates and regulations for dominant carriers that have not yet become effective, i.e., are pending, may not be made unless the effective date of the proposed changes is at least 30 days after the scheduled effective date of the pending revisions.

(c) Changes to rates and regulations for dominant carriers that have taken effect but have not been in effect for at least 30 days may not be made unless the scheduled effective date of the proposed changes is at least 30 days after the effective date of the existing regulations.

■ 31. Section 61.66 is revised to read as follows:

§ 61.66 Scope.

The rules in this subpart apply to all issuing carriers, unless otherwise noted.

■ 32. Section 61.68 is amended by revising paragraph (a) to read as follows:

§ 61.68 Special notations.

(a) Any tariff filing made pursuant to an Application for Special Permission, Commission decision or order must contain the following statement:

Issued under authority of (specific reference to the special permission, Commission decision, or order) of the Commission.

* * * * *

■ 33. Section 61.83 is revised to read as follows:

§ 61.83 Consecutive numbering.

Issuing carriers should file tariff publications under consecutive FCC numbers. If this cannot be done, a memorandum containing an explanation of the missing number or numbers must be submitted. Supplements to a tariff must be numbered consecutively in a separate series.

■ 34. Section 61.86 is revised to read as follows:

§ 61.86 Supplements.

An issuing carrier may not file a supplement except to suspend or cancel a tariff publication, or to defer the effective date of pending tariff revisions. A carrier may file a supplement for the voluntary deferral of a tariff publication.

■ 35. Section 61.87 is amended by revising paragraph (a) introductory text, paragraphs (a)(1)(i) and (ii), (a)(3), and (c) to read as follows:

§ 61.87 Cancellation of tariffs.

(a) An issuing carrier may cancel an entire tariff. Cancellation of a tariff automatically cancels every page and supplement to that tariff except for the canceling Title Page or first page.

(1) * * *

(i) The issuing carrier whose tariff is being canceled must revise the Title Page or the first page of its tariff indicating that the tariff is no longer effective, or

(ii) The issuing carrier under whose tariff the service(s) will be provided must revise the Title Page or first page of the tariff to be canceled, using the name and numbering shown in the heading of the tariff to be canceled, indicating that the tariff is no longer effective. This carrier must also file with the Commission the new tariff provisions reflecting the service(s) being canceled. Both filings must be effective on the same date and may be filed under the same transmittal.

* * * * *

(3) A carrier canceling its tariff, as described in this section, must comply with §§ 61.54(b)(1) and 61.54(b)(5), as applicable.

* * * * *

(c) When a carrier ceases to provide service(s) without a successor, it must cancel its tariff pursuant to the notice requirements of § 61.58, as applicable, unless otherwise authorized by the Commission.

■ 36. Section 61.132 is revised to read as follows:

§ 61.132 Method of filing concurrences.

A carrier proposing to concur in another carrier's effective tariff must deliver one copy of the concurrence to the issuing carrier in whose favor the concurrence is issued. The concurrence must be signed by an officer or agent of the carrier executing the concurrence, and must be numbered consecutively in a separate series from its FCC tariff numbers. At the same time the issuing carrier revises its tariff to reflect such a concurrence, it must file one copy of the concurrence electronically with the Commission in accordance with the requirements set forth in § 61.13 through § 61.17. The concurrence must bear the same effective date as the date of the tariff filing reflecting the concurrence. Carriers shall file revisions reflecting concurrences in their tariffs on the notice period specified in § 61.58.

■ 37. Section 61.134 is revised to read as follows:

§ 61.134 Concurrences for through services.

An issuing carrier filing rates or regulations for through services between points on its own system and points on another carrier's system (or systems), or between points on another carrier's system (or systems), must list all concurring, connecting or other participating carriers as provided in § 61.54 (f), (g) and (h). A concurring carrier must tender a properly executed instrument of concurrence to the issuing carrier. If rates and regulations of the other carriers engaging in the through service(s) are not specified in the issuing carrier's tariff, that tariff must state where the other carrier's rates and regulations can be found. Such reference(s) must contain the FCC number(s) of the referenced tariff publication(s), the exact name(s) of the carrier(s) issuing such tariff publication(s), and must clearly state how the rates and regulations in the separate publications apply.

■ 38. Section 61.191 is revised to read as follows:

§ 61.191 Carrier to file supplement when notified of suspension.

If an issuing carrier is notified by the Commission that its tariff publication has been suspended, the carrier must file, within five business days from the release date of the suspension order, a consecutively numbered supplement without an effective date, which specifies the schedules which have been suspended.

PART 64—MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

■ 39. The authority citation for part 64 continues to read as follows:

Authority: 47 U.S.C. 154, 254(K); secs. 403(b)(2)(B), (c), Pub. L. 104–104, 110 Stat. 56. Interpret or apply 47 U.S.C. 201, 218, 222, 225, 226, 228, and 254(k) unless otherwise noted.

■ 40. Section 64.709 is amended by revising paragraphs (d)(1) and (d)(2) to read as follows:

§ 64.709 Informational tariffs.

* * * * *

(d) * * *

(1) The original of the cover letter shall be submitted to the Secretary without attachments, along with FCC Form 159, and the appropriate fee to the address set forth in § 1.1105 of this chapter.

(2) Carriers should file informational tariffs and associated documents, such as cover letters and attachments, electronically in accordance with §§ 61.13 and 61.14 of this chapter.

* * * * *

[FR Doc. 2011–17778 Filed 7–19–11; 8:45 am]

BILLING CODE 6712–01–P

Proposed Rules

Federal Register

Vol. 76, No. 139

Wednesday, July 20, 2011

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF ENERGY

10 CFR Part 431

[Docket No. EERE–2011–BT–STD–0031]

RIN 1904–AC54

Commercial and Industrial Pumps

AGENCY: Department of Energy, Office of Energy Efficiency and Renewable Energy.

ACTION: Reopening of comment period.

SUMMARY: On June 13, 2011, DOE published a request for information (RFI) in the **Federal Register** requesting information from interested parties regarding product markets, energy use, test procedures, and energy efficient product designs for commercial and industrial pumps. The comment period closed on July 13, 2011. This document announces an extension of the time period for submitting comments on the RFI for commercial and industrial pumps. The comment period is extended to September 16, 2011.

DATES: The comment period for the proposed rule published June 13, 2011 (76 FR 34192), is reopened. The Department of Energy (DOE) will accept comments, data, and information regarding the RFI for commercial and industrial pumps received no later than 5 p.m. on September 16, 2011.

ADDRESSES: Any comments submitted must identify the RFI for commercial and industrial pumps and provide docket number EERE–2011–BT–STD–0031 and/or RIN number 1904–AC54. 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: Pumps-RFI–2011–STD–0031@ee.doe.gov.* Include docket number EERE–2011–BT–STD–0031 and/or RIN 1904–AC54 in the subject line of the message. Submit electronic comments in WordPerfect, Microsoft Word, PDF, or ASCII file format and avoid the use of special characters or any form of encryption.
- *Postal Mail:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121. *Telephone:* (202) 586–2945. Please submit one signed original paper copy.
- *Hand Delivery/Courier:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, 950 L'Enfant Plaza, SW., 6th Floor, Washington, DC 20024. Please submit one signed original paper copy.

Docket: For access to the docket to read background documents or comments received, visit the U.S. Department of Energy, Resource Room of the Building Technologies Program, 950 L'Enfant Plaza, SW., 6th Floor, Washington, DC 20024, (202) 586–2945, between 9 a.m. and 4 p.m. Monday through Friday, except Federal holidays. Please call Ms. Brenda Edwards at the above telephone number for additional information regarding visiting the Resource Room. Please note: DOE's Freedom of Information Reading Room (Room 1E–190 at the Forrestal Building) no longer houses rulemaking materials.

FOR FURTHER INFORMATION CONTACT: Mr. Charles Llenza, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Program, EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121. *Telephone:* (202) 586–2192. *E-mail:* Charles.Llenza@ee.doe.gov. In the Office of General Counsel, contact Ms. Elizabeth Kohl, U.S. Department of Energy, Office of the General Counsel, GC–71, 1000 Independence Avenue, SW., Washington, DC 20585. *Telephone:* (202) 586–7796. *E-mail: Elizabeth.Kohl@hq.doe.gov.*

SUPPLEMENTARY INFORMATION: On June 13, 2011, DOE published a request for information (RFI) in the **Federal Register** (76 FR 34192) requesting information from interested parties regarding product markets, energy use, test procedures, and energy efficient product designs for commercial and industrial pumps as prescribed by Title III of the Energy Policy and Conservation Act of 1975, as amended (EPCA, 42 U.S.C. 6291 *et seq.*). The RFI provided for the submission of comments by July 13, 2011. The Hydraulic Institute, which represents the pump manufacturing industry in North America, requested an extension of time to provide comments, stating that it is not possible to gather the requisite information and provide quality comments to DOE by July 13. DOE has determined that an extension of the public comment period is appropriate based on the foregoing reasons and is hereby extending the comment period. DOE will consider any comments received by 5 p.m. on September 16, 2011 and deems any comments received between July 13, 2011 and 5 p.m. on September 16, 2011 to be timely submitted.

Further Information on Submitting Comments

Under 10 CFR Part 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit two copies: One copy of the document including all the information believed to be confidential, and one copy of the document with the information believed to be confidential deleted. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

Factors of interest to DOE when evaluating requests to treat submitted information as confidential include (1) a description of the items, (2) whether and why such items are customarily treated as confidential within the industry, (3) whether the information is generally known by or available from other sources, (4) whether the information has previously been made available to others without obligation concerning its confidentiality, (5) an explanation of the competitive injury to the submitting person which would result from public disclosure, (6) when such information might lose its confidential character due to the passage of time, and (7) why disclosure of the information would be contrary to the public interest.

Issued in Washington, DC, on July 12, 2011.

Kathleen B. Hogan,

Deputy Assistant Secretary for Energy Efficiency, Office of Technology Development, Energy Efficiency and Renewable Energy.

[FR Doc. 2011–17995 Filed 7–19–11; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 905

[Docket No. FR–5361–P–01]

RIN–2577–AC81

Public Housing: Physical Needs Assessment

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Proposed rule.

SUMMARY: This rule proposes to revise HUD's existing regulations governing a physical needs assessment (PNA) undertaken by a public housing agency (PHA). A PNA identifies all of the work that a PHA would need to undertake to bring each of its projects up to the applicable modernization and energy conservation standards. This rule would require PHAs to project the current modernization and life-cycle replacement repair needs of its projects over a 20-year period, rather than a 5-year period, because the 20-year period coincides better with the useful life of individual properties and their building components and systems to ensure the long-term viability of the property. Additionally, this rule proposes to integrate the performance of the PNA with the performance of an energy audit.

DATES: *Comments Due Date:* September 19, 2011.

ADDRESSES: Interested persons are invited to submit comments regarding this proposed rule to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW., Room 10276, Washington, DC 20410–0500. Communications must refer to the above docket number and title. There are two methods for submitting public comments. All submissions must refer to the above docket number and title.

1. *Submission of Comments by Mail.* Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW., Room 10276, Washington, DC 20410–0500.

2. *Electronic Submission of Comments*. Interested persons may submit comments electronically through the Federal eRulemaking Portal at *http://www.regulations.gov.* HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the *http://www.regulations.gov* Web site can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

Note: To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of the rule.

No Facsimile Comments. Facsimile (FAX) comments are not acceptable.

Public Inspection of Public Comments. All properly submitted comments and communications submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, an advance appointment to review the public comments must be scheduled by calling the Regulations Division at 202–402–3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Relay Service, toll free, at 800–877–8339. Copies of all comments submitted are available for inspection and downloading at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Kevin Gallagher, Capital Program Division, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 4116, Washington, DC 20410–8000; telephone number 202–402–4192 (this is not a toll-free number). Hearing- or speech-impaired individuals may access this number through TTY by calling the toll-free Federal Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Background

A PNA provides PHAs with critical information on the physical condition of each project in its inventory and assists PHAs with identifying and prioritizing work items that require repair and modernization. The requirement to conduct a PNA has long been part of the regulations for HUD's Public Housing Modernization program, found in 24 CFR part 968. HUD's proposed rule on the Public Housing Capital Fund, published on February 7, 2011, at 76 FR 6654, proposes to remove part 968 and incorporate public housing modernization requirements in the regulations governing the Public Housing Capital Fund program in 24 CFR part 905.

Although the requirement to conduct a PNA has long been part of the regulations for HUD's Public Housing Modernization program, HUD, on July 21, 2009; September 29, 2010; October 14, 2010; and December 2, 2010, hosted meetings with PHAs and their representatives to discuss how repair and modernization needs should be assessed, and the costs and benefits of obtaining that information to PHAs and to HUD. At these meetings, PHAs raised a number of issues regarding costs, the content of the PNAs, and the methodologies that would be involved. Information about these meetings is available at *http://portal.hud.gov/huddoc/report-on-pna.pdf.*

This rule proposes to revise the regulations governing the completion and submission of a PNA, currently found in 24 CFR part 968, based on consideration of issues raised at the above meetings, experience with funding for public housing capital expenditures under the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5, approved February 13, 2009 (Recovery Act)), the PNA requirement imposed on PHAs receiving Recovery Act capital funds, and HUD's further consideration of how a PNA should be undertaken, completed, and submitted by a PHA.

The existing requirements of 24 CFR part 968, subpart C (Comprehensive Grant Program), provide that PHAs with 250 or more units are required to periodically complete a PNA in conjunction with their Comprehensive Plan (see § 968.315(e)(2)). There is currently no requirement for PHAs with fewer than 250 units to conduct a PNA. Throughout this preamble where ''small'' PHAs are referenced, it is in the context of 24 CFR part 968, subpart B, which applies to PHAs with fewer than 250 public housing units. Section 5A of the United States Housing Act of 1937 (1937 Act) (42 U.S.C. 1437c–1(a)(1)), which establishes the PHA 5-year Plan, requires each PHA to submit to HUD, not less than once every 5 years, a plan that includes a statement of the mission of the PHA for serving the needs of low-income and very low-income families, and ''a statement of the goals and objectives * * * that will enable the housing authority to serve the needs identified.'' These needs are, in turn, reflected by PHAs in their Annual Statement/Performance and Evaluation Report (form HUD–50075.1) and Capital Fund Program—Five-Year Action Plan (form HUD–50075.2) and are funded under the capital fund formula authorized at section 9(d)(2) of the 1937

Act (42 U.S.C. 1437g(d)(2)) and established by regulation at 24 CFR 905.10. In accordance with these requirements, PHAs are expected to reflect their capital improvement and spending priorities in their Annual Statements and 5-year action plans, which should be based on PNAs that are prepared in accordance with the requirements of 24 CFR part 968.

The current PNA regulation at 24 CFR 968.315(e)(2) requires: A brief summary of the physical improvements needed to bring each development to HUD standards for modernization, energy conservation life-cycle cost effective performance standards, and lead-based paint testing and abatement standards; the replacement needs of equipment and structural elements during the period covered; a preliminary estimate of cost; any physical disparities between buildings occupied predominantly by one racial or ethnic group and the physical improvements required to correct the disparity; and the number of units the PHA is proposing for substantial rehabilitation and subsequent sale, if any (see 24 CFR 968.315(e)(2)). As to energy audits, HUD requires PHAs to complete an energy audit for each PHA-owned project under management, not less than once every 5 years (see 24 CFR 965.302).

II. This Proposed Rule

The need for PHAs to engage in strategic planning has increased considerably over the past decade as PHAs have transitioned to an asset-based accounting and management model more closely aligned to industry-standard real estate management procedures. A focus on the individual project, rather than on the macro level of the entirety of a PHA's public housing portfolio, further highlights the need for strategic planning over a longer term period. As the public housing portfolio ages, the need to strategically plan impacts all PHAs regardless of size. The opportunities for PHAs to take advantage of a variety of financing vehicles to modernize and develop public housing have also increased over the past decade. Thus, in managing their public housing portfolios, PHAs are increasingly called upon to make long-term reinvestment and portfolio management decisions that may entail demolition, disposition, conversion, financing, redevelopment, or repositioning of real estate assets. A key tool to accomplishing such strategic planning is a PNA.

This rule proposes to supplement the Public Housing Capital Fund Program regulation, published on February 7, 2011, at 76 FR 6654, to include new PNA regulations. This proposed rule would add a new paragraph (b)(9) to proposed new section § 905.300 in the rule of February 7, 2011 (see 76 FR 6665), which would require all PHAs, including small PHAs and Moving to Work PHAs, to complete PNAs and provide them to HUD so that PHAs may properly administer their Capital Fund programs, and so that HUD may effectuate its implementation and oversight functions in regard to the Capital Fund. In addition, because the rule refers to Moving to Work PHAs, the rule would add a definition of such PHAs in new proposed § 905.108, entitled ''Definitions.'' (See 76 FR 6661)

Section 9(d)(1)(L) of the 1937 Act, 42 U.S.C. 1437g(d)(1)(L)), includes in the list of eligible activities related to the Capital Fund ''integrated utility management and capital planning to maximize energy conservation and efficiency measures.'' While energy audits are already required, HUD is proposing to provide for the most cost-effective, useful, and efficient performance of activities funded under 42 U.S.C. 1437g(d)(1)(L) by requiring PHAs to complete their PNAs in conjunction with energy audits, and adopt or consider the findings of an energy audit, identify work items that correspond to energy conservation measures (ECMs), and incorporate cost-effective data from energy audits and PNAs into their assessment.

The integration of the energy audit and PNA is considered to be most effective when both activities are coordinated. In addition, coordination between an energy auditor and PNA provider is considered to be important for energy efficiency and capital upgrade decision-making. As the consulting industry that services PHAs and the public housing program is introduced to conducting coordinated or integrated PNAs and energy audits, the costs associated with performing both of these assessments may be reduced. HUD invites comment on the potential benefits and challenges of preparing energy audits in conjunction with PNAs. HUD is also interested in comment on the effect of aging on energy audit information as related to its usefulness for cost projection and strategic planning in a PNA.

This rule proposes to require PHAs to project the current modernization and life-cycle replacement repair needs over a 20-year period, rather than a 5-year period, in accordance with the useful life of individual properties and their building components and systems, to ensure the long-term viability of the property. This 20-year period is more closely related to the life cycle of buildings and major physical components than the current 5-year period. This proposed life-cycle-based, project-level PNA will enhance capital planning, recapitalization, and portfolio management practices by PHAs.

In addition, PNAs covering 20 years or more of projected capital needs are standard in real estate management. PNAs are standard requirements for refinancing, purchase of existing real estate, and property management. It is recognized that PNAs, especially in the later years of the 20-year period, will provide an estimate of future costs, not a statement of actual cost. These projections will be revised and become more accurate as time passes. The value of this order-of- magnitude estimate is the identification that there will be future obligations that must be planned and budgeted for in advance. Actual cost will be established by a contract for performance of the work; a PNA represents an informed estimate of future cost.

There currently exists no guidance as to the qualifications for the PNA provider. In addition, there exists no professional industry certification standard for providers of PNAs. Providers of such services range from architects and engineers to experienced practitioners from the building and inspection trades. Some PHAs directly employ staff people that perform physical needs assessment for their property. The proposed rule would establish minimum qualifications for the PNA provider, which standards would include experiential qualifications in property inspection and evaluation, cost estimating, energy efficiency and green capital upgrade and construction practices, and working knowledge of common information technology software. The rule would continue to permit the PHA to have its staff perform PNAs, but would give PHAs better guidance as to qualifications staff should have to perform this function. Although this is intended to minimize the compliance burden on PHAs, HUD understands that PHAs must weigh the decreased cost of the in-house assessment against the possibly greater objectivity, and hence validity, of third-party assessments. PHAs that plan to use PNAs to directly support a financial or funding transaction are advised to consider contracting with a third-party provider to the extent they are financially able. HUD invites public comment regarding appropriate qualifications for PNA providers and the appropriateness of PHA staff performing PNAs used for internal strategic planning purposes, PNAs used to directly support a funding or financial transaction, or both. HUD also seeks comment on the implications of adopting a requirement that PHAs use independent third-party providers to conduct their PNAs and the extent to which such a requirement would affect the compliance burden on PHAs and the validity of the PNA data.

This rule would require that the PNA and energy audit be completed in conjunction with each other once every 5 years to promote coordination of capital planning involving the selection of building materials and supplies, as well as capital expenditures that address life-cycle replacement repairs and energy efficiency improvements. The new PNA regulation and PNA form being developed by HUD will record energy conservation measures as identified in an energy audit. This rule proposes that, using information from the energy audit, the PHA shall identify specific work items and their associated costs in the PNA that match energy conservation measures (ECMs) identified in the energy audit.

While HUD proposes to require PHAs to update the PNA annually (and wholly revise it once every 5 years), HUD proposes to minimize any burden associated with the updates by having the PNA submitted electronically via a mechanism that will allow HUD to both aggregate and analyze the PNA data. Moreover, the annual update of the PNA, as proposed to be required by this rule, will provide HUD with the information it needs to effectively monitor PHA performance with respect to the manner in which the PHA addresses capital repair needs and administers the Capital Fund. PNA updates will be used to show how PHAs reduce capital repair backlog in their inventory and will enable HUD to assess the impact on the physical needs of the entire public housing portfolio.

Annual Update. The specific procedures for annual PNA updates will be determined as the new PNA tool is developed, but HUD plans for these updates to be a simple process performed by PHA staff in an automated format. The PHA, at the conclusion of the fiscal year, would review the PNA that it had prepared and would eliminate capital costs for the year that just ended by eliminating estimated costs for capital improvements actually completed. For capital improvements that were not completed during the year that just ended, the costs for those incomplete improvements would be moved to a future year. The PHA would continue in this manner for each year until the next comprehensive PNA is performed to refresh the data. This is the standard process used in the management of multifamily real estate portfolios. In this way, the PHA and HUD will have continuous visibility of the effectiveness of Capital Funds for long- term capital and financial planning.

Initial Submission and Transition. HUD plans to require that the PNAs, as proposed, be required only after the appropriate submission and evaluation systems are developed. Additionally, for the first two PNAs and first two energy audits, HUD may establish different dates for the submission of this information, recognizing that the initial effort to aggregate PNA and energy audit data may not allow for integration of the information into the 5-year reporting format as contemplated. For example, the 5-year planning cycle places many PHAs in a timeframe to submit their 5-year plans in Fiscal Year (FY) 2011. The new HUD PNA format is not anticipated to be available for use before FY 2012. HUD has provided initial guidance to PHAs to extend their existing PNAs and delay performance of a wholly new PNA until availability of the new PNA tool. It is envisioned that PHAs will report on their 5-year plan in FY 2011 on the basis of their existing PNA, as extended. The PHA will then perform the new PNA when the PNA tool becomes available in 2012. Since the new PNA will provide a 20-year schedule and would be updated annually by the PHA, adequate information from the 2012 PNA would exist for the PHA to use as the basis for its 5-year plan of 2016. The next PNA would be performed in 2020, in advance of the PHA's 5-year plan for 2021. Thereafter, the timing of completion of new PNAs shall be aligned to support more directly the 5-year PHA plan cycle.

The current PNA regulation assesses the needs and costs to ensure long-term physical viability, while the proposed rule would require the PNA to include all projected capital costs needed to keep the projects decent, safe, in good repair, and in compliance with all public housing requirements. When preparing capital repair and life-cycle repair cost estimates for modernization purposes, PHAs will continue their current practice of complying with local building and construction codes, as well as with all applicable public housing requirements, including uniform physical conditions standards, section 504 of the Rehabilitation Act (see 29 U.S.C. 794), and Uniform Federal Accessibility Standards (UFAS) (see 24 CFR part 40) requirements.

HUD believes that the amendments to the PNA regulations as proposed to be provided in new § 905.300(b)(9) of this rule will make the PNA tool a more effective tool and therefore better address the modernization and life-cycle replacement repair needs of a PHA's projects. The PNA existing regulation in 24 CFR 968.315(e)(2) was already proposed to be removed by the February 7, 2011, proposed rule. (See 76 FR 6661)

III. Findings and Certifications

Paperwork Reduction Act

The information collection requirements contained in this proposed rule have been submitted to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). In accordance with the Paperwork Reduction Act, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless the collection displays a currently valid OMB control number.

The burden of the information collections in this proposed rule is estimated as follows:

REPORTING AND RECORDKEEPING BURDEN

Section reference	Number of respondents	Number of responses per respondent	Estimated average time for requirement (in hours)	Estimated annual burden (in hours)
§ 905.300(b)(9)—PNA performed every 5 years including data collection and site inspection	620	1	[1] 130	80,600
§ 905.300(b)(9)—PNA data analysis and reporting	620	1	[2] 45	27,900
§ 905.300(b)(9)(vii)—annual update	2,480	1	[3] 8	19,840

REPORTING AND RECORDKEEPING BURDEN—Continued

Section reference	Number of respondents	Number of responses per respondent	Estimated average time for requirement (in hours)	Estimated annual burden (in hours)
Quality Assurance	104	1	[4] 16	1664
Total Paperwork Burden for the New Rule				130,004
Total Burden from current OMB ICR 2577–0157[5]				47,740
Total Additional Burden as a result of this rule				82,264

In accordance with 5 CFR 1320.8(d)(1), HUD is soliciting comments from members of the public and affected agencies concerning this collection of information to:

(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;

(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 collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Interested persons are invited to submit comments regarding the information collection requirements in this rule. Under the provisions of 5 CFR part 1320, OMB is required to make a decision concerning this collection of information between 30 and 60 days after today's publication date. Therefore, a comment on the information collection requirements is best assured of having its full effect if OMB receives the comment within 30 days of today's publication date. This time frame does not affect the deadline for comments to the agency on the proposed rule, however. Comments must refer to the proposal by name and docket number (FR–5361–P–01) and must be sent to:

HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503, Fax number: 202–395–6947;

and one of the two options below:

Colette Pollard, HUD Reports Liaison Officer, Office of the Chief Information Officer, Department of Housing and Urban Development, 451 7th Street, SW., Room 2204, Washington, DC 20410; or

Interested persons may submit comments regarding the information collection requirements electronically through the Federal eRulemaking Portal at *http://www.regulations.gov*. HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the *http://www.regulations.gov* Web site can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

Regulatory Planning and Review

OMB reviewed this proposed rule under Executive Order 12866 (entitled ''Regulatory Planning and Review''). This rule is a ''significant regulatory action'' as defined in 3(f) of the order (although not an economically significant regulatory action, as provided under section 3(f)(1) of the order).

The rule is not expected to have a significant economic impact. It is estimated that full compliance with the rule as proposed would cost PHAs, collectively, up to $29 million once every 5 years or an average of $5.9 million annually. The rule would not have any budgetary impact to the Federal Government, as costs to implement the PNA would be accommodated within HUD's existing budget authority. However, the additional expenses to expand PNA activities would generate some transfers from PHAs to those entities performing PNAs. These changes, however, are necessary for the transition to asset management and to accommodate the growing flexibility of financing granted to PHAs.

This proposed rule would require all PHAs to project the current modernization life-cycle replacement repair needs over a 20-year period.[6] This rule would coordinate the performance of the PNA with the performance of an energy audit and would expand the PNA requirements to apply to PHAs with fewer than 250 units.

The cost to perform PNAs can be approximated using existing examples and HUD's own experience.

HUD is using the PNA format of HUD's Green Retrofit Program (GRP), a Recovery Act program, as a source for the development of the PNA to be used in public housing and the new HUD PNA will be comparable in complexity/comprehensiveness.[7] HUD's Office of

[1] PHAs are only required to complete PNAs once every 5 years. This entry reflects the data collection and inspections. Therefore, to reflect the annual burden, a weighted average was derived by taking ⅕ of the total burden required of PHAs once every 5 years.

[2] This entry reflects the time to analyze the collected data, prepare a report, and upload the data to HUD.

[3] Per the new rule, PHAs will be required to complete an annual update in the years that they are not required to do a full PNA (thus annual updates will be required 4 out of every 5 years). Therefore, to reflect an annual burden, a weighted average was derived by taking ⅘ of the burden for PHAs to fulfill the annual update requirement.

[4] Quality Assurance will be performed by HUD on a sample of approximately 521 PNAs after each 5-year PNA cycle. Since all of the sampled PHAs would already have collected the basic quantity, component age, and other data into a PNA, the additional burden on the sampled PHAs is expected to be minimal.

[5] In the currently effective Information Collection Request (ICR), the burden is 15.4 hours annually for 3,100 PHAs.

[6] The current PNA regulation assesses the needs and costs to ensure long-term physical and social viability over a 5-year period.

[7] HUD's Office of Affordable Housing Programs, in the Office of Housing, manages the GRP, which involves direct engagement of providers to perform Physical Needs Assessment and Energy Audits for affordable housing projects. The GRP PNA is a baseline PNA including all of the components generally understood to be found in a PNA. It should be noted that the GRP includes an energy audit portion and an integrated pest management

Affordable Housing Programs (OAHP), in the Office of Housing, has shared a summary of its costs to perform PNAs during 2009/10 using its format for a set of 66 projects nationwide. These projects averaged 96 units per project, making them very comparable to the average project size of small PHAs of 84 units.

The average cost for the PNA portion of the GRP for these projects was $6,220 per project or $65.22 per unit.

During 2010, HUD staff in the Office of Public Housing visited a number of PHAs nationwide in an effort to familiarize itself with PNA procedures, forms, and formats used by PHAs, as well as to evaluate the burden of performance. These visits yielded some cost data that can be used as illustrative of the costs to perform PNAs to generally accepted industry standards for a baseline PNA. Notably, a large housing authority provided a copy of a proposal for its completed PNA indicating a cost of $63 per unit in 2007 from a nationally recognized high quality third-party provider. Two other PHAs, each of which had previously engaged third-party PNA providers to complete PNAs, are currently preparing to solicit proposals for new PNAs. Each indicated that their respective budget for the effort was $50 per unit in the context of having contracted for similar work previously and having baseline data from those prior assessments.

The $50 per-unit cost is used in this analysis as the cost to PHAs that are currently performing PNAs.

Assuming that PHAs are currently spending $50 per unit to perform PNAs and that it would cost $65.22 per unit under this rule, Exhibit-1 shows that compliance with the PNA requirements as proposed would cost about $79 million once every 5 years. However, the additional cost beyond what PHAs are already doing would be only $29 million. Small PHAs will be required to perform PNAs where no requirement previously existed. For these authorities, the cost would be estimated based upon the GRP cost data for similarly sized projects. This cost would be estimated at between $13,286,423 (203,717 units at $65.22 per unit) and $15,077,280 (2,424 projects at $6,220 per project) for the first performance of the PNA.

EXHIBIT—1

	Universe [1]						PNA current regulation		PNA proposed regulation		Estimate regulatory cost
	PHAs	% PHAs	Projects	% Projects	Total	% Units	$/Unit [2]	$Total	$/Unit [3]	$Total	
Under 250 Units	2,424	74.95	2,312	31.67	203,717	16.79	(PNA not required)		65.22	13,286,423	13,286,423
Over 250 Units	810	25.05	4,988	68.33	1,009,436	83.21	50.00	50,471,800	65.22	65,835,416	15,363,616
Totals	3,234	100.00	7,300	100.00	1,213,153	100.00		50,471,800		79,121,839	28,650,039

[1] The number of PIH units is from the PUD records.
[2] This is the average for Baltimore and Boston, each of which has previously hired third-party PNA contractors.
[3] HUD is using the Green Retrofit Physical Condition Assessment (GRPCA) as a source for the development of the PNA to be used in public housing and the new HUD PNA will be comparable complexity and comprehensiveness. The average cost of the PNA portion of the GRPCA for these assessments was $65.22 per unit.

Large PHAs that already are required to perform PNAs with 5-year terms will now be required to perform PNAs with 20-year terms and to potentially higher standards than the current PNA requirement. Regardless of the term of the PNA, it is assumed that an assessor would still be required to examine virtually every component of a project in order to determine its remaining useful life and whether that life falls within the term of the PNA. The difference in performance, therefore, is primarily the entry of data over a 20-year term rather than a 5-year term. The cost of greater standards of performance for large PHAs could be estimated at $15,363,616, representing the difference between the cost to perform a PNA to the GRP standard ($65.22 per unit) and the cost to perform a PNA to the PHAs standards in the absence of a new standard from HUD ($50 per unit) multiplied by the number of units (1,009,436) within larger authorities.

These estimates are probably high since it is known that some proportion of small PHAs (with fewer than 250 units) perform a PNA as a capital planning and strategic planning tool. Also, many larger PHAs (with 250 units or more) already perform PNAs to generally similar or higher standards than the baseline PNA required by the PNA rule and many PHAs perform, and will continue to perform, PNAs with in-house staff.

The rule also has significant benefits. Planning is a hallmark of a well-managed property. A Physical Needs Assessment (PNA) is a key planning tool. HUD distributes several billion dollars in capital and operating funds annually to PHAs. The quality and efficiency of property management directly impacts the effective use of these funds. While it is self-evident that efficiently managed real estate costs less to operate, it is not feasible to quantify a dollar cost savings owing to efficient management applicable to all properties, since the implementation of planning varies over a very broad spectrum. It is certainly feasible to assume that such savings would exceed the costs for performing PNAs on an aggregate basis. The following is a list (not exhaustive) of possible benefits of the rule.

1. The identification of capital expenditures far enough in advance of their required implementation to allow for consideration of the most efficient method of paying for the improvement, whether by the application of grant funds, borrowing, or other mechanisms, including repositioning of the property.

2. The identification of synergies in the timing and intensity of capital improvements, and the avoidance of duplicative or wasteful capital expenditures that might be lost in the subsequent comprehensive modernization or obsolescence of a property.

3. Informing a preventative maintenance strategy that most efficiently employs maintenance resources to maximize the useful life of property components and to potentially extend useful lives beyond their expected duration.

4. Minimizing unexpected component failures and the potential for additional costs for tenant relocation, emergency services, premium time, liability exposure, and insurance costs, etc.

5. Promoting the implementation of energy efficiency measures and the utility savings that accrue.

6. Increased occupancy and enhanced health and safety as a result of more habitable units.

portion, in addition to the PNA portion. Energy audits are already required to be performed every 5 years for every PHA regardless of size; integrated pest management is not a requirement in public housing and is not required by the new PNA.

This analysis also considers transfers. The proposed rule has the potential to generate about $29 million in additional PNA work every 5 years. These additional expenses would constitute a transfer from PHAs to those entities performing PNAs. There exists an active industry engaged in providing PNAs to PHAs.

HUD's economic analysis can be found at *http://www.regulations.gov* and in the docket file, which is available for public inspection between the hours of 8 a.m. and 5 p.m., weekdays, in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW., Room 10276, Washington, DC 20410–0500. Due to security measures at the HUD Headquarters building, an advance appointment to review the docket file must be scheduled by calling the Regulations Division at 202–708–3055 (this is not a toll-free number). Hearing- or speech-impaired individuals may access this number through TTY by calling the toll-free Federal Relay Service at 800–877–8339.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) (UMRA) establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. This proposed rule does not impose any federal mandate on any state, local, or tribal government or the private sector within the meaning of UMRA.

Environmental Impact

This proposed rule that does not direct, provide for assistance or loan and mortgage insurance for, or otherwise govern, or regulate, real property acquisition, disposition, leasing, rehabilitation, alteration, demolition, or new construction, or establish, revise or provide for standards for construction or construction materials, manufactured housing, or occupancy. Accordingly, under 24 CFR 50.19(c)(1), this proposed rule is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321).

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. This proposed rule expands the PNA requirements to apply to PHAs that have fewer than 250 units. However, all PHAs, including small PHAs, have been required to complete energy audits, which essentially review building systems for the purpose of assessing whether the project would benefit from energy conservation measures.

With respect to small PHAs that would have to complete PNAs under this rule, while there is some burden, it is not considered a significant economic impact nor is it considered significant in the context of standard operating procedures for real estate management. The burden entails assembling existing physical data for the property and organizing a brief site survey of a sample of the physical property. It is generally acknowledged that the burden is greater the first time a PNA is completed, since a completed PNA becomes a data repository that is largely reusable. There are a total of approximately 3,100 PHAs. Of these, approximately 2,300 are small entities that have previously not been required to complete a PNA. While these 2,300 PHAs represent approximately 74 percent of all PHAs, they only represent approximately 20 percent of the units in the public housing portfolio, or 200,000 of the 1,200,000 units. The total additional paperwork burden imposed by the rule for small entities is 95,220 hours per year for 2,300 parties, or 41.4 hours per small PHA. HUD assumes for the purpose of this analysis that, in most cases, staff at small PHAs would complete the paperwork, thus requiring no additional expenditure beyond salaries. Even were the small PHAs to hire third parties to complete a PNA, the costs for completing a PNA once every 5 years are expected to be minimal when compared to the amount of Capital Funds the PHA will receive during that same 5-year period, and enable the PHA to more effectively expend those funds. Hence, this rule does not have significant economic impact on small PHAs.

Notwithstanding the determination that this rule would not have a significant economic impact on a substantial number of small entities, HUD specifically invites any comments regarding any less burdensome alternatives to this rule that will meet HUD's objectives as described in this preamble.

Executive Order 13132, Federalism

Executive Order 13132 (entitled "Federalism") prohibits, to the extent practicable and permitted by law, an agency from promulgating a regulation that has federalism implications and either imposes substantial direct compliance costs on state and local governments and is not required by statute or preempts state law, unless the relevant requirements of section 6 of the Executive Order are met. This rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

Catalog of Federal Domestic Assistance Number

The Catalog of Federal Domestic Assistance number for 24 CFR part 905 is 14.872.

List of Subjects in 24 CFR Part 905

Grant programs—housing and community development, Public housing, Reporting and recordkeeping requirements.

Accordingly, for the reasons stated in the preamble, HUD proposes to amend 24 CFR part 905, as proposed to be revised at 76 FR 6661, February 7, 2011, as follows:

PART 905—THE PUBLIC HOUSING CAPITAL FUND PROGRAM

1. The authority citation for part 905 continues to read as follows:

Authority: 42 U.S.C. 1437g and 3535(d).

2. In § 905.108, add the definition of "Moving to Work PHA" in proper alphabetical order to read as follows:

§ 905.108 Definitions.

* * * * *

Moving to Work PHA means a PHA that participates in the Moving to Work (MTW) demonstration program, which provides PHAs the opportunity to design and test innovative, locally designed strategies that use federal dollars more efficiently, help residents find employment and become self-sufficient, and increase housing choices for low-income families. MTW is funded through annual appropriations acts.

* * * * *

3. In § 905.300, add a new paragraph (b)(9) to read as follows:

§ 905.300 Capital Fund Submission Requirements.

* * * * *

(b) * * *

(9) *Physical needs assessment (PNA).* Each PHA, including Moving to Work PHAs, shall complete and submit a comprehensive PNA at a time and in a form and manner prescribed by HUD that incorporates the life-cycle repair

and replacement costs of project systems and components for a 20-year period, for each public housing project in its inventory. The PNA will provide summary level information for the PHA's overall public housing portfolio, as well as information from the energy audit completed in conjunction with the PNA.

(i) The PNA and the associated estimates shall be completed without regard to whether funds are available at the time the PNA is completed to do the repair and replacement work projected by the PNA.

(ii) The PNA shall capture all capital costs needed to comply with public housing requirements, including section 504 of the Rehabilitation Act (see 29 U.S.C. 794), Uniform Federal Accessibility Standards (UFAS) requirements (see 24 CFR part 40), and Lead Safe Housing Rule (LSHR) requirements (see 24 CFR part 35).

(iii) The PNA shall account for the impact of any projected or actual removal of units from the inventory by the corresponding removal of cost associated with physical needs of those removed units.

(iv) The first two PNAs pursuant to this part and first two energy audits completed after [effective date of final rule to be inserted at final rule stage] shall be completed in accordance with a timeframe delineated by HUD in order to better enable PHAs, after the completion of the first PNA pursuant to this part, to better utilize the PNA in support of their 5-year planning cycle. After the completion of the first two PNAs and first two energy audits, the PHA shall completely update the PNA and energy audit no less often than once every 5 years.

(v) The PNA provider shall be experienced in the performance of residential building assessment including building systems, health and safety conditions, physical and structural conditions, cost estimating, and building modernization. The PNA provider shall have knowledge of energy efficiency and green capital upgrade and construction practices. The PNA submission shall identify the PNA provider(s). Additional qualifications shall include:

(A) Five (5) years or more of direct experience in physical facility inspection and/or assessment;

(B) Five (5) years or more of direct experience in cost estimating;

(C) Knowledge of applicable building standards and codes, including federal, state, and local requirements as demonstrated by experience, training, or certifications;

(D) Knowledge of energy conservation and energy efficiency and green capital upgrade and construction practices, as demonstrated by experience, training, or certifications;

(E) Working knowledge of commonly used computer technology and software.

(vi) The PNA shall be performed in conjunction with an energy audit and the energy audit findings shall be integrated into the PNA. PHAs that will have completed an energy audit within 2 years of the date that the PHA will complete its first PNA, pursuant to this part, shall not be required to complete a new energy audit concurrent with its first PNA if the existing energy audit contains the cost-effectiveness data required by HUD. Using information from the energy audit, the PHA shall identify specific work items and their associated costs in the PNA that match energy conservation measures (ECMs) identified in the energy audit. For each ECM reviewed as part of an energy audit, unless otherwise directed by HUD, the PNA shall incorporate the pay back data from the energy audit in a form and manner prescribed by HUD.

(vii) As modernization and repairs of public housing developments are completed, the PHA shall make revisions to its PNA to indicate that repairs to individual buildings have been addressed. These PNA revisions shall be completed on an annual basis.

(viii) The PHA shall submit its PNAs and annual updates to HUD in a time, manner, and format determined by HUD. HUD may evaluate the quality and accuracy of PNAs. HUD may require a PHA to revise its PNA to correct errors or inaccuracies, or elements of the PNA that do not comply with HUD requirements, all as determined by HUD. In addition, HUD may directly revise a PHA's PNA to make such corrections. To the extent such revisions are made, the PHA shall update the corrected PNA in its annual update submission.

(ix) A PHA shall not obligate or expend Capital Funds for administration, for transfers to operations, or for management improvements unless:

(A) A PNA has been submitted in a time, manner, and format determined by HUD in accordance with this subpart; and

(B) Corrections to the PNA required in accordance with paragraph (b)(9)(viii) of this section have been completed by the PHA within 3 months of having been notified of the need for correction by HUD.

Dated: June 10, 2011.

Sandra B. Henriquez,

Assistant Secretary for Public and Indian Housing.

[FR Doc. 2011–18046 Filed 7–19–11; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 41

[REG–122813–11]

RIN 1545–BK35

Highway Use Tax; Filing and Payment for Taxable Period Beginning July 1, 2011

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking by cross-reference to temporary regulations.

SUMMARY: In the Rules and Regulations section of this issue of the **Federal Register**, the IRS is issuing temporary regulations that provide guidance on the filing of Form 2290 ''Heavy Highway Vehicle Use Tax Return'' and payment of the associated highway use tax for the taxable period beginning July 1, 2011. These regulations affect owners and operators of highway motor vehicles with a taxable gross weight of 55,000 pounds or more. The text of the temporary regulations also serves as the text of the proposed regulations on this subject.

DATES: Written and electronic comments and requests for a public hearing must be received by October 18, 2011.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–122813–11), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered to: CC:PA:LPD:PR Monday through Friday between the hours of 8 a.m. and 4 p.m. to: CC:PA:LPD:PR (REG–122813–11), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW.; Washington, DC, or sent electronically via the Federal eRulemaking Portal at *http://www.regulations.gov* (IRS REG–122813–11).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Natalie Payne, (202) 622–3130; concerning submissions of comments and requests for a public hearing, Regina Johnson, (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

This document contains proposed amendments to the Highway Use Tax Regulations (26 CFR part 41) under sections 6001, 6071 and 6151 of the Internal Revenue Code (Code). The text of temporary regulations published in this issue of the **Federal Register** also serves as the text of these proposed regulations. The preamble to the temporary regulations explains the temporary regulations.

Proposed Effective Date

These regulations are proposed to apply to taxable use of highway motor vehicles occurring on or after July 1, 2011.

Special Analyses

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

Comments and Requests for a Public Hearing

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

Drafting Information

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

List of Subjects in 26 CFR Part 41

Excise taxes, Motor vehicles, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 41 is proposed to be amended as follows:

PART 41—EXCISE TAX ON USE OF CERTAIN HIGHWAY MOTOR VEHICLES

Paragraph 1. The authority citation for part 41 is amended to read in part as follows:

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

Section 41.6001–2 also issued under 26 U.S.C. 6001. * * *

Section 41.6071(a)–1 also issued under 26 U.S.C. 6071(a). * * *

Section 41.6151(a)–1 also issued under 26 U.S.C. 6151(a). * * *

Par. 2. Section 41.6001–2 is amended by revising paragraphs (b)(1)(ii), (b)(4)(ii), (c)(2)(ii) and (c)(2)(iii) to read as follows:

§ 41.6001–2 Proof of payment for State registration purposes.

* * * * *

(b) * * *

(1) * * *

(ii) [The text of this proposed amendment to § 41.6001–2(b)(1)(ii) is the same as the text of § 41.6001–2T(b)(1)(ii) published elsewhere in this issue of the **Federal Register**].

* * * * *

(4) * * *

(ii) [The text of this proposed amendment to § 41.6001–2(b)(4)(ii) is the same as the text of § 41.6001–2T(b)(4)(ii) published elsewhere in this issue of the **Federal Register**].

* * * * *

(c) * * *

(2) * * *

(ii) [The text of this proposed amendment to § 41.6001–2(c)(2)(ii) is the same as the text of § 41.6001–2T(c)(2)(ii) published elsewhere in this issue of the **Federal Register**].

(iii) [The text of this proposed amendment to § 41.6001–2(c)(iii) is the same as the text of § 41.6001–2T(c)(2)(iii) published elsewhere in this issue of the **Federal Register**].

* * * * *

Par. 3. Section 41.6071(a)–1 is amended by adding paragraph (c) to read as follows:

§ 41.6071(a)–1 Time for filing returns.

* * * * *

(c) [The text of this proposed amendment to § 41.6071(a)–1(c) is the same as the text of § 41.6071(a)–1T(c) through (c)(3) published elsewhere in this issue of the **Federal Register**].

Par. 4. Section 41.6151(a)–1 is revised to read as follows:

§ 41.6151(a)–1 Time and place for paying tax.

[The text of this proposed amendment to § 41.6151(a)–1 is the same as the text of § 41.6151(a)–1T(a) and (b) published elsewhere in this issue of the **Federal Register**].

Steven T. Miller,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2011–18250 Filed 7–15–11; 4:15 pm]

BILLING CODE 4830–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2010–0972]

RIN 1625–AA09

Drawbridge Operation Regulations; Bayou Liberty, Mile 2.0, St. Tammany Parish, Slidell, LA

AGENCY: Coast Guard, DHS.

ACTION: Supplemental notice of proposed rulemaking.

SUMMARY: The Coast Guard is proposing to change the operating schedule for the State Route 433 (S433) bridge across Liberty Bayou, mile 2.0, at Slidell, St. Tammany Parish, Louisiana. The proposed rule provides for an opening upon one-hour notice from 7 a.m. to 7 p.m., allowing the Louisiana Department of Transportation and Development, owner of the bridge, to reduce the hours of manned operation of the bridge in order to make more efficient use of personnel and operating resources. This Supplemental Notice follows a Notice of Proposed Rulemaking published in the **Federal Register** [USCG–2010–0972] on November 22, 2010 (75 FR 71061).

DATES: Comments and related material must be received by the Coast Guard on or before September 19, 2011.

ADDRESSES: You may submit comments identified by docket number USCG–2010–0972 using any one of the following methods:

(1) *Federal eRulemaking Portal: http://www.regulations.gov.*

(2) *Fax:* 202–493–2251.

(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 proposed rule, call or e-mail Jim Wetherington; Bridge Administration Branch, Eighth Coast Guard District, telephone 504–671–2128, e-mail *james.r.wetherington@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 participate in this rulemaking by submitting comments and related materials. 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 rulemaking (USCG–2010–0972), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online (*http://www.regulations.gov*), or by fax, mail or hand delivery, but please use only one of these means. If you submit a comment online via *http://www.regulations.gov,* it will be considered received by the Coast Guard when you successfully transmit the comment. If you fax, hand deliver, or mail your comment, it will be considered as having been received by the Coast Guard when it is received at the Docket Management Facility. We recommend that you include your name and a mailing address, an e-mail address, or a phone 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 ''Proposed Rules'' and insert ''USCG–2010–0972'' 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 and may change the rule based on your comments.

Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, 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–2010–0972'' and click ''Search.'' Click the ''Open Docket Folder'' in the ''Actions'' column. You may also visit 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 notice regarding our public dockets in the January 17, 2008, issue of the **Federal Register** (73 FR 3316).

Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for one using one of the four methods specified under **ADDRESSES**. Please explain why one would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

Basis and Purpose

In October 2010, the Louisiana Department of Transportation and Development (LDOTD), the owner of the bridge, replaced the existing S433 pontoon bridge over Bayou Liberty, mile 2.0, St. Tammany Parish, Slidell, LA with a new modern swing bridge. Due to the fact that not all vessels would now require the bridge to open for the passage of vessels, LDOTD requested a modification to the existing requirements for giving notice to open the bridge. The Coast Guard published a Notice of Proposed Rulemaking in the **Federal Register** [USCG–2010–0972] on November 22, 2010 (75 FR 71061). The proposed rule would have changed the notice required for an opening of the bridge from 7 a.m. to 7 p.m. from on signal to two hours notice. The notice required for an opening from 7 p.m. to 7 a.m. would have remained two hours as required by the existing regulations.

At the same time, a test deviation was published in the **Federal Register** (75 FR 71017) to allow mariners to test the proposed change for 30 days. Thirteen comments were received either by e-mail or through the docket but only four were within the time specified. All 13 comments were considered, and are discussed and addressed in this SNPRM.

Discussion of Comments and Changes

As stated above, we received 13 submissions commenting on the NPRM. Five comments expressed concern with testing a new opening procedure during the winter months and relying on recorded openings during construction or the recreational boating off season. One comment specifically stated that Bayou Liberty is primarily a recreational waterway and several comments referenced residential and recreational use. The Coast Guard agrees that better results will likely result from a test period during a season that better reflects the recreational and residential use of the waterway and as a result issued a new temporary deviation to run from June 1, 2011 through September 9, 2011, to test a revised opening schedule and it was published in **Federal Register** (76 FR 28311) on May 17, 2011. The current test deviation will provide a record of openings during the spring and summer months, including recreational boating during a couple of holiday weekends. So, the comparison between recorded openings during prior years and recorded openings during the current test period will provide a better representation of the bridge's use and need, specifically during holidays. While one comment mentioned a 12 month test period, the Coast Guard feels that this would be unnecessary and impracticable. As stated above, the current test period will be during the higher traffic season and will be compared to the prior year's recorded openings. Lengthening a test period to 12 months would incorporate lower traffic months already determined to be a poor representation of the bridge's use, unnecessarily delaying an appropriate final opening schedule.

Four comments mention concern with the impact this rule would have on property value if certain vessels are not able to easily transit through the bridge. The Coast Guard understands this concern and the current test deviation will provide a record of the type of traffic using and attempting to use the bridge during the high use season.

Four comments indicated a concern with evacuation during threat of a hurricane or tropical storm. Should emergency evacuation be necessary, the bridge would operate under emergency procedures already in place pursuant to the Code of Federal Regulations, 33 CFR part 117. Specifically, 33 CFR 117.59 states that for the duration of occurrences hazardous to safety or navigation such as floods, freshets and damage to the bridge of fender system, the District Commander may require the owner of an operational drawbridge listed in this sub part to have the bridge attended full time and open on signal. But, 33 CFR 117.33 provides that ''[d]raw bridges need not open for the passage of vessels during periods of natural disasters or civil disorders declared by the appropriate authorities unless otherwise provided for or directed to do so by the District Commander.''

Four comments expressed a concern that the two-hour request time was excessive during the day. The Coast Guard agrees and the bridge owner agreed to the new test deviation and this SNPRM proposing a one-hour request time during the day, cutting the request time during the day in half.

Two comments expressed difficulty with reaching the point of contact to request an opening. The Coast Guard contacted the bridge owner, confirming that accurate contact information is posted. The bridge owner also stated that they do periodic tests of the phone system and have never had an issue.

One comment expressed concern that the majority of comments submitted were concerned with large boats and that smaller boat owners are not as concerned about a change in opening procedures because the replacement bridge is high enough to go under. The new test period during a higher traffic season is expected to provide a better representation of the waterway use by boats requiring the bridge to open.

Finally, two comments proposed combining bridge-tender duties with other bridges operating in the vicinity of this bridge and stated that a full-time tender was represented as part of the new bridge. The Coast Guard contacted LDOTD, the bridge owner, and confirmed that LTOTD is considering a solution regarding bridge-tender duties and if they may be combined.

In summary, the time of year that the original NPRM and deviation were issued did not capture a true representation of the bridge's use and how a new operating schedule may impact such use. The original test period was during the winter when vessel traffic was considerably less than the summer months which the new test and comment period will cover.

Based on the limited data received and the aforementioned comments, LDOTD changed their request to modify the requirements for giving notice to open the bridge. Specifically, LDOTD lessened the request time required for opening during the day. This supplemental notice proposes to have the bridge open on signal if at least one-hour notice is given from 7 a.m. to 7 p.m. and two-hour notice is given from 7 p.m. to 7 a.m.

As previously stated, the Coast Guard issued a new temporary deviation to test the newly proposed schedule and it was published in **Federal Register** (76 FR 28311) on May 17, 2011. The test deviation is scheduled to run from June 1, 2011 through September 9, 2011. During and following completion of the test deviation, the Coast Guard will analyze the data collected from the tender logs and vehicular transits and review the comments received to this SNPRM to determine if the requested modifications to the operating schedule can be made permanent.

The replacement bridge has a vertical clearance of 7.59 feet above the 2% flowline, elevation 2.5 feet (NAVD 1988) in the closed-to-navigation position and unlimited in the open-to-navigation position. In accordance with 33 CFR 117.469, the draw of the S433 Bridge, mile 2.0, at Slidell, shall open on signal, except that between 7 p.m. and 7 a.m., the draw shall open on signal if at least a two-hour notice is given.

Discussion of Proposed Rule

LDOTD is requesting a new regulation to open the bridge on signal with one-hour notice from 7 a.m. to 7 p.m. and with two-hour notice from 7 p.m. to 7 a.m. Presently, the bridge opens on signal, except that between 7 p.m. to 7 a.m., the draw shall open on signal if at least a two-hour notice is given. This rule proposes to change the requirement that a bridge tender open the bridge on signal during the day. The proposed change is to require that the bridge be opened with a one-hour notice during the 7 a.m. to 7 p.m. time period each day. So, the bridge would open within one hour of a mariner calling the number posted at the bridge rather than having a bridge tender present from 7 a.m. to 7 p.m. each day. The area above the bridge site is an area normally transited by local mariners. It is believed that these mariners will be able to contact the bridge owner before their planned departure from their docks. The reason for the requested change in the operation schedule is that a new swing bridge has been constructed with a vertical clearance of 7.59 feet above the 2% flowline, elevation 2.5 feet (NAVD 1988) in the closed-to-navigation position and unlimited in the open-to-navigation. This new bridge replaces a pontoon bridge that required bridge openings for all vessels. LDOTD has indicated that bridge opening requests have decreased significantly and the bridge owner feels that they can maintain a quality level of service without keeping a tender on the bridge at all times.

Regulatory Analyses

We developed this proposed 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, as supplemented by Executive Order 13563, Improving Regulation and Regulatory Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Executive Order 12866 or under section 1 of Executive Order 13563. The Office of Management and Budget has not reviewed it under that those Orders.

We expect the economic impact of this proposed rule to be so minimal that a full Regulatory Evaluation is unnecessary.

The public would need to notify the bridge owner of a required opening one hour in advance from 7 a.m. to 7 p.m., rather than on signal. From 7 p.m. to 7 a.m., two-hour notice will be required.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this proposed 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 proposed rule would not have a significant economic impact on a substantial number of small entities. This proposed rule would affect the following entities, some of which might be small entities: The owners or operators of vessels needing to transit the bridge between 7 a.m. and 7 p.m. with less than one-hour advance notice.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please call or e-mail Jim Wetherington; Bridge Administration Branch, Eighth Coast Guard District, telephone 504–671–2128, e-mail *james.r.wetherington@uscg.mil.* The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

Collection of Information

This proposed rule will not call for a 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 proposed 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 proposed 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 proposed rule would 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 proposed 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 proposed rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and would not create an environmental risk to health or risk to safety that might disproportionately affect children.

Indian Tribal Governments

This proposed rule does not have Tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have a substantial direct effect on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

Energy Effects

We have analyzed this proposed 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 proposed rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this proposed rule under Department of Homeland Security Management Directive 023–01, and Commandant Instruction M16475.lD which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment because it simply promulgates the operating regulations or procedures for drawbridges. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

List of Subjects in 33 CFR Part 117

Bridges.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 33 CFR 1.05–1; Department of Homeland Security Delegation No. 0170.1.

2. § 117.469 is revised to read as follows:

§ 117.469 Liberty Bayou.

The draw of the S433 Bridge, mile 2.0, at Slidell, shall open on signal with a one hour notice from 7 a.m. to 7 p.m. and from 7 p.m. to 7 a.m., two-hour notice will be required, seven days a week.

Dated: March 25, 2011.

Mary E. Landry,

Rear Admiral, U.S. Coast Guard, Commander, Eighth Coast Guard District.

[FR Doc. 2011–18225 Filed 7–19–11; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 55

[EPA–R03–OAR–2011–0140; FRL–9434–6]

Outer Continental Shelf Air Regulations Consistency Update for Virginia

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA proposes to update a portion of the Outer Continental Shelf (OCS) Air Regulations. Requirements applying to OCS sources located within 25 miles of States' seaward boundaries must be updated periodically to remain consistent with the requirements of the corresponding onshore area (COA), as mandated by section 328(a)(1) of the Clean Air Act (CAA). The portion of the OCS air regulations that is being updated pertains to the requirements that would apply to OCS sources located within 25 miles of the seaward boundary of the Commonwealth of Virginia. EPA is taking this action as a direct final rule without prior proposal because the Agency views this as a noncontroversial action and anticipates no adverse comments. If no adverse comments are received in response to this action, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time.

DATES: Written comments must be received by August 19, 2011.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R03–OAR–2011–0140 by one of the following methods:

1. *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
2. *E-mail: cox.kathleen@epa.gov.*
3. *Mail:* EPA–R03–OAR–2011–0140, Kathleen Cox, Associate Director, Office of Permits and Air Toxics, Mailcode 3AP10, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.
4. *Hand Delivery or Courier.* At the previously-listed EPA Region III address. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R03–OAR–2011–0140. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit through *http://www.regulations.gov,* or e-mail, information that you consider to be CBI or otherwise protected. 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.

Docket: All documents in the electronic docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *i.e.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

FOR FURTHER INFORMATION CONTACT: Emlyn Vélez-Rosa, (215) 814–2038 or by e-mail at *velez-rosa.emlyn@epa.gov*.

SUPPLEMENTARY INFORMATION: For further information, please see the information provided in the direct final action, with the same title, located in the Rules and Regulations section of this **Federal Register** publication.

Dated: June 3, 2011.

W. C. Early,

Acting Regional Administrator, Region III.

[FR Doc. 2011–18130 Filed 7–19–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 122 and 125

[EPA–HQ–OW–2008–0667, FRL–9441–8]

RIN 2040–AE95

National Pollutant Discharge Elimination System—Cooling Water Intake Structures at Existing Facilities and Phase I Facilities

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; reopening public comment period.

SUMMARY: On April 20, 2011, EPA proposed requirements under section 316(b) of the Clean Water Act for all existing power generating facilities and existing manufacturing and industrial facilities. EPA requested that public comments on the proposal be submitted on or before July 19, 2011. Since publication, the Agency has received several requests for additional time to submit comments. EPA is re-opening the comment period and will accept public comments on the proposal through August 18, 2011.

DATES: Comments on the proposed rule, which was published April 20, 2011, at 76 FR 22174, must be received on or before August 18, 2011.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OW–2008–0667, by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: OW–Docket@epa.gov.*
- *Mail:* U.S. Environmental Protection Agency; EPA Docket Center

(EPA/DC) Water Docket, MC 28221T; 1200 Pennsylvania Avenue, NW., Washington, DC 20460.

• *Hand Delivery:* EPA Docket Center, 1301 Constitution Ave., NW., EPA West, Room 3334, 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–OW–2008–0667. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or 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. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, 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 Office of Water Docket/EPA/DC, 1301 Constitution Ave., NW., EPA West, Room 3334, Washington, DC. This Docket Facility is open from 8:30 a.m. until 4:30 p.m., EST, Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Office of Water Docket is (202) 566–2426.

FOR FURTHER INFORMATION CONTACT: Paul Shriner, Engineering and Analysis Division (4303T), U.S. EPA, 1200 Pennsylvania Ave., NW., Washington, DC 20460; (202) 566–1076; *shriner.paul@epa.gov.*

Dated: July 15, 2011.

Nancy K. Stoner,

Acting Assistant Administrator for Water.

[FR Doc. 2011–18407 Filed 7–19–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 174 and 180

[EPA–HQ–OPP–2011–0082; FRL–8880–1]

Receipt of Several Pesticide Petitions Filed for Residues of Pesticide Chemicals in or on Various Commodities

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of filing of petitions and request for comment.

SUMMARY: This document announces the Agency's receipt of several initial filings of pesticide petitions requesting the establishment or modification of regulations for residues of pesticide chemicals in or on various commodities.

DATES: Comments must be received on or before August 19, 2011.

ADDRESSES: Submit your comments, identified by docket identification (ID) number and the pesticide petition number (PP) of interest as shown in the body of this document, by one of the following methods:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments.

• *Mail:* Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

• *Delivery:* OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

Instructions: Direct your comments to the docket ID number and the pesticide petition number of interest as shown in the body of this document. EPA's policy is that all comments received will be included in the 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 regulations.gov or e-mail. The 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 *regulations.gov,* your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the docket index available at *http://www.regulations.gov.* Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov,* or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: A contact person, with telephone number and e-mail address, is listed at the end of each pesticide petition summary. You may also reach each contact person by mail at Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed at the end of the pesticide petition summary of interest.

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

3. *Environmental justice.* EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low-income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. To help address potential environmental justice issues, the Agency seeks information on any groups or segments of the population who, as a result of their location, cultural practices, or other factors, may have atypical or disproportionately high and adverse human health impacts or environmental effects from exposure to the pesticides discussed in this document, compared to the general population.

II. What action is the agency taking?

EPA is announcing its receipt of several pesticide petitions filed under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a, requesting the establishment or modification of regulations in 40 CFR part 174 or part 180 for residues of pesticide chemicals in or on various food commodities. The Agency is taking public comment on the requests before responding to the petitioners. EPA is not proposing any particular action at this time. EPA has determined that the pesticide petitions described in this document contain the data or information prescribed in FFDCA section 408(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data support granting of the pesticide petitions. After considering the public comments, EPA intends to evaluate whether and what action may be warranted. Additional data may be needed before EPA can make a final determination on these pesticide petitions.

Pursuant to 40 CFR 180.7(f), a summary of each of the petitions that are the subject of this document, prepared by the petitioner, is included in a docket EPA has created for each rulemaking. The docket for each of the petitions is available on-line at *http://www.regulations.gov.*

As specified in FFDCA section 408(d)(3), (21 U.S.C. 346a(d)(3)), EPA is publishing notice of the petition so that the public has an opportunity to comment on this request for the establishment or modification of regulations for residues of pesticides in or on food commodities. Further information on the petition may be obtained through the petition summary referenced in this unit.

New Tolerances

1. *PP* 1E7842. (EPA–HQ–OPP–2011–0343). Interregional Research Project Number 4 (IR–4), 500 College Road East, Suite 201W, Princeton, NJ 08540, requests to establish tolerances in 40 CFR part 180 for residues of the insecticide methoxyfenozide *per se,* benzoic acid, 3-methoxy-2-methyl-, 2-(3,5-dimethylbenzoyl)-2-(1,1-dimethylethyl) hydrazide, in or on fruit, citrus, group 10–10 at 1.9 parts per million (ppm); lemon, oil at 45 ppm; citrus, oil (except lemon) at 100 ppm; vegetable, root, except sugar beet, subgroup 1B at 0.8 ppm; and beet, sugar at 0.5 ppm. Analytical methodology for the magnitude of residue studies in citrus was based on a procedure based on Dow AgroSciences method GRM 02.25 ''Determination of Residues of Methoxyfenozide in High Moisture Crops by Liquid Chromatography with Tandem Mass Spectrometry Detection (LC/MS/MS)''. Analytical methodology for the magnitude of residue studies in root crops used a procedure based on the Rohm and Haas Technical Report No. 34–98–87, ''Tolerance enforcement method for Parent RH–2485 in Pome Fruit'' with minor modifications. *Contact:* Sidney Jackson, (703) 305–7610, *e-mail address: jackson.sidney@epa.gov.*

2. *PP* 1E7850. (EPA–HQ–OPP–2011–0357). Interregional Research Project Number 4 (IR–4), 500 College Road East, Suite 201W, Princeton, NJ 08540, requests to establish tolerances in 40 CFR part 180 for residues of the insecticide fenpyrazamine, 5-amino-2,3-dihydro-2-(1-methylethyl)-4-(2-

methylphenyl)-3-oxo-1*H*-pyrazole-1-carbothioic acid, *S*-2-propen-1-yl ester in or on caneberry subgroup 13–07A at 7.0 ppm; bushberry subgroup 13–07B at 7.0 ppm; pistachio at 0.02 ppm; and ginseng at 0.8 ppm. A practical analytical method utilizing LC/MS detection is available and has been validated for detecting and measuring residues of fenpyrazamine (fenpyrazamine and S–2188–DC) in and on crops. *Contact:* Sidney Jackson, (703) 305–7610, *e-mail address: jackson.sidney @epa.gov.*

3. *PP* 1E7851. (EPA–HQ–OPP–2011–0398). Interregional Research Project Number 4 (IR–4), 500 College Road East, Suite 201W, Princeton, NJ 08540, requests to establish tolerances in 40 CFR part 180 for residues of the fungicide azoxystrobin, (methyl (*E*)-2-[2-[6-(2-cyanophenoxy)pyrimidin-4-yloxy]phenyl]-3-methoxyacrylate) and the *Z* isomer of azoxystrobin, (methyl (*Z*)-2-[2-[6-(2-cyanophenoxy)pyrimidin-4-yloxy]pheny1]-3-methoxyacrylate), in or on onion, bulb, subgroup 3–07A at 1.0 ppm; onion, green, subgroup 3–07B at 7.5 ppm; caneberry subgroup 13–07A at 5.0 ppm; bushberry subgroup 13–07B at 3.0 ppm; small fruit vine climbing subgroup, except fuzzy kiwifruit, 13–07F at 1.0 ppm; low growing berry subgroup 13–07G, except cranberry, at 10.0 ppm; vegetable, fruiting, subgroup 8–10A at 0.2 ppm; vegetable, fruiting, subgroups 8–10B at 2.0 ppm; fruit, citrus, group 10–10 at 10.0 ppm; rapeseed subgroup 20A at 1.0 ppm; sunflower subgroup 20B at 0.5 ppm; cottonseed subgroup 20C at 0.6 ppm; wasabi at 50.0 ppm; dragon fruit at 2.0 ppm. An adequate analytical method, gas chromatography with nitrogen-phosphorus detection (GC/NPD) or in mobile phase by high performance liquid chromatography with ultra-violet detection (HPLC/UV), is available for enforcement purposes with a limit of detection that allows monitoring of food with residues at or above the levels set in these tolerances. The Analytical Chemistry section of the EPA concluded that the method(s) are adequate for enforcement. Analytical methods are also available for analyzing meat, milk, poultry and eggs which also underwent successful independent laboratory validations. *Contact:* Andrew Ertman, (703) 308–9367, *e-mail address: ertman.andrew@epa.gov.*

4. *PP* 1E7852. (EPA–HQ–OPP–2011–0300). Interregional Research Project Number 4 (IR–4), 500 College Road East, Suite 201W, Princeton, NJ 08540, requests to establish tolerances in 40 CFR part 180 for residues of the fungicide difenoconazole, 1-[2-[2-chloro-4-(4-chlorophenoxy)phenyl]-4-methyl-1,3-dioxolan-2-ylmethyl]-1*H*-1,2,4,-triazole, including its metabolites and degradates in or on vegetable, fruiting, group 8–10 at 0.6 ppm; fruit, citrus, group 10–10 at 0.6 ppm; fruit, pome, group 11–10 at 1.0 ppm; and low growing berry subgroup 13–07G, except cranberry at 2.5 ppm. Syngenta Crop Protection, Inc., has submitted a practical analytical method (AG–575B) for detecting and measuring levels of difenoconazole in or on food with a limit of quantitation (LOQ) that allows monitoring of food with residues at or above the levels set in the proposed tolerances. Method REM 147.08 is also available for enforcement method, for the determination of residues of difenoconazole in crops. Residues are qualified by LC/MS/MS. *Contact:* Sidney Jackson, (703) 305–7610, *e-mail address: jackson.sidney@epa.gov.*

5. *PP* 1E7853. (EPA–HQ–OPP–2011–0395). Interregional Research Project Number 4 (IR–4), 500 College Road East, Suite 201W, Princeton, NJ 08540, requests to establish tolerances in 40 CFR part 180 for residues of the fungicide fludioxonil, (4-(2, 2-difluoro-1,3-benzodioxol-4-yl)-1*H*-pyrrole-3-carbonitrile), in or on acerola at 5.0 ppm; atemoya at 20 ppm; biriba at 20 ppm; cherimoya at 20 ppm; custard apple at 20 ppm; feijoa at 5.0 ppm; guava at 5.0 ppm; ilama at 20 ppm; jaboticaba at 5.0 ppm; passionfruit at 5.0 ppm; soursop at 20 ppm; starfruit at 5.0 ppm; sugar apple at 20 ppm; wax jambu at 5.0 ppm; ginseng at 3.0 ppm; onion, bulb subgroup 3–07A at 0.2 ppm; onion, green subgroup 3–07B at 7.0 ppm; caneberry subgroup 13–07A at 5.0 ppm; bushberry subgroup 13–07B at 2.0 ppm; fruit, small vine climbing, except fuzzy kiwifruit, subgroup 13–07F at 1.0 ppm; berry, low growing, subgroup 13–07G, except cranberry at 2.0 ppm; vegetable, fruiting, group 8–10, except tomato at 0.7 ppm; fruit, citrus, group 10–10 at 10 ppm; fruit, pome, group 11–10 at 5.0 ppm; leafy greens subgroup 4A at 30 ppm; potato at 6.0 ppm; pineapple at 8.0 ppm; and dragon fruit at 1.0 ppm. Syngenta has developed and validated analytical methodology for enforcement purposes. This method (Syngenta Crop Protection Method AG–597B) has passed an Agency petition method validation for several commodities, and is currently the enforcement method for fludioxonil. An extensive database of method validation data using this method on various crop commodities is available. *Contact:* Laura Nollen, (703) 305–7390, *e-mail address: nollen.laura@epa.gov.*

6. *PP* 1E7854. (EPA–HQ–OPP–2011–0394). Interregional Research Project Number 4 (IR–4), 500 College Road East, Suite 201W, Princeton, NJ 08540, requests to establish tolerances in 40 CFR part 180 for residues of the fungicide cyprodinil, 4-cyclopropyl-6-methyl-*N*-phenyl-2-pyrimidinamine, in or on onion, bulb, subgroup 3–07A at 0.6 ppm; onion, green, subgroup 3–07B at 4.0 ppm; caneberry subgroup 13–07A at 10.0 ppm; bushberry subgroup 13–07B at 3.0 ppm; fruit, small vine climbing, except fuzzy kiwifruit, subgroup 13–07F at 2.0 ppm; berry, low growing, subgroup 13–07G, except cranberry at 5.0 ppm; dragon fruit at 2.0 ppm; fruit, pome, group 11–10 at 1.7 ppm; vegetable, fruiting, group 8–10 at 1.3 ppm; and leafy greens subgroup 4A at 40 ppm. Syngenta Crop Protection has developed and validated analytical methodology for enforcement purposes. This method (Syngenta Crop Protection Method AG–631B) has passed an Agency petition method validation for several commodities and is currently the enforcement method for cyprodinil. An extensive database of method validation data using this method on various crop commodities is available. *Contact:* Laura Nollen, (703) 305–7390, *e-mail address: nollen.laura@epa.gov.*

7. *PP* 1E7855. (EPA–HQ–OPP–2011–0397). Interregional Research Project Number 4 (IR–4), 500 College Road East, Suite 201W, Princeton, NJ 08540, requests to establish tolerances in 40 CFR part 180 for residues of the fungicide propiconazole, 1-[[2-(2,4-dichlorophenyl)-4-propyl-1,3-dioxolan-2-yl] methyl]-1*H*-1,2,4-triazole and its metabolites determined as 2,4,-dichlorobenzoic acid (DCBA) and expressed as parent compound, in or on bean, snap at 0.8 ppm; bean, succulent shelled at 0.15 ppm; bean, dry seed at 0.3 ppm; legume, foliage at 25 ppm; tomato at 2.5 ppm; fruit, citrus, group 10–10 at 8.0 ppm; fruit, stone, group 12, except plum at 7.0 ppm; plum at 1.0 ppm. Analytical methods AG–626 and AG–454A were developed for the determination of residues of propiconazole and its metabolites containing the DCBA moiety. Analytical method AG–626 has been accepted and published by EPA as the tolerance enforcement method for crops. *Contact:* Andrew Ertman, (703) 308–9367, *e-mail address: ertman.andrew@epa.gov.*

8. *PP* 1E7861. (EPA–HQ–OPP–2011–0477). Interregional Research Project Number 4 (IR–4), 500 College Road East, Suite 201W, Princeton, NJ 08540, requests to establish tolerances in 40 CFR part 180 for residues of the fungicide pyrimethanil, (4,6-dimethyl-*N*-phenyl-2-pyrimidinamine), in or on onion, bulb, subgroup 03–07A at 0.1 ppm; onion, green, subgroup 03–07B at 2.0 ppm; berry and small fruit, small

fruit vine climbing subgroup, except fuzzy kiwifruit 13–07F at 5.0 ppm; berry and small fruit, low growing berry subgroup 13–07G at 3.0 ppm; and ginseng at 2.5 ppm. The plant metabolism studies demonstrated that analysis for the parent compound, pyrimethanil is sufficient to enable the assessment of the relevant residues in crop commodities. Pyrimethanil was extracted from apples by homogenization with acetone. An aliquot of the extract was diluted with a mixture of acetonitrile and water with subsequent residue determination by HPLC/MS/MS. The method allows the detection and measurement of residues in or on agricultural commodities at or above the proposed tolerance level. *Contact:* Andrew Ertman, (703) 308–9367, *e-mail address: ertman.andrew@epa.gov.*

9. *PP* 1E7864. (EPA–HQ–OPP–2011–0449). Interregional Research Project Number 4 (IR–4), 500 College Road East, Suite 201W, Princeton, NJ 08540, requests to establish tolerances in 40 CFR part 180 for residues of the miticide acequinocyl, [2-(acetyloxy)-3-dodecyl-1,4-naphthalenedione] and its metabolite, 2-dodecyl-3-hydroxy-1,4-naphthoquinone, expressed as acequinocyl equivalents, in or on bean, succulent shelled at 0.15 ppm; caneberry subgroup 13–07A at 4.5 ppm; cherry at 0.8 ppm; cowpea, forage at 9.0 ppm; cucumber at 0.15 ppm; melon subgroup 9A at 0.06 ppm; soybean, vegetable, succulent at 0.25 ppm; fruit, small vine climbing, except fuzzy kiwifruit, subgroup 13–07F at 1.6 ppm; and berry, low growing, subgroup 13–07G at 0.4 ppm. The analytical method to quantitate residues of acequinocyl and acequinocyl-OH in/on food crops utilizes HPLC/MS/MS detection all crops listed in the petition. The lowest level of method validation (LLMV) for acequinocyl and acequinocyl-OH varied with the crop matrix. *Contact:* Laura Nollen, (703) 305–7390, *e-mail address: nollen.laura@epa.gov.*

10. *PP* 1E7878. (EPA–HQ–OPP–2011–0521). Interregional Research Project Number 4 (IR–4), 500 College Road East, Suite 201W, Princeton, NJ 08540, requests to establish a tolerance in 40 CFR part 180 for residues of the herbicide pendimethalin, *N*-(1-ethylpropyl)-3,4-dimethyl-2,6dinitrobenzenamine, and its 3, 5-dinitrobenzyl alcohol metabolite (CL 202347), in or on lettuce, leaf at 3.0 ppm; *Brassica,* leafy greens, subgroup 5B at 0.2 ppm; turnip greens at 0.2 ppm; melons subgroup 9A at 0.1 ppm; vegetable, soybean, succulent at 0.1 ppm; and small fruit vine climbing subgroup 13–07E, except grape at 0.1 ppm. Section 408 (b)(3) of the amended FDCA requires EPA to determine that there is a practical method for detecting and measuring levels of the pesticide chemical residue in or on food and that the tolerance be set at a level at or above of the limit of detection of the designated method. In plants, the method is aqueous organic solvent extraction, column cleanup, and quantitation by GC. The method has a LOQ of 0.05 ppm for pendimethalin and the alcohol metabolite. *Contact:* Andrew Ertman, (703) 308–9367, *e-mail address: ertman.andrew@epa.gov.*

11. *PP* 0F7713. (EPA–HQ–OPP–2011–0456). Bayer CropScience, 2 T.W. Alexander Drive, P.O. Box 12014, Research Triangle Park, NC 27709, requests to establish tolerances in 40 CFR part 180 for residues of the fungicide trifloxystrobin (benzeneacetic acid, (*E,E*)-α-(methoxyimino)-2-[[[[1-[3-(trifluoromethyl)phenyl] ethylidene]amino]oxy]methyl]-methyl ester) and the free form of its acid metabolite CGA–321113 ((*E,E*)-methoxyimino-[2-[1-(3-trifluoromethyl-phenyl)-ethylideneaminooxymethyl]-phenyl]acetic acid), in or on alfalfa, forage at 0.01 ppm and alfalfa, hay at 0.01 ppm. A practical analytical methodology for detecting and measuring levels of trifloxystrobin in or on raw agricultural commodities has been submitted. The method is based on crop specific cleanup procedures and determination by gas chromatography with nitrogen-phosphorus detection. A newer analytical method is available employing identical solvent mixtures and solvent to matrix ratio (as the first method), deuterated internal standards, and LC/MS/MS with an electrospray interface, operated in the positive ion mode. *Contact:* Tawanda Maignan, (703) 308–8050, *e-mail address: maignan.tawanda@epa.gov.*

12. *PP* 0F7785. (EPA–HQ–OPP–2010–0959). Syngenta Crop Protection, Inc., P.O. Box 18300, Greensboro, NC 27409, requests to establish tolerances in 40 CFR part 180 for residues of the fungicide difenoconazole, 1-[2-[2-chloro-4-(4-chlorophenoxy) phenyl]-4-methyl-1,3-dioxolan-2-ylmethyl]-1*H*-1,2,4-triazole, in or on oats, forage at 0.1 ppm; oats, hay at 0.1 ppm; oats, straw at 0.1 ppm; oats, grain at 0.1 ppm; rye, forage at 0.1 ppm; rye, straw at 0.1 ppm; rye, grain at 0.1 ppm; and wheat, hay at 0.1 ppm. Syngenta Crop Protection, Inc., has submitted a practical analytical method (AG–575B) for detecting and measuring levels of difenoconazole in or on food with a LOQ that allows monitoring of food with residues at or above the levels set in the proposed tolerances. Method REM 147.08 is also available for enforcement method for the determination of residues of difenoconazole in crops. Residues are qualified by LC/MS/MS. A practical analytical method (AG–544A) for detecting and measuring levels of difenoconazole in or on cattle tissues and milk, and poultry tissues and eggs with a LOQ that allows monitoring of food with residues at or above the levels set in the proposed tolerances. Tolerances in meat, milk, poultry or eggs were established for enforcement purposes. *Contact:* Rose Mary Kearns, (703) 305–5611, *e-mail address: kearns.rosemary@epa.gov.*

13. *PP* 0F7800. (EPA–HQ–OPP–2011–0388). BASF Corporation, P.O. Box 13528, Research Triangle Park, NC 27709, requests to amend the tolerances in 40 CFR part 180.493 for residues of the fungicide dimethomorph, [(*E,Z*)4-[3-(4-chlorophenyl)-3-(3,4-dimethoxyphenyl)-1-oxo-2-propenyl]-morpholine], in or on the raw agricultural commodity *Brassica,* Subgroup 5A from 2.0 ppm to 5.0 ppm; *Brassica,* Subgroup 5B from 20.0 ppm to 30.0 ppm; and green onion, Subgroup 3B from 2.0 ppm to 11.0 ppm. A reliable method for the determination of dimethomorph residues in *Brassica*-subgroup 5A, *Brassica*—subgroup 5B and green onions exists; this method is the FDA Multi-Residue Method, Protocol D, as published in the Pesticide Analytical Manual I. *Contact:* Tamue Gibson, (703) 305–9096, *e-mail address: gibson.tamue@epa.gov.*

14. *PP* 0F7808. (EPA–HQ–OPP–2011–0486). Syngenta Crop Protection, Inc., P.O. Box 18300, Greensboro, NC 27409, requests to establish tolerances in 40 CFR part 180 for residues of the fungicide cyprodinil, 2-pyrimidinamine, 4-cyclopropyl-6-methyl-*N*-phenyl, in or on nut, tree, group 14 at 0.10 ppm and almond, hulls at 18.0 ppm. Syngenta Crop Protection has developed and validated analytical methodology for enforcement purposes. This method (Syngenta Crop Protection Method AG–631B) has passed an Agency petition method validation for several commodities and is currently the enforcement method for cyprodinil. An extensive database of method validation data using this method on various crop commodities is available. *Contact:* Lisa Jones, (703) 308–9424, *e-mail address: jones.lisa@epa.gov.*

15. *PP* 0F7816. (EPA–HQ–OPP–2011–0387). BASF Corporation, P.O. Box 13528, Research Triangle Park, NC 27709, requests to establish a tolerance in 40 CFR part 180 for residues of the fungicide dimethomorph, [(*E,Z*)4-[3-(4-chlorophenyl)-3-(3,4-dimethoxyphenyl)-1-oxo-2-propenyl]-morpholine], in or on

vegetable, leafy at 16 ppm. A reliable method for the determination of dimethomorph residues in leafy vegetables exists; this method is the FDA Multi-Residue Method, Protocol D, as published in the Pesticide Analytical Manual I. *Contact:* Tamue Gibson, (703) 305–9096, *e-mail address: gibson.tamue@epa.gov.*

16. *PP* 1F7831. (EPA–HQ–OPP–2011–0487). Syngenta Crop Protection, Inc., P.O. Box 18300, Greensboro, NC 27409, requests to establish a tolerance in 40 CFR part 180 for residues of the fungicide fludioxonil, [4-(2,2-difluoro-1,3-benzodioxol-4-yl)-1*H*-pyrrole-3-carbonitrile], in or on vegetable, tuberous and corm, subgroup 01C at 0.04 ppm. Syngenta has developed and validated analytical methodology for enforcement purposes. This method (Syngenta Crop Protection Method AG–597B) has passed an Agency petition method validation for several commodities, and is currently the enforcement method for fludioxonil. This method has also been forwarded to the FDA for inclusion into PAM II. *Contact:* Lisa Jones, (703) 308–9424, *e-mail address: jones.lisa@epa.gov.*

Amended Tolerances

1. *PP* 1E7842. (EPA–HQ–OPP–2011–0343). Interregional Research Project Number 4 (IR–4), 500 College Road East, Suite 201W, Princeton, NJ 08540, requests to remove the established tolerances in 40 CFR 180.544 for residues of the insecticide methoxyfenozide, including its metabolites and degradates, in or on vegetable, root, subgroup 1A and citrus oil at 100 ppm from the table in paragraph (a) as well as fruit, citrus, group 10 from the table in paragraph (c) upon the approval of the proposed tolerances under ''New Tolerance''. Additionally, the petition proposes to revise the tolerance expressions in 40 CFR 180.544 to read as follows:

(a)(1) Tolerances are established for residues of the insecticide methoxyfenozide, including its metabolites and degradates, in or on the commodities in the table below. Compliance with the tolerance levels specified below is to be determined by measuring only methoxyfenozide [benzoic acid, 3-methoxy-2-methyl-, 2-(3,5-dimethylbenzoyl)-2-(1,1-dimethylethyl) hydrazide].

(a)(2) Tolerances are established for residues of the insecticide methoxyfenozide, including its metabolites and degradates, in or on the commodities in the table below. Compliance with the tolerance levels specified below is to be determined by measuring only the sum of methoxyfenozide [benzoic acid, 3-methoxy-2-methyl-, 2-(3,5-dimethylbenzoyl)-2-(1,1-dimethylethyl) hydrazide] and its glucuronide metabolite (β-D–Glucopyranuronic acid, 3-[[2-(1,1-dimethylethyl)-2-(3,5-dimethylbenzoyl)-hydrazino]carbonyl]-2-methylphenyl-), calculated as the stoichiometric equivalent of methoxyfenozide.

(b) *Section 18 emergency exemptions.* Time-limited tolerances specified in the following table are established for residues of the insecticide methoxyfenozide, including its metabolites and degradates, in or on the specified agricultural commodities, resulting from use of the pesticide pursuant to FFIFRA section 18 emergency exemptions. Compliance with the tolerance levels specified below is to be determined by measuring only methoxyfenozide [benzoic acid, 3-methoxy-2-methyl-, 2-(3,5-dimethylbenzoyl)-2-(1,1-dimethylethyl) hydrazide]. The expired tolerances will be revoked on the date specified in the table.

(d) *Indirect or inadvertent residues.* (1) Tolerances are established for the indirect or inadvertent residues of the insecticide methoxyfenozide, including its metabolites and degradates, in or on the raw agricultural commodities in the table below, when present therein as a result of the application of methoxyfenozide to growing crops as listed in paragraph (a) of this section. Compliance with the tolerance levels specified below is to be determined by measuring only methoxyfenozide [benzoic acid, 3-methoxy-2-methyl-, 2-(3,5-dimethylbenzoyl)-2-(1,1-dimethylethyl) hydrazide].

(2) Tolerances are established for the indirect or inadvertent residues of the insecticide methoxyfenozide, including its metabolites and degradates, in or on the raw agricultural commodities in the table below, when present therein as a result of the application of methoxyfenozide to growing crops as listed in paragraph (a) of this section. Compliance with the tolerance levels specified below is to be determined by measuring only the sum of methoxyfenozide [benzoic acid, 3-methoxy-2-methyl-, 2-(3,5-dimethylbenzoyl)-2-(1,1-dimethylethyl) hydrazide] and the following metabolites (all calculated as the stoichiometric equivalent of methoxyfenozide): Free phenol of methoxyfenozide [3,5-dimethylbenzoic acid *N*-tert-butyl- *N*′-(3-hydroxy-2-methylbenzoyl) hydrazide], the glucose conjugate of the phenol [3,5-dimethyl benzoic acid *N*-tert-butyl- *N*′-[3 (β-D-glucopyranosyloxy)-2-methylbenzoyl]-hydrazide] and the malonylglycosyl conjugate of the phenol [3,5-dimethyl benzoic acid *N*-tert-butyl- *N*′-[3 (β-D-6-malonyl-glucopyranosyl-1-oxy)-2-methylbenzoyl]-hydrazide]. *Contact:* Sidney Jackson, (703) 305–7610, *e-mail address: jackson.sidney@epa.gov.*

2. *PP* 1E7851. (EPA–HQ–OPP–2011–0398). Interregional Research Project Number 4 (IR–4), 500 College Road East, Suite 201W, Princeton, NJ 08540, requests to amend the tolerances in 40 CFR 180.507 for residues of the fungicide azoxystrobin: (methyl (*E*)-2-[2-[6-(2-cyanophenoxy)pyrimidin-4-yloxy]phenyl]-3-methoxyacrylate) and the *Z* isomer of azoxystrobin, (methyl (*Z*)-2-[2-[6-(2-cyanophenoxy)pyrimidin-4-yloxy]phenyl]-3-methoxyacrylate), in or on vegetable, tuberous and corm, subgroup 1C from 0.03 ppm to 6.0 ppm. Upon approval of the aforementioned tolerances under ''New Tolerance'', it is proposed that 40 CFR 180.507 be amended to remove the established tolerances for the residues of azoxystrobin in or on the raw agricultural commodities: Onion, bulb at 1.0 ppm; onion, green at 7.5 ppm; caneberry subgroup 13A, at 5.0 ppm; bushberry subgroup 13B at 3.0 ppm; Juneberry at 3.0 ppm; lingonberry at 3.0 ppm; salal at 3.0 ppm; grape at 1.0 ppm; strawberry at 10.0 ppm; tomato at 0.2 ppm; vegetable, fruiting, group 8, except tomato at 2.0 ppm; fruit, citrus, group 10 at 10.0 ppm; canola, seed at 1.0 ppm; cotton, undelinted seed at 0.6 ppm; crambe, seed at 0.5 ppm; flax, seed at 0.5 ppm; mustard, field, seed at 0.5 ppm; mustard, Indian, seed at 0.5 ppm; mustard, seed at 0.5 ppm; rapeseed, Indian at 0.5 ppm; rapeseed, seed at 0.5 ppm; safflower, seed at 0.5 ppm; sunflower, seed at 0.5 ppm; and potato at 0.03 ppm. *Contact:* Andrew Ertman, (703) 308–9367, *e-mail address: ertman.andrew@epa.gov.*

3. *PP* 1E7852. (EPA–HQ–OPP–2011–0300). Interregional Research Project Number 4 (IR–4), 500 College Road East, Suite 201W, Princeton, NJ 08540, requests to amend the tolerance in 40 CFR 180.475 for residues of the fungicide difenoconazole, 1-[2-[2-chloro-4-(4-chlorophenoxy)phenyl]-4-methyl-1,3-dioxolan-2-ylmethyl]-1*H*-1,2,4,-triazole, including its metabolites and degradates, in or on vegetable, tuberous and corm, subgroup 1C from 0.01 ppm to 4.0 ppm. In addition, the petition proposes to remove established tolerances in or on the raw agricultural commodities: Potato, processed waste at 0.04 ppm; vegetables, fruiting, group 8 at 0.6 ppm; fruit, citrus, group 10 at 0.6 ppm; fruit, pome, group 11 at 1.0 ppm; and strawberry at 2.5 ppm. *Contact:*

Sidney Jackson, (703) 305–7610, *e-mail address: jackson.sidney@epa.gov.*

4. *PP* 1E7853. (EPA–HQ–OPP–2011–0395). Interregional Research Project Number 4 (IR–4), 500 College Road East, Suite 201W, Princeton, NJ 08540, requests to amend the tolerances in 40 CFR 180.516 for residues of the fungicide fludioxonil, (4-(2, 2-difluoro-1,3-benzodioxol-4-yl)-1*H*-pyrrole-3-carbonitrile), in or on avocado from 0.45 ppm to 5.0 ppm; sapote, black from 0.45 ppm to 5.0 ppm; canistel from 0.45 ppm to 5.0 ppm; sapote, mamey from 0.45 ppm to 5.0 ppm; mango from 0.45 ppm to 5.0 ppm; papaya from 0.45 ppm to 5.0 ppm; sapodilla from 0.45 ppm to 5.0 ppm; star apple from 0.45 ppm to 5.0 ppm; longan from 1.0 ppm to 20 ppm; lychee from 1.0 ppm to 20 ppm; pulasan from 1.0 ppm to 20 ppm; rambutan from 1.0 ppm to 20 ppm; Spanish lime from 1.0 ppm to 20 ppm; and tomato from 0.50 ppm to 3.0 ppm. Upon approval of the aforementioned tolerances under ''New Tolerance'', the petition finally requests to amend 40 CFR 180.516 by removing the established tolerances for residues of fludioxonil in or on the following raw agricultural commodities: Onion, bulb at 0.2 ppm; onion, green at 7.0 ppm; caneberry subgroup 13A at 5.0 ppm; bushberry subgroup 13B at 2.0 ppm; Juneberry at 2.0 ppm; lingonberry at 2.0 ppm; salal at 2.0 ppm; grape at 1.0 ppm; strawberry at 2.0 ppm; vegetable, fruiting, group 8 at 0.01 ppm; tomatillo at 0.50 ppm; fruit, citrus, group 10 at 10 ppm; fruit, pome, group 11 at 5.0 ppm; and leafy greens subgroup 4A, except spinach at 30 ppm. Syngenta has developed and validated analytical methodology for enforcement purposes. This method (Syngenta Crop Protection Method AG–597B) has passed an Agency petition method validation for several commodities, and is currently the enforcement method for fludioxonil. An extensive database of method validation data using this method on various crop commodities is available. *Contact:* Laura Nollen, (703) 305–7390, *e-mail address: nollen.laura@epa.gov.*

5. *PP* 1E7854. (EPA–HQ–OPP–2011–0394). Interregional Research Project Number 4 (IR–4), 500 College Road East, Suite 201W, Princeton, NJ 08540, requests to amend the tolerances in 40 CFR 180.532 for residues of the fungicide cyprodinil, 4-cyclopropyl-6-methyl-*N*-phenyl-2-pyrimidinamine, in or on citrus, oil from 340 ppm to 60.0 ppm. Upon approval of the aforementioned tolerances under ''New Tolerance'', it is proposed that 40 CFR 180.532 be amended to remove the established tolerances for the residues of cyprodinil in or on the following raw agricultural commodities: Onion, bulb at 0.60 ppm; onion, green at 4.0 ppm; caneberry subgroup 13A at 10 ppm; bushberry subgroup 13B at 3.0 ppm; Juneberry at 3.0 ppm; lingonberry at 3.0 ppm; salal at 3.0 ppm; grape at 2.0 ppm; strawberry at 5.0 ppm; fruit, pome at 1.7 ppm; tomatillo at 0.45 ppm; tomato at 0.45 ppm; and leafy greens subgroup 4A, except spinach at 30 ppm. Syngenta Crop Protection has developed and validated analytical methodology for enforcement purposes. This method (Syngenta Crop Protection Method AG–631B) has passed an Agency petition method validation for several commodities and is currently the enforcement method for cyprodinil. An extensive database of method validation data using this method on various crop commodities is available. *Contact:* Laura Nollen, (703) 305–7390, *e-mail address: nollen.laura@epa.gov.*

6. *PP* 1E7855. (EPA–HQ–OPP–2011–0397). Interregional Research Project Number 4 (IR–4), 500 College Road East, Suite 201W, Princeton, NJ 08540, requests to remove the established tolerance in 40 CFR 180.434 for residues of the fungicide propiconazole, 1-[[2-(2,4-dichlorophenyl)-4-propyl-1,3-dioxolan-2-yl] methyl]-1*H*-1,2,4-triazole and its metabolites determined as 2,4,-dichlorobenzoic acid and expressed as parent compound, in or on fruit, stone, group 12 at 1.0 ppm. *Contact:* Andrew Ertman, (703) 308–9367, *e-mail address: ertman.andrew@epa.gov.*

7. *PP* 1E7864. (EPA–HQ–OPP–2011–0449). Interregional Research Project Number 4 (IR–4), 500 College Road East, Suite 201W, Princeton, NJ 08540, requests to remove the existing tolerances in 40 CFR 180.599 for residues of the miticide acequinocyl, [2-(acetyloxy)-3-dodecyl-1,4-naphthalenedione] and its metabolite, 2-dodecyl-3-hydroxy-1,4-naphthoquinone, expressed as acequinocyl equivalents, in or on grape at 1.6 ppm and strawberry at 0.4 ppm, as they will be superseded by inclusion in subgroup 13–07F and 13–07G, respectively under ''New Tolerance''. *Contact:* Laura Nollen, (703) 305–7390, *e-mail address: nollen.laura@epa.gov.*

8. *PP* 0F7808. (EPA–HQ–OPP–2011–0486). Syngenta Crop Protection, Inc., P.O. Box 18300, Greensboro, NC 27409, requests to remove established tolerances in 40 CFR 180.532 for residues of the fungicide cyprodinil: 2-pyrimidinamine, 4-cyclopropyl-6-methyl-*N*-phenyl, in or on almond at 0.02 ppm and pistachio at 0.10 ppm upon approval of the aforementioned tolerances under ''New Tolerance''. *Contact:* Lisa Jones, (703) 308–9424, *e-mail address: jones.lisa@epa.gov.*

9. *PP* 1F7871. (EPA–HQ–OPP–2009–0677). Arysta LifeScience North America, LLC, 15401 Weston Parkway, Suite 150, Cary, NC 27513, requests to amend the tolerances in 40 CFR 180.609 for residues of the fungicide fluoxastrobin, (1*E*)-[2-[[6-(2-chlorophenoxy)-5-fluoro-4-pyrimidinyl]oxy]phenyl] (5,6-dihydro-1,4,2-dioxazin-3-yl)methanone *O*-methyloxime and its *Z* isomer, (1*Z*)-[2-[[6-(2-chlorophenoxy)-5-fluoro-4-pyrimidinyl]oxy]phenyl](5,6-dihydro-1,4,2-dioxazin-3-yl)methanone *O*-methyloxime, in or on peanut from 0.01 ppm to 0.02 ppm; and peanut, oil, refined from 0.03 ppm to 0.06 ppm. Adequate analytical methodology is available for enforcement purposes. The method comprises microwave solvent extraction followed by a solid phase extraction clean up and quantification by HPLC/MS/MS. The individual detector responses for measured *E*- and *Z*-isomers is summed to give total residue. *Contact:* Heather Garvie, (703) 308–0034, *e-mail address: garvie.heather@epa.gov.*

List of Subjects

Environmental protection, Agricultural commodities, Feed additives, Food additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: July 8, 2011.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 2011–18101 Filed 7–19–11; 8:45 am]

BILLING CODE 6560–50–P

GENERAL SERVICES ADMINISTRATION

41 CFR Chapter 301

[FTR Notice 2011–01; Docket No. 2011–0002; Sequence 5]

Federal Travel Regulation (FTR): Temporary Duty (TDY) Travel Allowances: Notice of Public Meeting

AGENCY: Office of Governmentwide Policy, General Services Administration (GSA).

ACTION: Notice of public meeting.

SUMMARY: The General Services Administration (GSA) is revising the Federal Travel Regulation (FTR) in an effort to streamline travel policies, increase travel efficiency and effectiveness, and incorporate industry best practices. Additional goals of the FTR revision effort is to allow for open transparency, an exchange of ideas, and

provide agency flexibility. GSA is leading three working groups comprised of representatives from Federal agencies to revise those areas of the FTR which pertain to Temporary Duty (TDY) Travel Allowances that include special conveyances, per diem and air transportation. The purpose of this notice is to announce that the working groups will hold a public meeting to receive information from industry and the public on best practices in the aforementioned areas.

DATES: The meeting will take place on September 7, 2011 and September 8, 2011.

FOR FURTHER INFORMATION CONTACT: Ms. Marcerto Barr, GSA, 1275 First Street, NE., Washington, DC 20417; telephone: (202) 208–7654; or e-mail: *Marcerto.Barr@gsa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The U.S. General Services Administration under applicable authorities, such as 5 U.S.C. 5707; 20 U.S.C. 905(a); 31 U.S.C. 1353; 40 U.S.C. 121(c); 49 U.S.C. 40118; E.O. 11609, as amended; 3 CFR 1971–1975 Comp., p. 586; and E.O. 13563, is currently addressing the following categories of the FTR Chapter 301- TDY Allowances and related appendices: special conveyances (includes ground transportation and rental cars), per diem (includes meals, incidental expenses, and lodging), and air transportation (includes common carriage transportation). GSA is leading three working groups comprised of Federal agency representatives to address these categories. The last major rewrite of the FTR took place in 1998.

Meeting Details

Place: The 2-day public meetings will be held at the GSA Auditorium, 1800 F Street, NW., Washington, DC 20405. The meeting is open to industry and the general public beginning at 10 a.m. EST through 4 p.m. EST.

Attendance: The event is open to the public based upon space availability. Attendees and speakers must pre-register. A limited number of speakers will be allowed to make oral presentations based upon space and on a first-come, first-serve basis. Additionally individuals are welcome to submit written materials to the working groups.

Pre-Registration: To pre-register, as an attendee or speaker contact Ms. Barr as detailed above. Participants interested in speaking should indicate the category you would like to address, your name, company name or organization (if applicable), telephone number and email no later than the close of business on August 23, 2011.

Agenda: Presentations from industry and the public will be time limited. Each registered presenter will be allotted a total of 20 minutes.

Statements and Presentations: Send written or electronic statements and requests to make oral presentations to the contact person listed above. Submissions must be provided to Ms. Barr at *Marcerto.Barr@gsa.gov* no later than the close of business on August 23, 2011.

Information on Services for Individuals with Disabilities: Individuals requiring special accommodations at the meeting, please contact Ms. Barr no later than the close of business on August 23, 2011.

Dated: July 14, 2011.

Janet C. Dobbs,

Director, Office of Travel, Transportation & Asset Mgmt.

[FR Doc. 2011–18305 Filed 7–19–11; 8:45 am]

BILLING CODE 6820–14–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

45 CFR Part 156

[CMS–9983–P]

RIN 0938–AQ98

Patient Protection and Affordable Care Act; Establishment of Consumer Operated and Oriented Plan (CO–OP) Program

AGENCY: Department of Health and Human Services.

ACTION: Proposed rule.

SUMMARY: This proposed rule would implement the Consumer Operated and Oriented Plan (CO–OP) program, which provides loans to foster the creation of consumer-governed, private, nonprofit health insurance issuers to offer qualified health plans in the Affordable Insurance Exchanges (Exchanges). The purpose of this program is to create a new CO–OP in every State in order to expand the number of health plans available in the Exchanges with a focus on integrated care and greater plan accountability.

DATES: To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. on September 16, 2011.

ADDRESSES: In commenting, please refer to file code CMS–9983–P. 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–9983–P, P.O. Box 8010, Baltimore, MD 21244–8010.

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–9983–P, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850.

4. *By hand or courier.* Alternatively, you may deliver (by hand or courier) your written comments only to the following addresses prior to the close of the comment period:

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, call telephone number (410) 786–9994 in advance to schedule your arrival with one of our staff members.

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. Comments erroneously mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and received after the comment period.

For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Anne Bollinger, (301) 492–4395 for issues related to eligibility and CO–OP standards. Catherine Demmerle, (301) 492–4156 for issues related to conversions and program integrity. Meghan Elrington, (301) 492–4388 for general issues and issues related to loan terms.

SUPPLEMENTARY INFORMATION:

Acronym List

Because of the many terms to which we refer by acronym in this proposed rule, we are listing the acronyms used and their corresponding meanings in alphabetical order below:

CCIIO Center for Consumer Information & Insurance Oversight
CMS Centers for Medicare & Medicaid Services
CO–OP Consumer Operated and Oriented Plan
FACA Federal Advisory Committee Act
HHS Department of Health and Human Services
OIG Office of Inspector General
OMB Office of Management and Budget
PHS Act Public Health Service Act
QHP Qualified Health Plan
RFC Request for Comment
SHOP Small Business Health Options Program

Executive Summary: The Patient Protection and Affordable Care Act, Public Law 111–148, enacted on March 23, 2010 and the Health Care and Education Reconciliation Act of 2010, Public Law 111–152, enacted on March 30, 2010, are collectively referred to in this proposed rule as the ''Affordable Care Act.'' The Department of Defense and Full-Year Continuing Appropriations Act, 2011, Public Law 112–10, which amended the Affordable Care Act, was enacted on April 15, 2011. Section 1322 of the Affordable Care Act created the Consumer Operated and Oriented Plan program (CO–OP program) to foster the creation of new consumer-governed, private, nonprofit health insurance issuers, known as ''CO–OPs.'' In addition to improving consumer choice and plan accountability, the CO–OP program also seeks to promote integrated models of care and enhance competition in the Affordable Insurance Exchanges established under sections 1311 and 1321 of the Affordable Care Act.

The statute provides loans to capitalize eligible prospective CO–OPs with a goal of having at least one CO–OP in each State. The statute permits the funding of multiple CO–OPs in any State, provided that there is sufficient funding to capitalize at least one CO–OP in each State. Congress provided budget authority of $3.8 billion for the program.

This proposed rule: (1) Sets forth the eligibility standards for the CO–OP program; (2) establishes some terms for loans; and (3) provides certain basic standards that organizations must meet to participate in this program and become a CO–OP. The overall approach and intent of this proposed rule is to provide flexibility for organizations to develop and create a CO–OP. Acknowledging the significant variation in market conditions and populations served that CO–OPs will face, CMS encourages diversity in the organizational design and approach.

Starting in 2014, individuals and small businesses will be able to purchase private health insurance through State-based competitive marketplaces called Affordable Insurance Exchanges. Exchanges will offer Americans competition, choice, and clout. Insurance companies will compete for business on a level playing field, driving down costs. Consumers will have a choice of health plans to fit their needs. Exchanges will give individuals and small businesses the same purchasing clout as big businesses. The Departments of Health and Human Services, Labor, and the Treasury (the Departments) are issuing regulations implementing Exchanges in several phases. The first in this series was a Request for Comment relating to Exchanges, published in the **Federal Register** on August 3, 2010. Second, Initial Guidance to States on Exchanges was published issued on November 18, 2010. Third, a proposed rule for the application, review, and reporting process for waivers for State innovation was published in the **Federal Register** on March 14, 2011 (76 FR 13553). Fourth, on July 15, 2011, two proposed regulations were published in the **Federal Register** to implement components of the Exchange and health insurance premium stabilization policies in the Affordable Care Act including one entitled, ''Patient Protection and Affordable Care Act; Establishment of Qualified Health Plans and Exchanges,'' hereinafter referred to as ''Exchanges proposed rule.'' Fifth, additional regulations, including this one, are being published in the **Federal Register** to implement Exchange related components of the Affordable Care Act.

Submitting Comments: Comments from the public are welcome on all issues set forth in this proposed rule to assist CMS in fully considering issues and developing policies. Comments should reference the file code CMS–9983–P and the specific section on which a comment is made.

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 as soon as possible after they have been received, on the following *Web site: http://www.regulations.gov.* Follow the search instructions on that Web site to view public comments.

Comments received in a timely manner 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

A. Overview

The CO–OP program provides Federal loans to foster and encourage the creation of new consumer-run, private health insurers in every State that will provide consumers and small businesses with greater choice in the Exchanges starting in 2014. These new consumer-run, private, nonprofit insurers will be a vehicle for providing higher quality care that is affordable, coordinated, and responsive.

B. Statutory Basis for the Consumer Operated and Oriented Plan (CO–OP) Program

Section 1322(a) of the Affordable Care Act directs CMS to establish the CO–OP program to foster the creation of member-governed qualified nonprofit health insurance issuers to offer CO–OP qualified health plans in the individual and small group markets in the States in which they are licensed to offer such plans.

Section 1322(b)(1) of the Affordable Care Act provides that CMS shall provide two types of loans to organizations applying to become qualified nonprofit health insurance issuers: Start-up Loans and repayable grants (Solvency Loans). Start-up Loans will provide assistance with start-up costs and Solvency Loans will provide assistance in meeting solvency requirements in the States in which the organization is licensed to issue CO–OP qualified health plans.

Section 1322(b)(2) provides that in making awards, CMS must take into account the recommendations of the Advisory board further described in section 1322(b)(4) of the Affordable Care Act and give priority to applicants that offer CO–OP qualified health plans on a statewide basis, use integrated care models, and have significant private support.

Section 1322(b)(2) of the Affordable Care Act also directs CMS to ensure that there is sufficient funding to establish at least one qualified nonprofit health insurance issuer in each State and the District of Columbia. It permits CMS to fund additional qualified nonprofit health insurance issuers in any State if the funding is sufficient to do so. If no entities in a State apply, CMS may use funds to encourage the establishment of a qualified nonprofit health insurance issuer in the State or the expansion of another qualified nonprofit health insurance issuer from another State to that State.

Section 1322(b)(2) of the Affordable Care Act also directs any organization receiving a loan to enter into an agreement to meet the standards to become a qualified nonprofit health insurance issuer and any other terms and conditions of the loan awards.

Section 1322(b)(2)(c)(iii) of the Affordable Care Act provides that, if CMS determines that an organization has failed to meet any provisions of the loan agreement or failed to correct such failure within a reasonable period of time, the organization must repay an amount equal to the sum of:

- 110 percent of the aggregate amount of loans received; plus
- Interest on the aggregate amount of loans for the period the loans were outstanding starting from the date of drawdown.

CMS must notify the Department of the Treasury of any determination of a failure to comply with the CO–OP program standards that may affect an issuer's tax-exempt status under section 501(c)(29) of the Code.

Under section 1322(b)(3), Start-up Loans must be repaid within 5 years, and Solvency Loans must be repaid within 15 years. Repayment terms in the award of loans must take into consideration any appropriate State reserve requirements, solvency regulations, and requisite surplus note arrangements that must be constructed by a qualified health insurance issuer in a State to receive and maintain licensure.

Section 1322(c)(1) of the Affordable Care Act defines ''qualified nonprofit health insurance issuer'' as an organization that:

- Is organized under State law as a private, nonprofit, member corporation;
- Conducts activities of which substantially all consist of the issuance of CO–OP qualified health plans in the individual and small group markets in each State in which it is licensed to issue such plans; and
- Meets the other requirements in subsection 1322(c) of the Affordable Care Act.

Section 1322(c)(2) of the Affordable Care Act states that an organization is not eligible to become a qualified nonprofit health insurance issuer if the organization or a related entity (or any predecessor of either) was a health insurance issuer on July 16, 2009. In addition, an organization cannot be treated as eligible to apply for a loan under the CO–OP program if it is sponsored by a State or local government, any political subdivision thereof, or any instrumentality of such government or political subdivision. A CO–OP must be a private, nonprofit health insurance issuer.

Section 1322(c)(3) of the Affordable Care Act establishes governance requirements for a qualified nonprofit health insurance issuer. To ensure consumer control, the governance of the organization must be subject to a majority vote of its members. The organization's governing documents must incorporate ethics and conflict of interest standards to protect CO–OP members against insurance industry involvement and interference. To ensure consumer orientation, the organization is required to operate with a strong consumer focus, including timeliness, responsiveness, and accountability to members.

Section 1322(c)(4) of the Affordable Care Act directs the organization to use any profits to lower premiums, improve benefits, or for other programs intended to improve the quality of health care delivered to its members.

Section 1322(c)(5) of the Affordable Care Act directs that the organization must meet all the State standards for licensure that other issuers of qualified health plans must meet in any State where the issuer offers a CO–OP qualified health plan, including solvency and licensure requirements and any other State law described in section 1324(b) of the Affordable Care Act.

Section 1322(c)(6) of the Affordable Care Act prohibits a qualified nonprofit health insurance issuer from offering a health plan in a State until that State has in effect (or CMS has implemented for the State) the market reforms outlined in part A of title XXVII of the Public Health Service Act (as amended by subtitles A and C of title I of the Affordable Care Act) including but not limited to, the requirements for guaranteed issue and limitations on premium variation.

Section 1322(e) of the Affordable Care Act prohibits representatives of any Federal, State, or local government (or of any political subdivision or instrumentality thereof), and representatives of an organization that was an existing issuer or a related entity (or predecessor of either) on July 16, 2009, from serving on the board of directors of the qualified nonprofit health insurance issuer or a private purchasing council established under section 1322(d) of the Affordable Care Act.

Together, these provisions form the statutory basis for the CO–OP program established under this rule.

C. Purpose of the Consumer-Operated and Oriented Plan Program

Section 1322 of the Affordable Care Act established the CO–OP program to provide loans to foster the creation of new consumer-governed nonprofit health insurance issuers (referred to as CO–OPs) that will operate with a strong consumer focus. The statute divides the loans into two types: loans for start-up costs to be repaid in 5 years (''Start-up Loans'') and loans to enable CO–OPs to meet State insurance solvency and reserve requirements to be repaid in 15 years (''Solvency Loans''). Section 1322(b)(2)(A) of the Affordable Care Act directs CMS to ensure that there is sufficient funding to establish at least one CO–OP in each State and to give priority to organizations capable of offering CO–OP qualified health plans on a Statewide basis. To further ensure the presence of CO–OPs in the Exchanges, section 1301(a)(2) of the statute deems CO–OP qualified health plans offered by a qualified nonprofit health insurance issuer eligible to participate in the Exchanges.

The CO–OP program also seeks to promote improved models of care. Existing health insurance cooperatives and other business cooperatives provide possible models for the successful development of CO–OPs around the country. One major barrier to continued development of this model has been the difficulty of obtaining adequate capitalization for start-up costs and State reserve requirements. The CO–OP program is designed to help overcome this major barrier to new issuer formation by providing funding for these critical activities.

Pursuant to section 1322(b)(4) of the Affordable Care Act, the Comptroller General announced the appointment of a 15 member CO–OP Program Advisory Board to make recommendations to CMS on awarding loans on June 23, 2010. Section 1322(b)(2)(A) directs the Secretary to consider the recommendations of the Advisory Board when awarding loans under the CO–OP program. After taking comments in three day-long public hearings from January through March, 2011 and written comments, the Advisory Board approved its final recommendations and report on April 15, 2011. The Advisory Board's final report is available at: *http://cciio.hhs.gov/resources/files/coop_faca_finalreport_04152011.pdf.* The Advisory Board generally advised the Department to develop flexible criteria that recognize the diversity of market conditions around the country to enable the development of various CO–OP models and allow different types of sponsorship. It also strongly encouraged the Department to provide technical assistance at all stages of the process in order to enhance the viability of individual CO–OPs and the success of the program.

The Advisory Board developed four major principles for awarding loans. CMS concurs with those principles:

(1) Consumer operation, control, and focus must be the salient features of the CO–OP and must be sustained over time;

(2) Solvency and the financial stability of coverage should be maintained and promoted;

(3) CO–OPs should encourage care coordination, quality and efficiency to the extent feasible in local provider and health plan markets; and

(4) Initial loans should be rolled out as expeditiously as possible so that CO–OPs can compete in the Exchanges in the critical first open enrollment period.

CMS also concurs with the Advisory Board in recognizing that potential CO–OPs will initially present different capabilities and levels of development. This proposed rule incorporates the principles endorsed by the Advisory Board by allowing diversity among CO–OPs and maintaining the vision outlined in the Advisory Board Final Report. The CO–OP program will offer an entry point to eligible organizations that seek to provide more consumer-focused coverage and create additional competition for insurance that will make high-quality care more affordable. By creating more health plan choices, CO–OPs can benefit all consumers.

D. Request for Comment

On February 2, 2011, CMS published a Request for Comment (RFC) in the **Federal Register** (76 FR 5774) seeking public comment on the rules that will govern the CO–OP program. The comment period closed on March 4, 2011. CMS has considered and incorporated the comments received in developing specific regulatory proposals.

The public response to the RFC yielded 55 unique comment submissions. A total of 65 unique entities submitted comments, including entities that submitted stand-alone comments and multiple individuals who signed onto one comment submission. The 65 total unique commenters included consumers and consumer advocacy organizations, medical and health care professional trade associations and societies, health insurers and insurance trade associations, health benefits consultants, and actuaries. The majority of the comments related to the types of organizations that would likely become successful CO–OPs and the criteria CMS should use in awarding loans.

E. Structure of the Proposed Rule

The regulations outlined in this Notice of Proposed Rulemaking will be codified in the new 45 CFR part 156 subpart F. The major subjects covered in this proposed rule under subpart F of part 156 are described below.

- Section 156.500 describes the statutory basis of the CO–OP program and the scope of this proposed rule;
- Section 156.505 sets forth definitions for the terms applied in subpart F;
- Section 156.510 specifies the criteria to be eligible for a loan under the CO–OP program;
- Section 156.515 sets forth the standards for a CO–OP; and
- Section 156.520 sets forth the terms for loans awarded under the CO–OP program including repayment terms and interest rates.

II. Provisions of the Proposed Regulations

A. Basis and scope (§ 156.500)

Section 156.500 specifies the general statutory authority for and scope of standards proposed in subpart F. The CO–OP program fosters the creation of qualified nonprofit health insurance issuers to offer CO–OP qualified health plans in the individual and small group markets. Subpart F establishes certain governance requirements for CO–OPs and the terms for loans awarded under the CO–OP program. Applicants may apply for loans to help fund start-up costs and meet the solvency requirements of States in which the applicant seeks to be licensed to issue CO–OP qualified health plans.

B. Definitions (§ 156.505)

Section 156.505 sets forth definitions for terms that are used throughout subpart F. Many of the definitions presented in § 156.505 are taken directly from the Affordable Care Act, but new definitions were created when necessary. All definitions proposed are intended to apply only to subpart F.

Several of the terms used in subpart F are defined elsewhere in Parts 155 and 156, which have been proposed previously (76 FR 41866). The terms ''individual market,'' ''small group market,'' ''SHOP,'' and ''Exchange'' are defined in § 155.20. ''Individual market'' is defined as the market for health insurance coverage offered to individuals other than in connection with a group health plan. ''Small group market'' is defined as the health insurance market under which individuals obtain health insurance coverage (directly or through any arrangement) on behalf of themselves (and their dependents) through a group health plan maintained by a small employer. ''SHOP'' is defined as a Small Business Health Options Program operated by an Exchange through which a qualified employer can provide its employees and their dependents with access to one or more QHPs. ''Exchange'' is defined as a governmental agency or non-profit entity that meets the applicable requirements of this part and makes QHPs available to qualified individuals and qualified employers. Unless otherwise identified, this term refers to State Exchanges, regional Exchanges, subsidiary Exchanges, and a Federally-facilitated Exchange.

CMS proposes that a ''CO–OP qualified health plan'' means a health plan that has in effect a certification that it meets the standards described in subpart C of part 156, which has been previously proposed (76 FR 41866), except that the plan can be deemed certified by CMS or an entity designated by CMS as described in 156.520(e).

''*Applicant''* is defined as an entity eligible to apply for a loan described in § 156.520.

A ''qualified nonprofit health insurance issuer'' is a loan recipient, which satisfies or can reasonably be expected to satisfy the standards in section 1322(c) of the Affordable Care Act and § 156.515 within the time frames specified in this subpart, until such time as CMS determines the loan recipient does not satisfy or cannot reasonably be expected to satisfy these standards. This ensures that loan recipients can receive the benefits of section 1322(h), addressing the tax exemption for qualified nonprofit health insurance issuers, at the appropriate time, as determined by the Internal Revenue Service. CMS proposes that the term ''consumer operated and oriented plan (CO–OP)'' means a loan recipient that satisfies the standards in section 1322(c) of the Affordable Care Act and § 156.515 within the time frames specified in this subpart. Thus, to be considered a CO–OP, a loan recipient must meet the governance and health plan issuance standards described in § 156.515 within the timeframes established in this subpart. In addition, the loan recipient must comply with State insurance laws and State insurance reforms and ensure that revenues in excess of expenses inure to the benefit of its members in accordance with section 1322(c)(4) of the Affordable Care Act.

We define a ''*nonprofit member corporation''* (also referred to as a ''nonprofit member organization'') as a nonprofit, not-for-profit, public benefit, or similar membership entity organized as appropriate under State law. For the purposes of this subpart, as defined in section 1304(d) of the Affordable Care Act, ''State'' means each of the 50 States and the District of Columbia. CMS proposes that in order for an organization to be eligible for CO–OP loans (and become an ''applicant'') it would first have to meet the definition of a nonprofit member organization.

CMS proposes to adopt the Advisory Board's recommendation to use the terms ''*formation board''* and ''*operational board''* when discussing the governance requirements for a CO–OP. The term ''formation board'' means the initial board of directors of the applicant or loan recipient before it has begun accepting enrollment and conducted an election to the board of directors. ''Operational board'' means the board of directors elected by the members of the CO–OP after it has begun accepting enrollment. A ''member'' is an individual covered under health insurance policies issued by a CO–OP.

Section 1322(c)(2)(A) of the Affordable Care Act prohibits an organization from participating as a ''*qualified nonprofit health insurance issuer''* in the CO–OP program ''if the organization or a related entity (or any predecessor of either) was a health insurance issuer on July 16, 2009.'' Consistent with section 1551 of the Affordable Care Act, we propose that an entity is an ''issuer'' under this subpart if it satisfies the definition in section 2791(b)(2) of the Public Health Service Act: an insurance company, insurance service, or insurance organization (including a health maintenance organization) which is licensed to engage in the business of insurance in a State and which is subject to State law which regulates insurance. Additionally, ''*pre-existing issuer''* means (for the purposes of this subpart) a health insurance issuer that was in existence on July 16, 2009. We seek comments on this definition.

CMS proposes the definition of ''related entity'' to mean an organization that shares common ownership or control with a pre-existing issuer or a trade association whose members consist of pre-existing issuers, *and* satisfies at least one of the following conditions: (1) Retains responsibilities for the services to be provided by the issuer; (2) furnishes services to the issuer's enrollees under an oral or written agreement; or (3) performs some of the issuer's management functions under contract or delegation. Thus, CMS would permit a nonprofit organization that is not an issuer or the representative of an issuer but shares control with an existing issuer to ''sponsor'' or facilitate the creation of a CO–OP if the applicant (and resulting CO–OP) and the existing issuer do not share the same chief executive or any of the board of directors. We seek comment on this interpretation.

''*Sponsor''* is defined as an organization or individual that is involved in the development, creation, or organization of the CO–OP or provides financial support to a CO–OP. We propose that a ''*predecessor''* means any entity that participates in a merger, consolidation, purchase or acquisition of property or stock, corporate separation, or other similar business transaction that results in the formation of the new entity.

Section 1322(b)(1) of the Affordable Care Act directs CMS to award to applicants loans to provide assistance in meeting start-up costs and any State solvency requirements in the States in which the applicant seeks to be licensed to issue CO–OP qualified health plans. ''*Start-up Loan''* means a loan provided by CMS to a loan recipient for costs associated with creating and developing a CO–OP. The term ''*Solvency Loan''* means a loan provided by CMS to a loan recipient in order to meet State solvency and reserve requirements.

C. Eligibility (§ 156.510)

Section 156.510 outlines the minimum standards that an organization must meet to be eligible to receive a loan from the CO–OP program to create a new private consumer-operated insurer.

1. General

In paragraph (a), we propose that the applicant declare its intention to become a CO–OP. Since the loan recipient may not meet all of the conditions to be considered a CO–OP at the time of the application, it is important that the organization intend to meet all of the standards and demonstrate the likelihood of being able to meet such requirements by the time periods established in this subpart before the award is made, especially those related to consumer focus and consumer governance of the organization.

Consistent with the recommendation of the Advisory Board, CMS proposes the applicant have formed a nonprofit member organization under State law prior to applying for a loan. This means that the new nonprofit member corporation, and not an organization that is sponsoring the creation of a CO–OP, would be the applicant for and recipient of a loan.

2. Exclusions From Eligibility

Paragraph (b) codifies the conditions in section 1322(c)(2) of the Affordable Care Act under which an organization will not be eligible to participate in the CO–OP program. Paragraph (b)(1)(i) codifies that if an organization is a pre-existing issuer, a related entity, or any predecessor of either, it is not eligible for loans under the CO–OP program and therefore, cannot become a CO–OP. In addition, an organization is not eligible for the CO–OP program if the organization or a related entity (or any predecessor of either) is a trade association whose members consist of pre-existing issuers. We seek comment on this interpretation.

Paragraph (b)(1)(ii) codifies that, if an organization is sponsored by a State or local government, any political subdivision thereof, or any instrumentality of such government or political subdivision, it is not eligible to be a CO–OP and cannot apply for a loan under the CO–OP program. CMS considered whether this prohibition should apply to provider organizations that are associated with State university medical centers and concluded that medical centers, physician practices, hospitals, and other organizations that are part of a State university system are instrumentalities of the State. We believe that the prohibition against sponsorship by State or local government, and their political subdivisions and instrumentalities, must also apply to medical centers that are part of State or local governments and to medical practice groups that are created and overseen by a medical center owned by State or local government. This prohibition would not apply to Indian tribes. We invite comment on these interpretations.

As incorporated in section 1551 of the Affordable Care Act, section 2791(b)(2) of the PHS Act defines a ''health insurance issuer'' as ''an insurance company, insurance service, or insurance organization * * * which is licensed to engage in the business of insurance in a State and which is subject to State law which regulates insurance (within the meaning of section 514(b)(2) of the Employee Retirement Income Security Act of 1974).'' CMS believes that the following types of entities are examples of organizations that are not ''issuers'' and would be eligible to sponsor applicants for loans under the CO–OP program provided that they otherwise meet the requirements for eligibility:

(1) A prospective applicant not licensed by its State as a health insurance issuer on July 16, 2009, but which has subsequently achieved a State license,

(2) Self-funded and Taft-Hartley group health plans, and

(3) Church plans that were not licensed issuers on July 16, 2009, and

(4) Three-share or multi-share programs not licensed by their State insurance regulator.

CMS invites comment on how these organizations and others like them would sponsor an applicant.

Taking into account comments received on the RFC and the recommendations of the Advisory Board, in paragraph (b)(2)(i) CMS proposes that a nonprofit organization that is not an issuer but that currently sponsors an issuer would remain eligible to sponsor an applicant for a CO–OP loan in certain circumstances. Specifically a nonprofit non-issuer organization that currently sponsors a pre-existing issuer and meets other eligibility parameters may sponsor an applicant for a CO–OP loan provided that the pre-existing issuer does not share any of the board or the same chief executive with the applicant. We seek comment on this interpretation.

In paragraph (b)(2)(ii), we are further proposing that an organization that has purchased assets from a preexisting issuer in an arm's-length transaction where neither party was in a position to exert undue influence on the other is eligible to apply for a CO–OP loan. Therefore, an organization is eligible for CO–OP loans if it contracts for services, including health provider network access, premium billing, and case management from a health insurance issuer that existed on July 16, 2009, as long as the existing issuer has no control over the new private nonprofit issuer. Conversely, an applicant and a pre-existing issuer could have common control by a non-issuer organization. The applicant and pre-existing issuer would not be related entities unless the pre-existing issuer also provided the CO–OP's services or management functions.

D. CO–OP Standards (§ 156.515)

1. General

A CO–OP must satisfy the standards set forth in all statutory, regulatory, or other requirements as applicable. CMS proposes additional standards that a CO–OP must meet in § 156.515, many of which are recommendations made by the Advisory Board in the final report dated April 15, 2011. We invite comment on these proposed standards, which are set forth below.

2. Governance Requirements

In response to the RFC, provider organizations submitted comments that suggested that providers may be in the best position to sponsor CO–OPs and encouraged CMS to impose no additional standards related to governance beyond those in the statute. In contrast, other commenters suggested that CMS set specific standards for the composition of the governing body, such as those to avoid conflicts and to encourage diverse representation on governing bodies that are representative of the local population. Other commenters expressed concern that in some markets providers could create a CO–OP and control pricing in the market.

Section 1322(c)(3)(C) of the Affordable Care Act directs the Secretary to promulgate regulations requiring the organization to operate with a strong consumer focus, including timeliness, responsiveness, and accountability to members. Pursuant to this authority and taking into account the comments, CMS proposes additional governance requirements in paragraph (b). These proposed standards reflect the recommendations of the Advisory Board.

Paragraph (b)(1) proposes that a CO–OP implement policies and procedures to foster and ensure member control of the organization. Section 1322(c)(3) of the Affordable Care Act states that the governance of the organization be subject to a majority vote of its members. Paragraph (b)(1)(i) proposes that the organization be governed by an operational board with each of its directors elected by a majority vote of its members. In paragraph (b)(1)(ii), we propose that every member of the CO–OP be eligible to vote for each director of the CO–OP during the elections described in (b)(1)(iv). In paragraph (b)(1)(iii), we propose that each member of the organization have one vote in the elections of directors.

Paragraph (b)(1)(iv) proposes that the first election of the operational board of directors occur no later than one year after the effective date on which the CO–OP provides coverage to its first member. The Advisory Board recommended that this election should take place within the first year after enrollment begins or when a certain designated membership level is reached, but should occur no later than two years after the organization enrolls its first member, recognizing that a certain level of membership is necessary for meaningful elections. CMS is concerned that the Advisory Board's recommendation of an election date of the start-up period plus two years after enrollment will delay the introduction of consumer governance beyond a point where it can have an impact on the strategic direction of the CO–OP. We do not believe that holding an election one year after coverage begins will burden the formation board or CO–OP operations since the formation board will have the full start-up period plus one year to plan for this transition. We solicit comments on the proposed timeline.

Paragraph (b)(1)(v) proposes that the elections for the board of directors of the organization be contested and that there be more candidates for open positions on the board than there are positions. We are not specifying the mechanism by which the CO–OP will achieve this standard, but we believe that the CO–OP's bylaws should address this standard, most likely by creating a nominating committee that will ensure that this standard is met. This standard will help ensure that consumer members of the organization have a choice of candidates for the board of directors, provide an opportunity for a change in directors, and help prevent a group of directors from exerting disproportionate control over the organization. CMS believes that the operation of contested elections will provide safeguards against the long-term entrenchment or undue influence of any individual director while protecting the members' choice of directors.

Consistent with the recommendations of the Advisory Board and commenters to the RFC, paragraph (b)(1)(vi) proposes that a majority of the voting directors must be members of the organization. While all directors must be elected by the members, a CO–OP may want to reserve positions for directors who have certain types of expertise that are essential to the governance of the organization, such as providers or individuals with experience in health care operations or finance. CMS recognizes that it may not be possible to find members of the CO–OP with the desired expertise who are willing to serve as directors. The purpose of this provision is to recognize the need to allow for directors who are not members, but to ensure that members who are consumers of the services of the organization are the majority of the board of directors and that the governance of the organization is accountable to consumers.

Standards for the operational board of directors, consistent with the recommendations of the Advisory Board are included in (b)(2). Paragraph (b)(2)(i) specifies that each director must meet ethical, conflict-of-interest, and disclosure standards. Specifically, each director must act in the sole interest of the CO–OP and its members, avoid self-dealing, and act prudently and consistently with the terms of the CO–OP's governance documents and applicable State and Federal law.

Paragraph (b)(2)(ii) specifies that each voting director has only one vote on matters before the board. This standard also recognizes that a CO–OP may choose to have directors who provide expertise but do not vote. Non-voting directors must bring specific expertise or be members of the management team of the CO–OP, whose participation in the board of directors is considered essential.

Paragraph (b)(2)(iii) acknowledges that positions on the board of directors may be designated for individuals with certain types of expertise or experience. The type of expertise that is needed may vary over time and the CO–OP may choose to enlist candidates for the board with certain types of expertise through its nominating process.

Paragraph (b)(2)(iv) specifies that positions on the board that are designated for individuals with specialized expertise, experience, or affiliation (for example, providers, employers, labor representatives) cannot constitute a majority of the operational board even if the individuals serving in designated seats are members of the CO–OP. This standard should be addressed in the bylaws of the CO–OP, in the conflict of interest standard for board members, and in the nominating procedures of the CO–OP.

Paragraph (b)(2)(v) codifies the limitation in section 1322(e) of the Affordable Care Act that no representative of any Federal, State or local government (or of any political subdivision or instrumentality thereof) and no representative of any organization described in § 156.510(b)(i) may serve on the board of directors.

Paragraph (b)(3) codifies the provision that an organization must have governing documents that incorporate ethics and conflict of interest standards protecting against insurance industry involvement and interference. At a minimum, the standards must establish procedures for identifying potential conflicts of interest and addressing any violation of the standards.

Paragraph (b)(4) codifies the provision that the CO–OP must operate with a strong consumer focus, including timeliness, responsiveness, and accountability to members. Finally, the CO–OP must demonstrate financial viability and the ability to meet all other statutory, legal, or other requirements.

3. Requirements to Issue Health Plans and Become a CO–OP

In paragraph (c)(1), CMS codifies section 1322(c)(1)(B) of the Affordable Care Act that provides that substantially all of the activities of the CO–OP consist of the issuance of CO–OP qualified health plans in the individual and small group markets in each State in which it is licensed to issue such plans. CMS proposes that a CO–OP will satisfy this standard if at least two-thirds of the contracts for health insurance coverage issued by a CO–OP are CO–OP qualified health plans offered in the individual and small group markets in the States in which the CO–OP operates. An organization must continually meet this requirement to be considered a CO–OP. Members of the Advisory Board noted that State insurance regulations generally refer to the contracts for insurance, not the number of lives covered under each contract, when referring to policy issuance. The Advisory Board therefore recommended that: the interpretation of ''substantially all'' refer to contracts issued; the proportion of contracts that must meet the ''substantially all'' test be interpreted to provide CO–OPs maximum flexibility; and CO–OPs be allowed to meet that standard over time to build enrollment gradually in the individual and small group market. Consistent with the Advisory Board recommendations on this issue and public comment received in response to the RFC, CMS interprets the statute to mean that each insurance policy or contract that an issuer sells constitutes a single activity. We solicit comments on whether two-third is the appropriate threshold for this standard.

This proposed standard would allow providers wishing to sponsor CO–OPs to enroll their own employees in the CO–OP and thereby encourage provider participation. It would also permit CO–OPs to participate in Medicaid and Children's Health Insurance Program (CHIP), which would enable individuals and families to remain with the same health insurance issuer and providers if they move between the Exchange and these programs.

In paragraph (c)(2), CMS proposes that a CO–OP applicant receiving a Start-up Loan or Solvency Loan offer at least one CO–OP qualified health plan at both the silver and gold benefit levels, as defined in section 1302(d) of the Affordable Care Act, in every individual market Exchange that serves the geographic market in which it is licensed and intends to provide health care coverage (market area). In addition, CMS proposes that if a CO–OP chooses to offer coverage in the small group market outside the Exchange, a CO–OP must commit to offering at least one CO–OP qualified health plan at both the silver and gold benefit levels in the SHOP of any market area where the CO–OP is licensed. Note that it is a choice for a CO–OP to offer coverage in the small group market, but if it does so, it must also offer coverage through SHOP to prevent adverse selection against SHOP. These standards are consistent with section 1301 of the Affordable Care Act providing that health insurance issuers that participate in the Exchanges offer qualified health plans at both the silver and gold benefit levels.

In paragraph (c)(3) CMS proposes that within the earlier of thirty-six months following the initial drawdown of a Start-up Loan or six months following the initial drawdown of the Solvency Loan, a loan recipient be licensed in a State and offer at least one CO–OP qualified health plan at the silver and gold benefit levels (as defined in section 1302(d) of the Affordable Care Act) in an individual market Exchange and, if offering a health plan in the small group market, in a SHOP. Thus, the loan recipient must satisfy the requirements of title XXVII of the Public Health Service Act applicable to health insurance coverage in the individual market and small group market, if applicable and comply with all standards generally applicable to qualified health plan issuers. To continue offering CO–OP qualified health plans in the Exchanges, a CO–OP must continue to meet these standards.

Due to concerns regarding the ability of a CO–OP to establish sufficient enrollment to make its health plans viable, CMS proposes that when offering a CO–OP qualified health plan in an Exchange for the first time, loan recipients may only begin to offer health plans and accept enrollment during an open enrollment period for the applicable Exchange. We seek comment on this proposal.

In paragraph (d), CMS proposes that a loan recipient must satisfy the requirements of section 1322(c) of the Affordable Care Act and § 156.515 and become a CO–OP within fifty-four months following the first drawdown of a Start-up Loan or eighteen months following the initial drawdown of a Solvency Loan.

These provisions will ensure that loan recipients actively work toward becoming a CO–OP that offers CO–OP qualified health plans in the Exchanges. Commenters to the RFC indicated that it could take from 6 months to 3 years for a new CO–OP to become operational and begin accepting enrollment, with most commenters stating that 18 to 24 months would be needed to become operational. CMS believes that the proposed timeframes provide sufficient time for a loan recipient to offer CO–OP qualified health plans in the Exchanges and become a new CO–OP that meets all of the governance requirements of the CO–OP program. We request comment on these proposed standards.

E. Loan Terms (§ 156.520)

1. Overview of Loans

Paragraph (a)(1), proposes that organizations that meet eligibility standards according to § 156.510 can apply for Start-up Loans and Solvency Loans (pursuant to a separate CO–OP program Funding Opportunity Announcement (FOA)). Organizations may apply for Start-up Loans to assist with start-up costs associated with establishing a CO–OP. In addition, CMS proposes that organizations that meet the eligibility standards may apply for Solvency Loans to assist in meeting the solvency requirements of States in which the applicant seeks to be licensed to issue CO–OP qualified health plans.

Section § 156.520 outlines the terms of the loans awarded under the CO–OP program. Other than the 5-year and 15-year repayment periods, the statute leaves the specific terms of the loans to CMS's discretion but requires that CMS take into consideration State solvency requirements. Accordingly, CMS proposes loan terms that are consistent with the goals of the CO–OP program, most likely to encourage successful CO–OPs, and protect the Federal investment.

The Advisory Board strongly recommended that CMS begin awarding loans in late 2011 or early 2012 to provide sufficient time for CO–OPs to become operational and accept enrollment during the first Exchange open enrollment period to compete for membership and gain the level of enrollment needed to be viable. Commenters to the RFC generally agreed that it is important for CMS to provide startup funding to CO–OPs as soon as possible. Accordingly, we intend to begin awarding CO–OP loans in this timeframe.

As a condition of licensure as a health insurer, State insurance departments require that an insurer maintain an amount of capital that is consistent with its size and risk profile. This measure of reserve is called risk-based capital (RBC). State law establishes a variety of required regulatory actions if an insurer's RBC falls below established levels or percent of RBC. These regulatory interventions can range from a corrective action plan to liquidation of the insurer if it is insolvent. Solvency and the financial health of insurers is historically a State-regulated function.

Solvency Loans are intended to help loan recipients meet the reserve requirements, solvency regulations, and requisite surplus note arrangements in each State. Since Solvency Loans must be repaid to the Federal government within 15 years, the Advisory Board expressed a concern that they will be treated by States as debt rather than capital that satisfies State solvency and reserve requirements.

A loan is considered a liability and typically would not assist an organization in meeting solvency requirements, since the liability would have to be subtracted from the calculation of reserves in order to determine the net protection afforded to enrollees. In order to assist CO–OPs in meeting State solvency requirements, the loans will be structured so that premiums would go to pay claims and meet cash reserve requirements before repayment to CMS. The goal of this provision is to satisfy the reserve requirements of the individual insurance department in the States in which each CO–OP seeks licensure. The Advisory Board proposed that CO–OPs discuss the appropriate mechanisms with their insurance regulators for structuring the loans to meet reserve requirements and include a description of those mechanisms in their applications so that loan and repayment terms for that applicant conform to the State's requirements.

CMS proposes in § 156.520(a)(3) to structure Solvency Loans to each loan recipient in a manner that meets State reserve and solvency requirements so that the loan recipient can fund its required capital reserves. This ensures that they are recognized as contributing to State reserve and solvency requirements in the States in which the applicant intends to offer CO–OP qualified health plans. We request comment on this provision.

2. Repayment Period

Section 1322(b)(3) of the Affordable Care Act states that loans awarded must be repaid within 5 years and 15 years respectively, taking into consideration any appropriate State reserve requirements, solvency regulations, and requisite surplus note arrangements that must be constructed in a State. This standard is codified in § 156.520(b).

Loan recipients must make loan payments consistent with the repayment schedule approved by CMS and agreed to by the loan recipient until the loans have been paid in full. Recognizing that it would be difficult for a loan recipient to begin repaying the loans before it has enrolled members and received premiums, the Advisory Board recommended that loan repayment begin after the loan recipient has begun receiving enrollment. Commenters to the RFC generally recommended repayment schedules for loans that are flexible. Most commenters indicated that preventing the failure of a CO–OP should take priority over repayment because insolvency of a CO–OP would harm its members and create disruption in insurance markets.

CMS agrees with the commenters and believes that a flexible repayment approach would promote the growth of CO–OPs, serve the interests of the CO–OP members and the public, and enhance the likelihood of full repayment. Flexibility in the repayment schedule helps address the diversity in each CO–OP's local market conditions, projected member risk profiles, business strategy, and projected enrollment size. CMS proposes to permit individualized repayment schedules to be submitted with the application with features such as a grace period, graduated repayments, or balloon payments at the end of the repayment period.

The Advisory Board recommended an enhanced oversight process for cases where a loan recipient is not meeting the terms and conditions of its loan but where CMS has concluded that discontinuing funding is not in the best interest of the members, the public, or the government. Consistent with the Advisory Board's recommendation, CMS may execute a loan modification or workout when a loan recipient is having difficulty making loan repayments. If a loan recipient is unable to (1) make repayments or meet other conditions of the loan without adversely affecting coverage stability, member control, quality of care, or the public interest generally or (2) meet State reserve and solvency requirements, CMS would have the option to execute a loan modification or workout.

3. Interest Rates

In § 156.520(c), CMS proposes that loan recipients pay an interest rate benchmarked to the average interest rate on marketable Treasury securities of similar maturity. These interest rates are tied to prevailing market conditions while providing low cost loans that are consistent with the statute's direction to foster the development of viable private nonprofit CO–OPs. CMS is considering reductions to the benchmarked rate for Start-Up Loans and Solvency Loans to make it easier for new CO–OPs to repay their loans.

Section 1322(b)(2)(C)(iii) of the Affordable Care Act states that if CMS determines that a loan recipient has failed to meet any of its contractual obligations, or has used Federal funds in a prohibited or improper manner, the loan recipient must repay to CMS 110 percent of the aggregate amount of loans received under this section, plus interest. This provision is codified in § 156.520(c) so that if a loan recipient's loan agreement is terminated by CMS, the loan recipient would be charged the statutory penalty and an interest rate equal to the average interest rate on marketable Treasury securities of similar maturity. We request public comment on the proposed interest rates and the structure of the debt instrument.

4. Failure to Pay

In § 156.520(d), CMS proposes to use any and all remedies available to it under law to collect loan payments or penalty payments if a loan recipient fails to make payments consistent with the repayment schedule in its loan agreement or in a loan modification or workout.

5. Deeming of CO–OP Qualified Health Plans

In § 156.520(e) we codify the ''deeming'' provisions of section 1301(a)(2) of the Affordable Care Act. To be deemed certified to participate in an Exchange, we propose that a loan recipient must be in compliance with the terms of the CO–OP program, the Federal standards for CO–OP qualified health plans set forth pursuant to section 1311(c) of the Affordable Care Act and State standards. CMS or an entity designated by CMS will make a determination regarding whether or not a loan recipient meets these standards based on evidence provided by the loan recipient. CMS or its designee will notify the Exchange in which the loan recipient proposes to operate that the loan recipient is deemed certified to participate. Similarly, if a loan recipient loses its deemed status for any reason, CMS or its designee will provide notice to the applicable Exchanges.

A loan recipient that is deemed certified to participate in the Exchange would be exempt from the certification procedures for each applicable Exchange. However, the loan recipient must still meet any standards established by CMS for all qualified health plans participating in an Exchange, along with all State requirements in the case where a State is operating the Exchange.

6. Conversions

The Advisory Board expressed a concern about the potential for successful CO–OPs to become targets for conversion to for-profit, non-consumer operated entities. Such an outcome could reduce consumer control, limit choice, and weaken competition in the insurance marketplace. Accordingly, the Advisory Board recommended imposing conditions on conversions that would create strong disincentives for a company to acquire a CO–OP and for a CO–OP to pursue such offers. Because allowing conversions to a for-profit or non-consumer operated entity would be contrary to the goals of the CO–OP program, CMS proposes to prohibit such conversions. This prohibition on conversions and sales to for-profit or non-consumer operated entities would ensure that loans awarded under this program are used to sustain program goals over time.

CMS recognizes the potential for changes in CO–OP governance in circumstances other than conversions and sales to for-profit or non-consumer-operated entities. Since the goals of the CO–OP program are to make available new consumer-governed private nonprofit health plans and expand competition in the Exchanges, CMS proposes to prohibit any transaction by a CO–OP that would result in a change to a governance structure that does not meet the standards in § 156.515 or any other program standards. We request comment on these prohibitions.

III. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995, we are required to provide 60-day notice in the **Federal Register** and solicit public comment before an information collection request is submitted to the Office of Management and Budget (OMB) for review and approval. We will solicit comments on the information collection request in association with the implementation of the CO–OP program (for example, application, reporting) in one or more future 60-day notices.

V. Regulatory Impact Analysis (RIA)

A. Introduction

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). An RIA must be prepared for rules with economically significant effects ($100 million or more in any 1 year). This proposed rule is economically significant. Accordingly, the Office of Management and Budget has reviewed this proposed rule.

B. Statement of Need, Health Insurance Markets, and CO–OP Plans

The Affordable Care Act established the Consumer Operated and Oriented Plan (CO–OP) program. Section 1322(b)(3) of the Affordable Care Act requires CMS to promulgate regulations to implement this program. The purpose of this program is to create a new CO–OP in every State in order to expand the number of qualified health plans available in the Exchanges with a focus on integrated care and greater plan accountability.

Only a few States offer insurance choices sponsored and managed by entities primarily focused on meeting the health insurance needs and preferences of consumers, as determined directly by consumers or their elected representatives. Currently, we believe that there are four issuers in the country that meet this standard, located in the States of Washington, Idaho, Minnesota, and Wisconsin. While these issuers cover in excess of one million lives, their market share is only about one percent of private insurance coverage.

Congress has provided budget authority of $3.8 billion to assist sponsoring organizations in creating such plans and to do so with enough capital and reserves to become licensed and ultimately effective competitors in State insurance markets. These funds will enable CO–OPs to use Federal government loans (''Solvency Loans'') to meet the requirements for risk-based capital that State insurance commissions impose on health plans to ensure that they will be able to finance the services they have contractually promised their enrollees.

The Affordable Care Act, as implemented through this regulation, prohibits issuers that existed prior to July 16, 2009 from participating in the CO–OP program but allows CO–OPs to use experienced managers and health care organizations to manage the functions they have to perform in providing health insurance. Further, as indicated throughout the preamble to this proposed rule, the CO–OP Advisory Board in its advice to the Secretary, and the Department in its proposed provisions, have consistently favored provisions that would give CO–OP flexibility, within the boundaries set by the statute, in setting up and operating these plans.

CO–OPs may not, however, enter the program unless their activities are limited primarily to issuing plans in the individual and small group markets. CO–OPs will therefore face the problem of being either brand new organizations or existing organizations facing a major change in purpose.

C. Anticipated Federal Costs

As previously explained, Congress has provided $3.8 billion to assist sponsoring organizations in creating such plans and to do so with enough capital and reserves to become licensed and ultimately effective competitors in State insurance markets.[1] The capital requirements for CO–OPs would be financed, in part, by member premiums and in part by the $3.8 billion dollars available for loans over the next five years. The net Federal costs of these loans to CO–OPs are ''transfers.'' The net transfer costs resulting from default and loss of interest over the relevant 5 year (Start-up Loan) and 15 year (Solvency Loan) periods are estimated later in this analysis, in Table 1. We estimate that 65 percent of the Solvency Loans and 60 percent of the Start-up Loans will be repaid. Our estimates use one percent below the current yields for 5-year U.S. Treasury bonds as the repayment interest rate on Start-up Loans and two percent below the current yields for longer term U.S. Treasury Bonds as the repayment rate for the Solvency Loans.

D. Anticipated Benefits

CO–OPs also offer a unique opportunity to foster and spread emerging models of integrated delivery systems, both to improve health outcomes and to lower health costs (see, for example, testimony of Sara Collins before the Advisory Committee, *The Consumer Operated and Oriented Plan (CO–OP) Program Under the Affordable Care Act: Potential and Options for Spreading Mission-Driven Integrated Delivery Systems,* at *http://www.commonwealthfund.org/~/media/Files/Publications/Testimony/2011/Jan/Collins_CoOp%20testimony_11311.pdf).* CO–OPs can adopt new models and new arrangements that are more patient-centered than the current fragmented delivery system. Improved delivery systems may provide better health outcomes due to coordinated care, better chronic disease management, and improved quality of care.

In addition, by adding competition in numerous local and State markets, CO–OPs have the potential to promote efficiency, reduce premiums or premium growth, and improve service and benefits to enrollees. By their nature, traditional cooperatives, on which the CO–OP program is modeled, focus on responsiveness to their members and accountability to member needs, which may create flexibility to reduce administrative costs. Direct savings could be substantial after the initial start-up period given the magnitude of the total spending that may be involved. Resulting attempts to regain market share by traditional insurance issuers competing with CO–OPs could lead to system-wide savings across millions of enrollees.

E. Alternatives Considered

Throughout this proposed rule we have presented and analyzed alternatives. The program is largely defined by the statute, but in this proposed rule, we have sought to identify options that would best enable newly formed CO–OPs to offer CO–OP qualified health plans. We welcome comments on any other alternatives that would improve the proposed rule and the likelihood of program success.

The most important alternatives to our proposed standards would be to impose either a higher or lower interest repayment on loans. Among the thousands of Federal programs providing financial assistance, the great majority make grants that are not repayable. The Federal government also provides financial assistance through loan programs. Borrower interest rates, in some cases, are higher than Treasury rates, while in other cases rates are subsidized by the Government (see the estimates in the Federal Credit Supplement volume of the Budget of the United States Government for FY 2012, at *http://www.gpoaccess.gov/usbudget/fy12/cr_supp.html*).

There is also a tradeoff between the amount of a loan subsidy and the likely default rate. For example, if a 1 percent increase in the interest rate were to increase the likelihood of total default by 1 percent or more, the net effect would be to increase Federal costs. In the CO–OP program, substantially higher interest rates could threaten required solvency reserves. We cannot predict quantitatively the effects of

[1] We note that these capital requirements are not ''cost'' for the purpose of calculating the benefits and costs of this Federal program. Costs, in the context of this program, are the resources spent on applying for and complying with the terms of the loans. As noted above, we will solicit comments on the information collection requests associated with the implementation of the CO–OP program (for example, application, reporting) in one or more future 60-day notices.

interest charges on the willingness of organizations to sponsor CO–OPs, but substantially higher interest charges would clearly reduce the likelihood of CO–OPs being created in as many States. Higher interest charges could also reduce the ability of CO–OPs to expand and correspondingly reduce the benefits of the program.

F. Accounting Statement

As required by OMB Circular A–4, we have prepared an accounting statement. The transfer costs shown are the net costs resulting from default and loss of interest over the relevant 5 year (Start-up Loan) and 15 year (Solvency Loan) periods. We have estimated that $600 million would be used for Start-up Loans and $3,200 million would be used for Solvency Loans. As previously presented, for purposes of this calculation our primary estimate is that 65 percent of the Solvency Loans and 60 percent of the Start-up Loans are repaid. We have used a low-cost estimate that assumes 80 percent repayment of all loans and a high-cost estimate that assumes 50 percent repayment of all loans. Our estimates use one percent below the current yields for 5-year U.S. Treasury bonds as the repayment interest rate on Start-up loans and two percent below the current yields for the average of 10-year and 20-year U.S. Treasury Bonds as the repayment rate for the Solvency Loans (see *http://www.treasury.gov/resource-center/data-chart-center/interest-rates/Pages/TextView.aspx?data=yield*).

TABLE 1—ACCOUNTING STATEMENT: CLASSIFICATION OF ESTIMATED COSTS AND SAVINGS

[$ in millions]

Category	Primary estimate	Low estimate	High estimate	Units		
				Year dollars	Discount rate (%)	Period covered
Benefits						
Qualitative: New CO–OP enrollees served may experience better health outcomes. There are also potential cost savings system-wide from competitive effects on other health care plans. Net benefits will depend on the extent to which CO–OP plans augment or substitute for other health care insurance and services.						
Costs						
Qualitative: Costs include administrative burdens associated with applying for and complying with the terms of the loans.						
Transfers						
Federal Government Costs	$210 million $110 million	$190 million $80 million	$230 million $140 million	2012 2012	7 3	2012–31 2012–31

VI. Other Requirements for Analysis of Economic Effects

The Regulatory Flexibility Act (RFA) requires agencies to determine whether proposed rules would have a ''significant economic impact on a substantial number of small entities'' and, if so, to prepare a Regulatory Flexibility Analysis to identify options that could mitigate the impact of the proposed regulation on small businesses.

All CO–OPs established under the program will be private nonprofit organizations and hence qualify as small entities under the RFA. CMS interprets the requirement as applying only to regulations with negative impacts, but routinely prepares a voluntary Regulatory Flexibility Analysis for regulations with significant positive impacts.

The positive economic impacts of the program on CO–OPs will clearly be ''significant,'' particularly in the effects on thousands of small businesses that are likely to purchase insurance through the Exchanges and would benefit from the lower premium costs that CO–OPs will likely create. Moreover, small businesses will have the opportunity to create consortia to help sponsor CO–OPs and may actively pursue these savings. In the light of the benefits to these small entities, the Department has prepared a voluntary Regulatory Flexibility Analysis. The preceding economic analysis, together with the remainder of this preamble, constitutes that analysis.

Section 1102(b) of the Social Security Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. We do not believe a regulatory impact analysis is required here because this proposed rule would not have a direct effect on small rural hospitals or other providers.

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates on State, local, or tribal governments in the aggregate, or on the private sector, require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. This proposed rule would impose no such mandates. Accordingly, no analysis under UMRA is required.

Executive Order 13132 on Federalism establishes requirements that an agency must meet when a proposed rule imposes substantial costs on State and local governments, preempts State law, or otherwise has Federalism implications. This proposed rule does not trigger these requirements.

List of Subjects in 45 CFR Part 156

Administrative practice and procedure, Advertising, Advisory committees, Brokers, Conflict of interest, Consumer protection, Grant programs—health, Grants administration, Health care, Health insurance, Health maintenance organization (HMO), Health records, Hospitals, Indians, Individuals with disabilities, Loan programs—health, Organization and functions (Government agencies), Medicaid, Public assistance programs, Reporting and recordkeeping requirements, Safety, State and local governments, Sunshine Act, Technical Assistance, Women, and Youth.

For the reasons set forth in the preamble, the Department of Health and Human Services proposes to further amend 45 CFR part 156, as proposed to be added at 76 FR 41866, July 15, 2011, as set forth below:

PART 156—HEALTH PLAN REQUIREMENTS UNDER THE PATIENT PROTECTION AND AFFORDABLE CARE ACT, INCLUDING REQUIREMENTS RELATED TO EXCHANGES

1. The authority citation for part 156 continues to read as follows:

Authority: Title I of the Affordable Care Act, Sections 1301–1304, 1311–1312, 1321, 1322, 1324, 1334, 1342–1343, and 1401–1402.

2. Subpart F is added to read as follows:

Subpart F—Consumer Operated and Oriented Plan Program

Subpart F—Consumer Operated and Oriented Plan Program

§ 156.500 Basis and scope.

This subpart implements section 1322 of the Affordable Care Act by establishing the Consumer Operated and Oriented Plan (CO–OP) program to foster the creation of new consumer-governed, private, nonprofit health insurance issuers, known as ''CO–OPs.'' Under this program, loans are awarded to encourage the development of CO–OPs. Applicants that meet the eligibility standards of the CO–OP program may apply to receive loans to help fund start-up costs and meet the solvency requirements of States in which the applicant seeks to be licensed to issue CO–OP qualified health plans. This subpart sets forth the governance requirements for the CO–OP program and the terms for loans awarded under the CO–OP program.

§ 156.505 Definitions.

The following definitions apply to this subpart:

Applicant means an entity eligible to apply for a loan described in § 156.520 of this subpart.

Consumer operated and oriented plan (CO–OP) means a loan recipient that satisfies the standards in section 1322(c) of the Affordable Care Act and § 156.515 of this subpart within the timeframes specified in this subpart.

CO–OP qualified health plan means a health plan that has in effect a certification that it meets the standards described in subpart C of part 156, except that the plan can be deemed certified by CMS or an entity designated by CMS as described in § 156.520(e).

Exchange has the meaning given to the term in proposed § 155.20.

Formation board means the initial board of directors of the applicant or loan recipient before it has begun accepting enrollment and had an election by the members of the organization to the board of directors.

Individual market has the meaning given to the term in proposed § 155.20.

Issuer means an insurance company, insurance service, or insurance organization (including a health maintenance organization) which is licensed to engage in the business of insurance in a State and which is subject to State law which regulates insurance.

Member means an individual covered under health insurance policies issued by a loan recipient.

Nonprofit member organization or *nonprofit member corporation* means a nonprofit, not-for-profit, public benefit, or similar membership entity organized as appropriate under State law.

Operational board means the board of directors elected by the members of the loan recipient after it has begun accepting enrollment.

Predecessor, with respect to a new entity, means any entity that participates in a merger, consolidation, purchase or acquisition of property or stock, corporate separation, or other similar business transaction that results in the formation of the new entity.

Pre-existing issuer means a health insurance issuer that was in existence on July 16, 2009.

Qualified nonprofit health insurance issuer means a loan recipient, which satisfies or can reasonably be expected to satisfy the standards in section 1322(c) of the Affordable Care Act and § 156.515 of this subpart within the time frames specified in this subpart, until such time as CMS determines the loan recipient does not satisfy or cannot reasonably be expected to satisfy these standards.

Related entity means an entity that shares common ownership or control with a pre-existing issuer or a trade association whose members consist of pre-existing issuers, and satisfies at least one of the following conditions:

(1) Retains responsibilities for the services to be provided by the issuer;

(2) Furnishes services to the issuer's enrollees under an oral or written agreement; or

(3) Performs some of the issuer's management functions under contract or delegation.

SHOP has the meaning given to the term in proposed § 155.20.

Small group market has the meaning given to the term in proposed § 155.20.

Solvency Loan means a loan provided by CMS to a loan recipient in order to meet State solvency and reserve requirements.

Sponsor means an organization or individual that is involved in the development, creation, or organization of the CO–OP or provides financial support to a CO–OP.

Start-up Loan means a loan provided by CMS to a loan recipient for costs associated with establishing a CO–OP.

State has the meaning given to the term in proposed § 155.20.

§ 156.510 Eligibility.

(a) *General.* In addition to the eligibility standards set forth in the CO–OP program Funding Opportunity Announcement (FOA), to be eligible to apply for and receive a loan under the CO–OP program, an organization must intend to become a CO–OP and be a nonprofit member organization.

(b) *Exclusions from eligibility.* (1) Subject to paragraph (b)(2) of this section, an organization is not eligible to apply for a loan if:

(i) The organization is a pre-existing issuer, a trade association whose members consist of pre-existing issuers, a related entity, or a predecessor of either; or

(ii) A State or local government, any political subdivision thereof, or any instrumentality of such government or political subdivision is a sponsor of the organization.

(2) The exclusion of pre-existing issuers in paragraph (b)(1)(i) of this section does not exclude from eligibility an applicant that:

(i) Has as a sponsor a nonprofit organization that is not an issuer or a trade association whose members consist of issuers and that also sponsors a pre-existing issuer, provided that the pre-existing issuer does not share any of its board or the same chief executive with the applicant; or

(ii) Has purchased assets from a preexisting issuer provided that it is an arm's-length transaction where neither party was in a position to exert undue influence on the other.

§ 156.515 CO–OP standards.

(a) *General.* A CO–OP must satisfy the standards in this section in addition to all other statutory, regulatory, or other requirements.

(b) *Governance requirements.* A CO–OP must meet the following governance requirements:

(1) *Member control.* A CO–OP must implement policies and procedures to foster and ensure member control of the

organization. Accordingly, a CO–OP must meet the following the requirements:

(i) The CO–OP must be governed by an operational board with all of its directors elected by a majority vote of the CO–OP's members;

(ii) All members must be eligible to vote for each director on the organization's operational board;

(iii) Each member of the organization must have one vote in the elections of the directors of the organization's operational board;

(iv) Elections of the directors on the organization's operational board must occur no later than one year after the effective date on which the organization provides coverage to its first member;

(v) Elections of the directors on the organization's operational board must be contested so that the number of candidates for vacant positions on the operational board exceeds the number of vacant positions; and

(vi) The majority of the voting directors on the operational board must be members of the organization.

(2) *Standards for board of directors.* The operational board for a CO–OP must meet the following standards:

(i) Each director must meet ethical, conflict-of-interest, and disclosure standards including that each director act in the sole interest of the CO–OP;

(ii) Each director has one vote unless he or she is a non-voting director;

(iii) Positions on the board of directors may be designated for individuals with specialized expertise, experience, or affiliation (for example, providers, employers, and unions);

(iv) Positions on the operational board that are designated for individuals with specialized expertise, experience, or affiliation cannot constitute a majority of the operational board even if the individuals in those positions are members of the CO–OP. This provision does not prevent any individual from seeking election to the operational board based on being a member of the CO–OP; and

(v) Limitation on government and issuer participation. No representative of any Federal, State or local government (or of any political subdivision or instrumentality thereof) and no representative of any organization described in § 156.510(b)(1)(i) of this subpart may serve on the CO–OP's formation board or operational board.

(3) *Ethics and conflict of interest protections.* The CO–OP must have governing documents that incorporate ethics, conflict of interest, and disclosure standards. The standards must protect against insurance industry involvement and interference. In addition, the standards must ensure that each director acts in the sole interest of the CO–OP and its members, avoids self dealing, and acts prudently and consistently with the terms of the CO–OP's governance documents and applicable State and Federal law. At a minimum, these standards must include:

(i) A mechanism to identify potential ethical or other conflicts of interest;

(ii) A duty on the CO–OP's executive officers and directors to disclose all potential conflicts of interest;

(iii) A process to determine the extent to which a conflict exists;

(iv) A process to address any conflict of interest; and

(v) A process to be followed in the event a director or executive officer of the CO–OP violates these standards.

(4) *Consumer focus.* The CO–OP must operate with a strong consumer focus, including timeliness, responsiveness, and accountability to members.

(c) *Standards for health plan issuance.* A CO–OP must meet several standards for the issuance of health plans in the individual and small group market.

(1) At least two-thirds of the policies or contracts for health insurance coverage issued by a CO–OP in each State in which it is licensed must be CO–OP qualified health plans offered in the individual and small group markets.

(2) Loan recipients must offer a CO–OP qualified health plan at the silver and gold benefit levels, defined in section 1302(d) of the Affordable Care Act, in every individual market Exchange that serves the geographic regions in which the organization is licensed and intends to provide health care coverage. If offering at least one plan in the small group market, loan recipients must offer a CO–OP qualified health plan at both the silver and gold benefit levels, defined in section 1302(d) of the Affordable Care Act, in each SHOP that serves the geographic regions in which the organization offers coverage in the small group market.

(3) Within the earlier of thirty-six months following the initial drawdown of the Start-up Loan or 6 months following the initial drawdown of the Solvency Loan, loan recipients must be licensed in a State and offer at least one CO–OP qualified health plan at the silver and gold benefit levels, defined in section 1302(d) of the Affordable Care Act, in the individual market Exchanges and if the loan recipient offers coverage in the small group market, at the silver and gold benefit levels, defined in section 1302(d) of the Affordable Care Act, in the SHOPs. Loan recipients may only begin offering plans and accepting enrollment in the Exchanges for new CO–OP qualified health plans during the open enrollment period for each applicable Exchange.

(d) *Requirement to become a CO–OP.* Loan recipients must meet the standards of § 156.515 of this subpart no later than fifty-four months following initial drawdown of the Start-up Loan or eighteen months following the initial drawdown of a Solvency Loan.

§ 156.520 Loan terms.

(a) *Overview of Loans.* (1) Applicants may apply for the following loans under this section: Start-up Loans and Solvency Loans.

(2) All loans awarded under this subpart must be used in a manner that is consistent with the FOA, the loan agreement, and all other statutory, regulatory, or other requirements.

(3) Solvency Loans awarded under this subsection will be structured in a manner that ensures that the loan amount is recognized by State insurance regulators as contributing to the State-determined reserve requirements or other solvency requirements (rather than debt) consistent with the insurance regulations for the States in which the loan recipient will offer a CO–OP qualified health plan.

(b) *Repayment period.* The loan recipient must make loan payments consistent with the approved repayment schedule in the loan agreement until the loan is paid in full consistent with State reserve requirements, solvency regulations, and requisite surplus note arrangements. Subject to their ability to meet State reserve requirements, solvency regulations, or requisite surplus note arrangements, the loan recipient must repay its loans and, if applicable, penalties within the repayment periods in paragraphs (b)(1), (2), or (3) of this section.

(1) The contractual repayment period for Start-up Loans and any associated penalty is five years following each drawdown of loan funds consistent with the terms of the loan agreement.

(2) The contractual repayment period for Solvency Loans and any associated penalty is fifteen years following each drawdown of loan funds consistent with the terms of the loan agreement.

(3) Changes to the loan terms, including the repayment periods, may be executed if CMS determines that the loan recipient is unable to repay the loans as a result of State reserve requirements, solvency regulations, or requisite surplus note arrangements or without compromising coverage stability, member control, quality of care, or market stability. In the case of

a loan modification or workout, the repayment period for loans awarded under this subpart is the repayment period established in the loan modification or workout. The revised terms must meet all other regulatory, statutory, and other requirements.

(c) *Interest rates.* Loan recipients will be charged interest for the loans awarded under this subpart. Interest will be accrued starting from the date of drawdown on the loan amounts that have been drawn down and not yet repaid by the loan recipient. The interest rate will be determined based on the date of award.

(d) *Failure to pay.* Loan recipients that fail to make loan payments consistent with the repayment schedule or loan modification or workout approved by CMS will be subject to any and all remedies available to CMS under law to collect the debt.

(e) *Deeming of CO–OP qualified health plans.* Health plans offered by a loan recipient may be deemed certified as a CO–OP qualified health plan to participate in the Exchanges for up to 10 years following the life of any loan awarded to the loan recipient under this subpart, consistent with section 1301(a)(2) of the Affordable Care Act. An Exchange must recognize a health plan offered by a loan recipient as an eligible participant of the Exchange if it is deemed certified by CMS or an entity designated by CMS. To be deemed as certified to participate in the Exchanges, the loan recipient must comply with the standards for CO–OP qualified health plans set forth pursuant to section 1311(c) of the Affordable Care Act, all State-specific standards established by an Exchange for qualified health plans operating in that Exchange, and the standards of the CO–OP program as set forth in this subpart. If a loan recipient is deemed to be certified or loses its deemed status and is no longer deemed as certified to participate in the Exchanges, CMS or an entity designated by CMS will provide notice to the Exchanges in which the loan recipient offers CO–OP qualified health plans.

(f) *Conversions.* The loan recipient shall not convert or sell to a for-profit or non-consumer operated entity at any time after receiving a loan under this subpart. The loan recipient shall not undertake any transaction that would result in the CO–OP implementing a governance structure that does not meet the standards in this subpart.

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: July 15, 2011.

Marilyn Tavenner,

Principal Deputy Administrator and Chief Operating Officer, Centers for Medicare & Medicaid Services.

Approved: July 15, 2011.

Kathleen Sebelius,

Secretary, Department of Health and Human Services.

[FR Doc. 2011–18342 Filed 7–18–11; 11:15 am]

BILLING CODE 4120–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 654

[Docket No. 110707375–1374–01]

RIN 0648–BB07

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Stone Crab Fishery of the Gulf of Mexico; Removal of Regulations

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes to repeal the Fishery Management Plan for the Stone Crab Fishery of the Gulf of Mexico (FMP) and remove its implementing regulations, as requested by the Gulf of Mexico Fishery Management Council (Council). The stone crab fishery takes place primarily in state waters (off the coast of Florida) and Florida's Fish and Wildlife Conservation Commission (FWC) is extending its management into Federal waters. Repealing the Federal regulations would eliminate duplication of management efforts, reduce costs, and align with the President's Executive Order 13563, ''Improving Regulation and Regulatory Review,'' to ensure Federal regulations are more effective and less burdensome in achieving regulatory objectives. The intended effect of this action is to enhance the effectiveness and efficiency of managing the stone crab fishery in the Gulf of Mexico (Gulf).

DATES: Written comments must be received on or before August 19, 2011.

ADDRESSES: You may submit comments on the proposed rule identified by NOAA–NMFS–2011–0140 by any of the following methods:

- *Electronic submissions:* Submit electronic comments via the Federal e-Rulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Susan Gerhart, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701.

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.

To submit comments through the Federal e-rulemaking portal: *http://www.regulations.gov,* click on ''submit a comment,'' then enter ''NOAA–NMFS–2011–0140'' in the keyword search and click on ''search.'' To view posted comments during the comment period, enter ''NOAA–NMFS–2011–0140'' in the keyword search and click on ''search.'' NMFS will accept anonymous comments (enter N/A in the required field if you wish to remain anonymous). You may submit attachments to electronic comments in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

Comments received through means not specified in this rule will not be considered.

Electronic copies of documents supporting this proposed rule, which include an environmental assessment and an initial regulatory flexibility analysis (IRFA), may be obtained from Southeast Regional Office Web site at *http://sero.nmfs.noaa.gov.*

FOR FURTHER INFORMATION CONTACT: Susan Gerhart, telephone: 727–824–5305 or *e-mail: Susan.Gerhart@noaa.gov.*

SUPPLEMENTARY INFORMATION: The stone crab fishery of the Gulf of Mexico (Gulf) is managed under the FMP. The FMP was prepared by the Council and implemented through regulations at 50 CFR part 654 under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

Background

The commercial stone crab fishery is limited primarily to the coastal waters off the State of Florida, with a small amount of landings occurring off of Louisiana and Texas. Florida has actively managed the Florida stone crab fishery since 1929.

The Federal FMP, implemented in 1979, applies only to Federal Gulf waters adjacent to Florida waters. It was originally implemented to reduce gear conflicts between stone crab and shrimp fishermen in central and southwest Florida. The objectives of the FMP include: Providing for orderly conduct of the stone crab fishery to reduce conflict between stone crab fishermen and other fishermen in the management area (primarily shrimp fishermen with vessels registered in states other than Florida); establishing an effective statistical reporting system for monitoring the stone crab fishery; attaining full utilization of the stone crab resource in the management area; and promoting uniformity of the regulations throughout the management area. The FMP, as amended, adopted Florida's rules for stone crab in the exclusive economic zone (EEZ). By adopting Florida's rules, the Council and NMFS accommodated Florida's leading role in regulating this fishery.

The Council and NMFS have worked closely with Florida's FWC to adopt compatible management measures through the Federal FMP, including a framework to allow the Regional Administrator to resolve gear conflicts, implementing a limited access system, and recognizing FWC's licenses, trap certificates, and trap tags for use in the EEZ in lieu of Federal permits. Under the Federal FMP, there is also a Federal stone crab trap limitation program which requires issuance of a commercial vessel permit, a trap certificate, and annual trap tags. To date, NMFS has not issued any permits under the Federal trap limitation program. All trap limitation permits have been issued by the FWC.

The FMP for the Shrimp Fishery in the Gulf (Gulf Shrimp FMP) established areas closed to shrimp fishing to prevent gear conflicts with the stone crab fishery. These closed areas include shrimp/crab separation zones and a southwest Florida seasonal trawl closure. Although Federal regulations would no longer prevent stone crab trap deployment in certain zones, the state of Florida has the authority to enact these same regulations for all current participants in the fishery, much as they have done for Zone II, which lies entirely in state waters.

Repealing the Federal Stone Crab FMP

In the absence of Federal management, states have the opportunity to extend their authority to regulate a fishery in Federal waters, as authorized under the Magnuson-Stevens Act (16 U.S.C. 1856(a)(3)). In a letter to the Council dated August 13, 2010, the FWC stated its interest in taking management responsibilities for stone crab in the EEZ. At its April 2011 meeting, the FWC voted to begin rulemaking to extend its authority to regulate stone crab in Federal waters. The FWC already has the lead in several stone crab management actions including monitoring landings, implementing the trap limitation program and conducting stock assessments.

At its October 2010 meeting, the Council voted to repeal the Federal stone crab FMP. The Magnuson-Stevens Act (16 U.S.C. 1854(h)) requires a favorable vote by 75 percent of all voting members. The Council voted 14 in favor of this measure, 0 against, and 3 not present, thus meeting the threshold to repeal the FMP. If implemented, this action would allow the FWC to extend state regulations for stone crab into Federal waters for vessels registered to the State of Florida or vessels returning to a port in the state of Florida. Vessels registered to states other than Florida, who intend to fish for stone crab in Florida waters or in the EEZ off Florida and intend to land their vessels out-of-state, could be of concern. However, because the highest abundance of stone crabs is in south Florida, it is unlikely this concern will be realized. A vessel from outside of Florida would need to travel a long distance to reach the fishing grounds, thereby making fuel costs a larger factor. Furthermore, most stone crab fishermen deploy and service traps in multiple trips, and store traps on shore between trips, which would only be convenient for Florida fishermen. To date, no out-of-state vessel owner has applied for a Federal stone crab permit or trap tag for fishing in the EEZ. Therefore, interest in doing so at this time seems unlikely. Stone crab fishermen off Louisiana and Texas land a small amount of stone crab from their state waters. Although their state governments have not done so already, Louisiana and Texas also have the authority to extend management of stone crab into Federal waters off their states and could propose such an action in the future.

Repealing the Federal FMP in unlikely to have a significant effect on the status of the stone crab resource or on the conduct of the fishery. NMFS recognizes Florida's authority under section 306(a)(3) of the Magnuson-Stevens Act (16 U.S.C. 1856(a)(3)) to regulate vessels registered under its laws when such vessels harvest stone crab in the EEZ. These regulations are essentially the same as the current Federal regulations, so no practical changes to the biological or social and economic environment are expected. If fishing practices outside Florida's authority should constitute an emergency situation that jeopardizes effective management of the stone crab fishery in the EEZ, NMFS would consider issuing emergency regulations, as authorized by section 305(c)(1) of the Magnuson-Stevens Act (16 U.S.C. 1855(c)(1)).

Repealing the Federal FMP would also minimize costs and avoid unnecessary duplication of management efforts, consistent with National Standard 7 of the Magnuson-Stevens Act. This action also seeks to align with the President's Executive Order 13563. On January 18, 2011, President Obama signed Executive Order 13563, ''Improving Regulation and Regulatory Review,'' to ensure Federal regulations are more effective and less burdensome in achieving regulatory objectives. Federal agencies are tasked to periodically review their existing regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed. In this case, NMFS has determined that repealing the Federal stone crab FMP will not deter the continued effective management of stone crab, but will eliminate the burden of two agencies carrying out the same management objective.

For the reasons summarized above, NMFS proposes to repeal the FMP and to remove its implementing regulations.

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this proposed rule is consistent with the Magnuson-Stevens Act and other applicable law, subject to further consideration after public comment.

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

The Chief Counsel for Regulation of the Department of Commerce 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. The factual basis for this determination is as follows:

The purpose of this proposed rule is to promote management of the stone crab fishery in the most efficient manner, while maintaining conservation of the resource and the ecosystem. The Magnuson-Stevens Act provides the statutory basis for this proposed rule.

If implemented, this rule would directly affect commercial fishing vessels that harvest stone crab in the Gulf of Mexico. For the period 2004–2009, an average of 987 vessels per year recorded commercial stone crab landings in Florida. The total average annual ex-vessel revenue from all stone crab harvests from these vessels during this period was approximately $25.56 million (2008 dollars). The average annual total revenue per vessel from stone crab during this period was approximately $29,000 (2008 dollars).

The Small Business Administration has established size criteria for all major industry sectors in the U.S. including shellfish harvesters. A business involved in shellfish harvesting is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including its affiliates), and has combined annual receipts not in excess of $4.0 million (NAICS code 114112, shellfish fishing) for all its affiliated operations worldwide. Based on the average revenue estimate provided above, all commercial fishing vessels expected to be directly affected by this proposed rule are determined for the purpose of this analysis to be small business entities.

This proposed rule would not establish any new reporting, recordkeeping, or other compliance requirements. No duplicative, overlapping, or conflicting Federal rules have been identified.

If implemented, this rule would result in continued normal fishing practices, harvests, prices, and revenues. This action would not change the economic performance of the fishery, because current Federal regulations mirror Florida regulations and Florida has voted to extend its jurisdiction and these nearly identical regulations into Federal waters off Florida. Although Florida would only be able to extend its jurisdiction to vessels registered in Florida, or regulate fishermen who land stone crab in Florida, it is not expected that any fishermen would attempt to harvest stone crab in Federal waters off Florida for landing in other states in the foreseeable future. As a result, the stone crab fishery would continue to be a Florida fishery; be properly managed by Florida; the health of the resource appropriately protected; and the economic benefits associated with the fishery maintained. In summary, no economic impacts are expected to result from the proposed action. Therefore, this proposed rule, if implemented, would not have a significant direct adverse economic effect on the profits of a substantial number of small entities.

Because this proposed rule, if implemented, is not expected to have any direct adverse economic impact on a substantial number of small entities, an initial regulatory flexibility analysis is not required and none has been prepared.

List of Subjects in 50 CFR Part 654

Fisheries, Fishing, Incorporation by reference.

Dated: July 14, 2011.

John Oliver,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

For the reasons set out in the preamble, under the authority of 16 U.S.C. 1801 *et seq.*, part 654 is proposed to be removed.

[FR Doc. 2011–18318 Filed 7–19–11; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register
Vol. 76, No. 139
Wednesday, July 20, 2011

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

Agency Information Collection Activities: Proposed Collection: Comment Request: FNS–583, Supplemental Nutrition Assistance Program Employment and Training Program Activity Report

AGENCY: Food and Nutrition Service (FNS), USDA.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act, this notice invites the public and other public agencies to comment on a proposed information collection burden for the Supplemental Nutrition Assistance Program (SNAP) Employment and Training (E&T) Program, currently approved under OMB No. 0584–0339. This collection is a revision of a currently approved collection, which proposes to increase the currently approved burden of 21,755 by 4,328 hours. The adjusted burden is 26,083 hours. An increase in the estimated number of annual work registrants accounts for most of the increase.

DATES: Submit written comments on or before September 19, 2011.

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 will have practical utility; (b) the accuracy of the agency's estimate of burden of the proposed collection of information, including 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 form of information technology.

Comments may be sent to Moira Johnston, Chief, Program Design Branch, Program Development Division, Supplemental Nutrition Assistance Program, Food and Nutrition Service, U.S. Department of Agriculture, 3101 Park Center Drive, Room 810, Alexandria, Virginia, 22302. Comments may also be submitted via fax to the attention of Moira Johnston at 703–305–2454 or via e-mail to *moira.johnston@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, Alexandria, Virginia 22302, Room 810.

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.

FOR FURTHER INFORMATION CONTACT: Moira Johnston at (703) 305–2515, or send comment to *moira.johnston@fns.usda.gov* via the Internet.

SUPPLEMENTARY INFORMATION:

Title: Employment and Training Program Activity Report.

OMB Number: 0584–0339.

Expiration Date: December 31, 2011.

Type of Request: Revision of a currently approved collection.

Abstract: 7 CFR 273.7(c)(9) requires State agencies to submit quarterly E&T Program Activity Reports containing monthly figures for participation in the program. FNS uses Form FNS–583 to collect participation data. The information collected on the FNS–583 report includes:

- On the first quarter report, the number of work registrants receiving SNAP as of October 1 of the new fiscal year;
- On each quarterly report, by month, the number of new work registrants; the number of able–bodied adults without dependents (ABAWDs) applicants and recipients participating in qualifying components; the number all other applicants and recipients (including ABAWDs involved in non-qualifying activities) participating in components; and the number of ABAWDs exempt under the State agency's 15% exemption allowance;
- On the fourth quarter report, the total number of individuals who participated in each component, which is also sorted by ABAWD and non-ABAWD participants, and the number of individuals who participated in the E&T Program during the fiscal year.

7 CFR 273.7(d)(1)(i)(D) provides that if a State agency will not expend all of the funds allocated to it for a fiscal year, FNS will reallocate unexpended funds to other State agencies during the fiscal year or the subsequent fiscal year as FNS considers appropriate and equitable. After FNS makes initial E&T allocations, State agencies may request more funds, as needed. Typically, FNS receives fourteen such requests per year. The time it takes to prepare these requests is included in the burden. After receiving the State requests, FNS will reallocate unexpended funds as provided above. Following is the revised estimated burden for E&T reporting including the burden for State agencies to request additional funds.

FNS–583 Report

Reporting

Frequency: 4.
Affected Public: State Agency.
Number of Respondents: 53.
Number of Responses: 212.
Estimated Time per Response: 140.41 hours per State agency.
Estimated Total Annual Reporting Burden: 26,038.22 hours.

Recordkeeping

Number of Respondents: 53.
Number of Records: 212.
Number of Hours per Record: 0.136667 hours.
Estimated Total Annual Recordkeeping Burden: 28.97 hours.

Requests for Additional Funds

Reporting

Frequency: 1.
Affected Public: State Agency.
Number of Respondents: 53.
Number of Responses: 14.
Estimated Time per Response: 1.00 hour per request.
Estimated Total Annual Reporting Burden: 14 hours.

Recordkeeping

Number of Respondents: 53.

Number of Records: 14.

Number of Hours per Record: 0.136667 hours.

Estimated Total Annual Recordkeeping Burden: 1.91 hours.

TOTAL ANNUAL REPORTING AND RECORDKEEPING BURDEN: HOURS

[Compiling and reporting for the FNS–583 and requests for more funding SNAP employment and training Program activity report]

Section of regulation	Title	Number of respondents	Reports filed annually	Total responses (C × D)	Estimated number of hours per response	Estimated total hours (C × D × F)
A	B	C	D	E	F	G
7 CFR 273.7(c)(8)	Compiling work registration status.	53	[2] 4	[3] 212	75.15 × 212	15,931.76
7 CFR 273.24(g)	15% ABAWD exemptions.	[1] 7	4	28	20.27 × 28	567.42
7 CFR 273.7(f)	E&T activities (placements).	53	4	212	44.02 × 212	9,333.
7 CFR 273.7(C)(8)	Preparing FNS–583:					
	States filing electronically.	50	4	200 @ 1 hr	.9716 × 212	200
	States filing manually	3	4	12 @ .3 hr		6.
Reporting Burden for FNS–583.					140.4116	26,038.22
Recordkeeping burden for FNS–583.		53			0.13666 7 × 212	28.97
Total Reporting & Recordkeeping for FNS–583.						26,067.19
7 CFR 273.7(d)(1)(i)(F)	Preparing requests for more funds after initial allocation.	53	0.2641	14 @ 1 hr	1 × 14	14
	Recordkeeping burden for additional requests.				14 × 0.136667	1.91
Total Reporting & Recordkeeping Burden for Addt'l Funds Requests.						15.91
Reporting Burden for both FNS–583 and Additional Funds Requests.						26,052.22
7 CFR 277.12	Total Recordkeeping Burden for both FNS–583 & Additional Funds Requests.	53	4.2641	226	0.136667 × 226	30.88
Total All Burdens			53	4.2641	226	26,083.10

[1] Seven of 53 State agencies use 15% exemptions.
[2] State agencies report burden elements on the FNS–583, submitted quarterly.
[3] State agencies submit four FNS–583's annually for a total of 212 submittals plus 14 requests for additional funds for a total of 226 submittals.

Dated: June 16, 2011.

Audrey Rowe,

Administrator, Food and Nutrition Service.

[FR Doc. 2011–18229 Filed 7–19–11; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

Child and Adult Care Food Program: National Average Payment Rates, Day Care Home Food Service Payment Rates, and Administrative Reimbursement Rates for Sponsoring Organizations of Day Care Homes for the Period July 1, 2011 Through June 30, 2012

AGENCY: Food and Nutrition Service, USDA.

ACTION: Notice.

SUMMARY: This notice announces the annual adjustments to the national average payment rates for meals and snacks served in child care centers, outside-school-hours care centers, at-risk afterschool care centers, and adult day care centers; the food service payment rates for meals and snacks served in day care homes; and the administrative reimbursement rates for sponsoring organizations of day care homes, to reflect changes in the Consumer Price Index. Further adjustments are made to these rates to reflect the higher costs of providing meals in the States of Alaska and Hawaii. The adjustments contained in this notice are made on an annual basis each July, as required by the laws and regulations governing the Child and Adult Care Food Program.

DATES: These rates are effective from July 1, 2011 through June 30, 2012.

FOR FURTHER INFORMATION CONTACT: Ms. Tina Namian, Section Head, Policy and Program Development Branch, Child Nutrition Division, Food and Nutrition Service, U.S. Department of Agriculture, 3101 Park Center Drive, Room 640, Alexandria, Virginia 22302–1594, 703–305–2634.

SUPPLEMENTARY INFORMATION:

Definitions

The terms used in this notice have the meanings ascribed to them in the Child and Adult Care Food Program regulations, 7 CFR part 226.

Background

Pursuant to sections 4, 11, and 17 of the Richard B. Russell National School Lunch Act (42 U.S.C. 1753, 1759a, and 1766), section 4 of the Child Nutrition Act of 1966 (42 U.S.C. 1773) and sections 226.4, 226.12 and 226.13 of the regulations, notice is hereby given of the new payment rates for institutions participating in the Child and Adult Care Food Program (CACFP). These rates are in effect during the period, July 1, 2011 through June 30, 2012.

As provided for under the law, all rates in the CACFP must be revised annually, on July 1, to reflect changes in the Consumer Price Index (CPI), published by the Bureau of Labor Statistics of the United States Department of Labor, for the most recent 12-month period. In accordance with this mandate, the United States Department of Agriculture last published the adjusted national average payment rates for centers, the food service payment rates for day care homes, and the administrative reimbursement rates for sponsors of day care homes, for the period from July 1, 2010 through June 30, 2011, on July 19, 2010, at 75 FR 41793.

Child and Adult Care Food Program (CACFP)

[Per meal rates in whole or fractions of U.S. dollars, effective from July 1, 2011–June 30, 2012]

Centers	Breakfast	Lunch and Supper [1]	Snack
CONTIGUOUS STATES:			
PAID	0.27	0.26	0.07
REDUCED PRICE	1.21	2.37	0.38
FREE	1.51	2.77	0.76
ALASKA:			
PAID	0.40	0.43	0.11
REDUCED PRICE	2.11	4.10	0.61
FREE	2.41	4.50	1.23
HAWAII:			
PAID	0.30	0.31	0.08
REDUCED PRICE	1.46	2.85	0.44
FREE	1.76	3.25	0.89

Day Care Homes	Breakfast		Lunch and Supper		Snack	
	Tier I	Tier II	Tier I	Tier II	Tier I	Tier II
CONTIGUOUS STATES	1.24	0.45	2.32	1.40	0.69	0.19
ALASKA	1.97	0.70	3.76	2.27	1.12	0.31
HAWAII	1.44	0.52	2.71	1.64	0.81	0.22

Administrative Reimbursement Rates for Sponsoring Organizations of day Care Homes per Home

[Per month rates in U.S. dollars]

Initial 50	Next 150	Next 800	Each Addl	
CONTIGUOUS STATES	106	81	63	55
ALASKA	171	130	102	90
HAWAII	124	94	74	65

[1] These rates do not include the value of commodities (or cash-in-lieu of commodities) which institutions receive as additional assistance for each lunch or supper served to participants under the Program. A notice announcing the value of commodities and cash-in-lieu of commodities is published separately in the FEDERAL REGISTER.

The changes in the national average payment rates for centers reflect a 2.18 percent increase during the 12-month period, May 2010 to May 2011, (from 225.573 in May 2010, as previously published in the **Federal Register**, to 230.501 in May 2011) in the food away from home series of the CPI for All Urban Consumers.

The changes in the food service payment rates for day care homes reflect a 4.43 percent increase during the 12-month period, May 2010 to May 2011, (from 215.793 in May 2010, as previously published in the **Federal Register**, to 225.356 in May 2011) in the food at home series of the CPI for All Urban Consumers.

The changes in the administrative reimbursement rates for sponsoring organizations of day care homes reflect a 3.57 percent increase during the 12-month period, May 2010 to May 2011, (from 218.178 in May 2010, as previously published in the **Federal Register**, to 225.964 in May 2011) in the series for all items of the CPI for All Urban Consumers.

The total amount of payments available to each State agency for distribution to institutions participating in the Program is based on the rates contained in this notice.

This action is not a rule as defined by the Regulatory Flexibility Act (5 U.S.C. 601–612) and thus is exempt from the provisions of that Act. This notice has been determined to be exempt under Executive Order 12866.

This Program is listed in the Catalog of Federal Domestic Assistance under No. 10.558 and is subject to the provisions of Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 7 CFR Part 3015, subpart V, and final rule related notice published at 48 FR 29114, June 24, 1983.)

This notice has been determined to be not significant and was reviewed by the Office of Management and Budget in conformance with Executive Order 12866.

This notice imposes no new reporting or recordkeeping provisions that are subject to Office of Management and Budget review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3518).

Authority: Sections 4(b)(2), 11a, 17(c) and 17(f)(3)(B) of the Richard B. Russell National School Lunch Act, as amended (42 U.S.C. 1753(b)(2), 1759a, 1766(f)(3)(B)) and section 4(b)(1)(B) of the Child Nutrition Act of 1966, as amended (42 U.S.C. 1773(b)(1)(B)).

Dated: July 14, 2011.

Audrey Rowe,

Administrator.

[FR Doc. 2011–18257 Filed 7–19–11; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

Food Distribution Program: Value of Donated Foods From July 1, 2011 Through June 30, 2012

AGENCY: Food and Nutrition Service, USDA.

ACTION: Notice.

SUMMARY: This notice announces the national average value of donated foods or, where applicable, cash in lieu of donated foods, to be provided in school year 2012 (July 1, 2011 through June 30, 2012) for each lunch served by schools participating in the National School Lunch Program (NSLP), and for each lunch and supper served by institutions participating in the Child and Adult Care Food Program (CACFP).

DATES: The rate in this notice is effective July 1, 2011.

FOR FURTHER INFORMATION CONTACT: Michelle Waters, Program Analyst, Policy Branch, Food Distribution Division, Food and Nutrition Service, U.S. Department of Agriculture, 3101 Park Center Drive, Alexandria, Virginia 22302–1594 or telephone (703) 305–2662.

SUPPLEMENTARY INFORMATION: These programs are listed in the Catalog of Federal Domestic Assistance under Nos. 10.555 and 10.558 and are subject to the provisions of Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 7 CFR Part 3015, subpart V, and final rule related notice published at 48 FR 29114, June 24, 1983.)

This notice imposes no new reporting or recordkeeping provisions that are subject to Office of Management and Budget review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507). This action is not a rule as defined by the Regulatory Flexibility Act (5 U.S.C. 601–612) and thus is exempt from the provisions of that Act. This notice was reviewed by the Office of Management and Budget under Executive Order 12866.

National Average Minimum Value of Donated Foods for the Period July 1, 2011 Through June 30, 2012

This notice implements mandatory provisions of sections 6(c) and 17(h)(1)(B) of the Richard B. Russell National School Lunch Act (the Act) (42 U.S.C. 1755(c) and 1766(h)(1)(B)). Section 6(c)(1)(A) of the Act establishes the national average value of donated food assistance to be given to States for each lunch served in the NSLP at 11.00 cents per meal. Pursuant to section 6(c)(1)(B), this amount is subject to annual adjustments on July 1 of each year to reflect changes in a three-month average value of the Price Index for Foods Used in Schools and Institutions for March, April, and May each year (Price Index). Section 17(h)(1)(B) of the Act provides that the same value of donated foods (or cash in lieu of donated foods) for school lunches shall also be established for lunches and suppers served in the CACFP. Notice is hereby given that the national average minimum value of donated foods, or cash in lieu thereof, per lunch under the NSLP (7 CFR Part 210) and per lunch and supper under the CACFP (7 CFR Part 226) shall be 22.25 cents for the period July 1, 2011 through June 30, 2012.

The Price Index is computed using five major food components in the Bureau of Labor Statistics Producer Price Index (cereal and bakery products; meats, poultry and fish; dairy; processed fruits and vegetables; and fats and oils). Each component is weighted using the relative weight as determined by the Bureau of Labor Statistics. The value of food assistance is adjusted each July 1 by the annual percentage change in a three-month average value of the Price Index for March, April, and May each year. The three-month average of the Price Index increased by10.2 percent from 179.10 for March, April, and May of 2010, as previously published in the **Federal Register**, to 197.32 for the same three months in 2011. When computed on the basis of unrounded data and rounded to the nearest one-quarter cent, the resulting national average for the period July 1, 2011 through June 30, 2012 will be 22.25 cents per meal. This is an increase of two cents from the school year 2011 (July 1, 2010 through June 30, 2011) rate.

Authority: Sections 6(c)(1)(A) and (B), 6(e)(1), and 17(h)(1)(B) of the Richard B. Russell National School Lunch Act, as amended (42 U.S.C. 1755(c)(1)(A) and (B) and (e)(1), and 1766(h)(1)(B)).

Dated: July 14, 2011.

Audrey Rowe,

Administrator, Food and Nutrition Service.

[FR Doc. 2011–18259 Filed 7–19–11; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

National School Lunch, Special Milk, and School Breakfast Programs, National Average Payments/Maximum Reimbursement Rates

AGENCY: Food and Nutrition Service, USDA.

ACTION: Notice.

SUMMARY: This Notice announces the annual adjustments to the ''national average payments,'' the amount of money the Federal Government provides States for lunches, afterschool snacks and breakfasts served to children participating in the National School Lunch and School Breakfast Programs; to the ''maximum reimbursement rates,'' the maximum per lunch rate from Federal funds that a State can provide a school food authority for lunches served to children participating in the National School Lunch Program; and to the rate of reimbursement for a half-pint of milk served to non-needy children in a school or institution which participates in the Special Milk Program for Children. The payments and rates are prescribed on an annual basis each July. The annual payments and rates adjustments for the National School Lunch and School Breakfast Programs reflect changes in the Food Away From Home series of the Consumer Price Index for All Urban Consumers. The annual rate adjustment for the Special Milk Program reflects changes in the Producer Price Index for Fluid Milk Products.

DATES: These rates are effective from July 1, 2011 through June 30, 2012.

FOR FURTHER INFORMATION CONTACT: William Wagoner, Section Chief, School Programs Section, Policy and Program Development Branch, Child Nutrition Division, Food and Nutrition Service, USDA, 3101 Park Center Drive, Room 640, Alexandria, VA 22302 or phone (703) 305–2590.

SUPPLEMENTARY INFORMATION:

Background

Special Milk Program for Children—Pursuant to section 3 of the Child Nutrition Act of 1966, as amended (42 U.S.C. 1772), the Department announces the rate of reimbursement for a half-pint of milk served to non-needy children in a school or institution that participates in the Special Milk Program for Children. This rate is adjusted annually to reflect changes in the Producer Price Index for Fluid Milk Products, published by the Bureau of Labor Statistics of the Department of Labor.

For the period July 1, 2011 through June 30, 2012, the rate of reimbursement for a half-pint of milk served to a non-needy child in a school or institution which participates in the Special Milk Program is 20.50 cents. This reflects an increase of 16.55 percent in the Producer Price Index for Fluid Milk Products from May 2010 to May 2011 (from a level of 192.8 in May 2010 as previously published in the **Federal Register** to 224.7 in May 2011).

As a reminder, schools or institutions with pricing programs that elect to serve milk free to eligible children continue to receive the average cost of a half-pint of milk (the total cost of all milk purchased during the claim period divided by the total number of purchased half-pints) for each half-pint served to an eligible child.

National School Lunch and School Breakfast Programs—Pursuant to sections 11 and 17A of the Richard B. Russell National School Lunch Act, (42 U.S.C. 1759a and 1766a), and section 4 of the Child Nutrition Act of 1966 (42 U.S.C. 1773), the Department annually announces the adjustments to the National Average Payment Factors and to the maximum Federal reimbursement rates for lunches and afterschool snacks served to children participating in the National School Lunch Program and breakfasts served to children participating in the School Breakfast Program. Adjustments are prescribed each July 1, based on changes in the Food Away From Home series of the Consumer Price Index for All Urban Consumers, published by the Bureau of Labor Statistics of the Department of Labor. The changes in the national average payment rates for schools and residential child care institutions for the period July 1, 2011 through June 30, 2012 reflect a 2.18 percent increase in the Consumer Price Index for All Urban Consumers during the 12-month period May 2010 to May 2011 (from a level of 225.573 in May 2010 as previously published in the **Federal Register** to 230.501 in May 2011). Adjustments to the national average payment rates for all lunches served under the National School Lunch Program, breakfasts served under the School Breakfast Program, and afterschool snacks served under the National School Lunch Program are rounded down to the nearest whole cent.

Lunch Payment Levels—Section 4 of the Richard B. Russell National School Lunch Act (42 U.S.C. 1753) provides general cash for food assistance payments to States to assist schools in purchasing food. The Richard B. Russell National School Lunch Act provides two different section 4 payment levels for lunches served under the National School Lunch Program. The lower payment level applies to lunches served by school food authorities in which less than 60 percent of the lunches served in the school lunch program during the second preceding school year were served free or at a reduced price. The higher payment level applies to lunches served by school food authorities in which 60 percent or more of the lunches served during the second preceding school year were served free or at a reduced price.

To supplement these section 4 payments, section 11 of the Richard B. Russell National School Lunch Act (42 U.S.C. 1759a) provides special cash assistance payments to aid schools in providing free and reduced price lunches. The section 11 National Average Payment Factor for each reduced price lunch served is set at 40 cents less than the factor for each free lunch.

As authorized under sections 8 and 11 of the Richard B. Russell National School Lunch Act (42 U.S.C. 1757 and 1759a), maximum reimbursement rates for each type of lunch are prescribed by the Department in this Notice. These maximum rates are to ensure equitable disbursement of Federal funds to school food authorities.

Afterschool Snack Payments in Afterschool Care Programs—Section 17A of the Richard B. Russell National School Lunch Act (42 U.S.C. 1766a) establishes National Average Payments for free, reduced price and paid afterschool snacks as part of the National School Lunch Program.

Breakfast Payment Factors—Section 4 of the Child Nutrition Act of 1966 (42 U.S.C. 1773) establishes National Average Payment Factors for free, reduced price and paid breakfasts served under the School Breakfast Program and additional payments for free and reduced price breakfasts served in schools determined to be in ''severe need'' because they serve a high percentage of needy children.

Revised Payments

The following specific section 4, section 11 and section 17A National Average Payment Factors and maximum reimbursement rates for lunch, the afterschool snack rates, and the breakfast rates are in effect from July 1, 2011 through June 30, 2012. Due to a higher cost of living, the average payments and maximum reimbursements for Alaska and Hawaii are higher than those for all other States. The District of Columbia, Virgin Islands, Puerto Rico and Guam use the figures specified for the contiguous States.

National School Lunch Program Payments

Section 4 National Average Payment Factors—In school food authorities which served less than 60 percent free and reduced price lunches in School Year 2009–10, the payments for meals served are: *Contiguous States*—paid rate—26 cents, free and reduced price rate—26 cents, maximum rate—34 cents; *Alaska*—paid rate—43 cents, free and reduced price rate—43 cents, maximum rate—53 cents; *Hawaii*—paid rate—31 cents, free and reduced price rate—31 cents, maximum rate—39 cents.

In school food authorities which served 60 percent or more free and reduced price lunches in School Year 2009–10, payments are: *Contiguous States*—paid rate—28 cents, free and reduced price rate—28 cents, maximum rate—34 cents; *Alaska*—paid rate—45 cents, free and reduced price rate—45 cents, maximum rate—53 cents; *Hawaii*—paid rate—33 cents, free and reduced price rate—33 cents, maximum rate—39 cents.

Section 11 National Average Payment Factors—Contiguous States—free lunch—251 cents, reduced price lunch—211 cents; *Alaska*—free lunch—407 cents, reduced price lunch—367 cents; *Hawaii*—free lunch—294 cents, reduced price lunch—254 cents.

Afterschool Snacks in Afterschool Care Programs—The payments are: *Contiguous States*—free snack—76 cents, reduced price snack—38 cents, paid snack—07 cents; *Alaska*—free snack—123 cents, reduced price snack—61 cents, paid snack—11 cents; *Hawaii*—free snack—89 cents, reduced price snack—44 cents, paid snack—08 cents.

School Breakfast Program Payments

For schools ''not in severe need'' the payments are: *Contiguous States*—free breakfast—151 cents, reduced price breakfast—121 cents, paid breakfast—27 cents; *Alaska*—free breakfast—241 cents, reduced price breakfast—211 cents, paid breakfast—40 cents; *Hawaii*—free breakfast—176 cents, reduced price breakfast—146 cents, paid breakfast—30 cents.

For schools in ''severe need'' the payments are: *Contiguous States*—free breakfast—180 cents, reduced price breakfast—150 cents, paid breakfast—27 cents; *Alaska*—free breakfast—288 cents, reduced price breakfast—258 cents, paid breakfast—40 cents; *Hawaii*—free breakfast—210 cents, reduced price breakfast—180 cents, paid breakfast—30 cents.

Payment Chart

The following chart illustrates the lunch National Average Payment Factors with the sections 4 and 11 already combined to indicate the per lunch amount; the maximum lunch reimbursement rates; the reimbursement rates for afterschool snacks served in afterschool care programs; the breakfast National Average Payment Factors including ''severe need'' schools; and the milk reimbursement rate. All amounts are expressed in dollars or fractions thereof. The payment factors and reimbursement rates used for the District of Columbia, Virgin Islands, Puerto Rico and Guam are those specified for the contiguous States.

SCHOOL PROGRAMS MEAL, SNACK AND MILK PAYMENTS TO STATES AND SCHOOL FOOD AUTHORITIES

[Expressed in dollars or fractions thereof effective from July 1, 2011–June 30, 2012]

National school lunch program *	Less than 60%	60% or more	Maximum rate
CONTIGUOUS STATES:			
PAID	0.26	0.28	0.34
REDUCED PRICE	2.37	2.39	2.54
FREE	2.77	2.79	2.94
ALASKA:			
PAID	0.43	0.45	0.53
REDUCED PRICE	4.10	4.12	4.35
FREE	4.50	4.52	4.75
HAWAII:			
PAID	0.31	0.33	0.39
REDUCED PRICE	2.85	2.87	3.03
FREE	3.25	3.27	3.43

School breakfast program	Non-severe need	Severe need
CONTIGUOUS STATES:		
PAID	0.27	0.27
REDUCED PRICE	1.21	1.50
FREE	1.51	1.80
ALASKA:		
PAID	0.40	0.40
REDUCED PRICE	2.11	2.58
FREE	2.41	2.88
HAWAII:		
PAID	0.30	0.30
REDUCED PRICE	1.46	1.80
FREE	1.76	2.10

Special milk program	All milk	Paid milk	Free milk
PRICING PROGRAMS WITHOUT FREE OPTION	0.2050	N/A	N/A.
PRICING PROGRAMS WITH FREE OPTION	N/A	0.2050	Average Cost Per ½ Pint of Milk.
NONPRICING PROGRAMS	0.2050	N/A	N/A.

Afterschool Snacks Served in Afterschool Care Programs	
CONTIGUOUS STATES:	
PAID	0.07
REDUCED PRICE	0.38
FREE	0.76
ALASKA:	
PAID	0.11
REDUCED PRICE	0.61
FREE	1.23
HAWAII:	
PAID	0.08
REDUCED PRICE	0.44
FREE	0.89

* Payment listed for Free and Reduced Price Lunches include both section 4 and section 11 funds.

This action is not a rule as defined by the Regulatory Flexibility Act (5 U.S.C. 601–612) and thus is exempt from the provisions of that Act.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507), no new recordkeeping or reporting requirements have been included that are subject to approval from the Office of Management and Budget.

This notice has been determined to be not significant and was reviewed by the Office of Management and Budget in conformance with Executive Order 12866.

National School Lunch, School Breakfast and Special Milk Programs are listed in the Catalog of Federal Domestic Assistance under No. 10.555, No. 10.553 and No. 10.556, respectively, and are subject to the provisions of Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 7 CFR Part 3015, Subpart V, and the final rule related notice published at 48 FR 29114, June 24, 1983.)

Authority: Sections 4, 8, 11 and 17A of the Richard B. Russell National School Lunch Act, (42 U.S.C. 1753, 1757, 1759a, 1766a) and sections 3 and 4(b) of the Child Nutrition Act, (42 U.S.C. 1772 and 42 U.S.C. 1773(b)).

Dated: July 14, 2011.

Audrey Rowe,

Administrator, Food and Nutrition Service.

[FR Doc. 2011–18253 Filed 7–19–11; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Forest Service

Southern Montana Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Custer and Gallatin National Forest's Resource Advisory Committee will meet in Billings, Montana. The committee is meeting as authorized under the Secure Rural Schools and Community Self-Determination Act (Pub. L. 110–343) and in compliance with the Federal Advisory Committee Act. The purpose is to review project proposals and public comments.

DATES: The meeting will be held on August 10, 2011, and will begin at 10 a.m.

ADDRESSES: The meeting will be held at the Holiday Inn Grad Montana Hotel and Convention Center, 5500 Midland Road, Billings, MT. Written comments should be sent to Babete Anderson, Custer National Forest, 1310 Main Street, Billings, MT 59105. Comments may also be sent via e-mail to *branderson@fs.fed.us,* or via facsimile to 406–657–6222.

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 Custer National Forest 1310 Main Street, Billings, MT 59105. Visitors are encouraged to call ahead to 406–657–6205 ext 239.

FOR FURTHER INFORMATION CONTACT: Babete Anderson, RAC coordinator, USDA, Custer National Forest, 1310 Main Street, Billings, MT 59105; (406) 657–6205 ext 239; E-mail *branderson@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., Mountain Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The meeting is open to the public. The following business will be conducted: (1) Reviewing project proposal for recommending Title II projects; and (2) 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: July 15, 2011.

Frederick W. Prange,

Staff Officer.

[FR Doc. 2011–18368 Filed 7–19–11; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Forest Service

Lyon-Mineral Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Lyon-Mineral Resource Advisory Committee will meet in Hawthorne, NV. The committee is authorized under the Secure Rural Schools and Community Self-Determination Act (Pub. L. 110–343) (the Act) and operates in compliance with the Federal Advisory Committee Act. The purpose of the committee is to improve collaborative relationships and to provide advice and recommendations to the Forest Service concerning projects and funding consistent with the title II of the Act. The meeting is open to the public. The purpose of the meeting is to review project proposals that were submitted by the June 3, 2011 deadline and vote to determine which projects will be recommended for funding.

DATE: The meeting will be held August 10, 2011, 9 a.m.

ADDRESSES: The meeting will be held at the Mineral County Library, located at 110 1st Street, Hawthorne, NV 89415. Written comments may be submitted as described under **SUPPLEMENTARY INFORMATION**.

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 Bridgeport Ranger Station, Bridgeport, CA. Please call ahead to 760–932–5853 to facilitate entry into the building to view comments.

FOR FURTHER INFORMATION CONTACT: Sherri Lisius, RAC Coordinator, Bridgeport Ranger District, 760–932–5853, *sherrilisius@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. Requests for reasonable accomodation for access to the facility or procedings may be made by contacting the person listed **FOR FURTHER INFORMATION CONTACT**.

SUPPLEMENTARY INFORMATION: The following business will be conducted: Acceptance of notes from 07/22/11 meeting, review of and vote on projects, and public comments. A full agenda may be found at *https://fsplaces.fs.fed.us/fsfiles/unit/wo/secure_rural_schools.nsf,* by selecting the Lyon-Mineral RAC at the bottom of the webpage. Anyone who would like to bring related matters to the attention of the committee may file written statements with the committee staff before or after the meeting. The agenda will include time for people to make oral statements of three minutes or less. Individuals wishing to make an oral statement should request in writing by August 3, 2011 to be scheduled on the agenda. Written comments and requests for time for oral comments must be sent to Sherri Lisius, Forest Service, HC 62 Box 1000, Bridgeport, CA 93517, or by e-mail to *sherrilisius@fs.fed.us,* or via facsimile to 760–932–5899.

Dated: July 13, 2011.

Jeanne M. Higgins,

Forest Supervisor, Humboldt-Toiyabe National Forest.

[FR Doc. 2011–18233 Filed 7–19–11; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Docket 48–2011]

Foreign-Trade Zone 109—Watertown, NY, Application for Manufacturing Authority, North American Tapes, LLC, (Textile Athletic Tape), Watertown, NY

A request has been submitted to the Foreign-Trade Zones Board (the Board) by the Jefferson County Industrial Development Authority, grantee of FTZ 109, requesting manufacturing authority on behalf of North American Tapes, LLC (NAT), to manufacture athletic tape under FTZ procedures within FTZ 109. The application was submitted pursuant to the provisions of the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the Board (15 CFR Part 400). It was formally filed on July 15, 2011.

The NAT facility (25 employees) is located within FTZ 109 at 22430 Fisher

Road in the Jefferson County Industrial Park (Site 1), Watertown, New York. The facility is used to produce pressure-sensitive adhesive athletic tape (*e.g.*, trainers, hockey) with textile backing material for the U.S. market and export. The manufacturing process under FTZ procedures would involve blending, calendaring/laminating, winding, slitting, and packaging. The activity uses production inputs purchased from domestic and foreign sources. The sole material inputs sourced from abroad (representing about 30% of the finished tape's value) are woven cotton and polyester/cotton textile fabrics (duty rates: 10.5, 14.9%). The facility can produce up to 12.5 million square meters of finished athletic tape annually.

FTZ procedures could exempt NAT from customs duty payments on the foreign fabrics used in export production. The company anticipates that some 58 percent of the plant's shipments will be exported. On its domestic sales, NAT would be able to choose the duty rate during customs entry procedures that applies to athletic tape (duty rate: 2.9%) for the foreign-origin textile fabrics noted above. FTZ designation would further allow NAT to realize logistical benefits through the use of weekly customs entry procedures. Customs duties also could possibly be deferred or reduced on foreign status production equipment. NAT would also be exempt from duty payments on foreign fabric that becomes scrap during the production process. The application indicates that the savings from FTZ procedures would help improve the facility's international competitiveness.

In accordance with the Board's regulations, Pierre Duy of the FTZ Staff is designated examiner to evaluate and analyze the facts and information presented in the application and case record and to report findings and recommendations to the Board.

Public comment is invited from interested parties. Submissions (original and 3 copies) shall be addressed to the Board's Executive Secretary at the address below. The closing period for receipt of comments is September 19, 2011. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to October 3, 2011.

A copy of the application will be available for public inspection at the Office of the Executive Secretary, Foreign-Trade Zones Board, Room 2111, U.S. Department of Commerce, 1401 Constitution Avenue, NW., Washington, DC 20230–0002, and in the ''Reading Room'' section of the Board's Web site, which is accessible via *http://www.trade.gov/ftz*.

For further information, contact Pierre Duy at *Pierre.Duy@trade.gov* or (202) 482–1378.

Dated: July 15, 2011.

Elizabeth Whiteman,

Acting Executive Secretary.

[FR Doc. 2011–18301 Filed 7–19–11; 8:45 am]

BILLING CODE

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Docket T–3–2011]

Foreign-Trade Zone 72—Indianapolis, IN; Application for Temporary/Interim Manufacturing Authority; Brevini Wind USA, Inc. (Wind Turbine Gear Boxes), Yorktown, IN

An application has been submitted to the Executive Secretary of the Foreign-Trade Zones Board (the Board) by the Indianapolis Airport Authority, grantee of FTZ 72, requesting temporary/interim manufacturing (T/IM) authority within FTZ 72 at the Brevini Wind USA, Inc. (Brevini), facility, located in Yorktown, Indiana. The application was filed on July 14, 2011.

The Brevini facility (approximately 400 employees, 20 acres, 2,000 units/year) is located at 2400 Priority Way, within the Muncie Delaware County Park One Industrial Park in Yorktown, Indiana (Site 14). Under T/IM procedures, Brevini has requested authority to produce wind turbine gear boxes (HTSUS 8483.40, duty rate: 2.5%). Foreign components that would be used in production (representing 25% of the value of the finished gear boxes) include: shafts (HTSUS 8483.10), gears, (8483.40), and parts of gear boxes (8483.90) (duty rate range: 2.5%–5.5%, 25¢ ea. + 3.9%). T/IM authority could be granted for a period of up to two years.

FTZ procedures could exempt Brevini from customs duty payments on the foreign components used in export production. The company anticipates that some 30 percent of the plant's shipments will be exported. On its domestic sales, Brevini would be able to choose the duty rate during customs entry procedures that applies to wind turbine gear boxes (duty rate: 2.5%) for the foreign inputs noted above.

In accordance with the Board's regulations, Pierre Duy of the FTZ Staff is designated examiner to evaluate and analyze the facts and information presented in the application and case record and to report findings and recommendations pursuant to Board Orders 1347 and 1480.

Public comment is invited from interested parties. Submissions (original and 3 copies) shall be addressed to the Board's Executive Secretary at the following address: Office of the Executive Secretary, Foreign-Trade Zones Board, U.S. Department of Commerce, Room 2111, 1401 Constitution Ave., NW., Washington, DC 20230. The closing period for their receipt is August 19, 2011.

Brevini has also submitted a request to the FTZ Board for FTZ manufacturing authority beyond a two-year period, which may include additional products and components. It should be noted that the request for extended authority would be docketed separately and would be processed as a distinct proceeding. Any party wishing to submit comments for consideration regarding the request for extended authority would need to submit such comments pursuant to the separate notice that would be published for that request.

A copy of the application will be available for public inspection at the Office of the Foreign-Trade Zones Board's Executive Secretary at the address listed above, and in the ''Reading Room'' section of the Board's Web site, which is accessible via *http://www.trade.gov/ftz*. For further information, contact Pierre Duy at *Pierre.Duy@trade.gov* or (202) 482–1378.

Dated: July 14, 2011.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2011–18300 Filed 7–19–11; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–848]

Freshwater Crawfish Tail Meat From the People's Republic of China: Extension of Time Limit for Preliminary Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: *Effective Date:* July 20, 2011.

FOR FURTHER INFORMATION CONTACT: Dmitry Vladimirov, AD/CVD Operations, Office 5, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–0665.

SUPPLEMENTARY INFORMATION:

Background

On October 28, 2010, the Department of Commerce (the Department) initiated an administrative review of the antidumping duty order on freshwater crawfish tail meat from the People's Republic of China (PRC) for the period September 1, 2009, through August 31, 2010. See *Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 75 FR 66349 (October 28, 2010). We initiated an administrative review of six companies. On February 28, 2011, we rescinded the review of the order with respect to Yancheng Hi-King. See *Freshwater Crawfish Tail Meat From the People's Republic of China: Rescission of Antidumping Duty Administrative Review in Part,* 76 FR 10879 (February 28, 2011). On June 6, 2011, we extended the time period for issuing the preliminary results of this review by 46 days until July 18, 2011. See *Freshwater Crawfish Tail Meat From the People's Republic of China: Extension of Time Limit for Preliminary Results of Antidumping Duty Administrative Review,* 76 FR 32357 (June 6, 2011).

Extension of Time Limit for Preliminary Results

Section 751(a)(3)(A) of the Tariff Act of 1930, as amended (the Act), requires the Department to complete the preliminary results within 245 days after the last day of the anniversary month of an order for which a review is requested and the final results within 120 days after the date on which the preliminary results are published. If it is not practicable to complete the review within these time periods, section 751(a)(3)(A) of the Act allows the Department to extend the time limit for the preliminary results to a maximum of 365 days after the last day of the anniversary month.

We determine that it is not practicable to complete the preliminary results of this review within the extended time limit because we require additional time to analyze the allegation of middleman dumping and the record information pertaining to the allegation. In addition, the numerous extensions requested by, and granted to, the interested parties for filing various responses has contributed to the Department's need for additional time to complete the preliminary results. Therefore, we are extending the time period for issuing the preliminary results of this review by an additional 74 days until September 30, 2011.

This notice is published in accordance with section 751(a)(3)(A) of the Act and 19 CFR 351.213(h)(2).

Dated: July 13, 2011.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2011–18302 Filed 7–19–11; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–533–813]

Certain Preserved Mushrooms From India: Notice of Rescission of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

FOR FURTHER INFORMATION CONTACT: Kate Johnson or Gemal Brangman, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–4929 or (202) 482–3773, respectively.

SUPPLEMENTARY INFORMATION:

Background

On February 1, 2011, the Department of Commerce (the Department) published in the **Federal Register** a notice of ''Opportunity to Request Administrative Review'' of the antidumping duty order on certain preserved mushrooms from India for the period of review (POR) of February 1, 2010, through January 31, 2011. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review,* 76 FR 5559 (February 1, 2011).

On February 28, 2011, in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.213(b), the Department received a timely request from Monterey Mushrooms, Inc., a petitioner and a domestic interested party, to conduct an administrative review of the sales of Agro Dutch Foods Limited (Agro Dutch Industries Limited), Himalya International Ltd., Hindustan Lever Ltd. (formerly Ponds India, Ltd.), Transchem, Ltd., and Weikfield Foods Pvt. Ltd. Monterey Mushrooms, Inc. was the only party to request this administrative review.

On March 31, 2011, the Department published in the **Federal Register** a notice of initiation of an administrative review of the antidumping duty order on certain preserved mushrooms from India with respect to the above-named companies. *See Initiation of Antidumping Duty Administrative Reviews, Request for Revocation in Part, and Deferral of Administrative Review,* 76 FR 17825 (March 31, 2011).

On June 27, 2011, Monterey Mushrooms, Inc. timely withdrew its request for a review of the above-named companies.

Rescission of Administrative Review

Pursuant to 19 CFR 351.213(d)(1), the Department will rescind an administrative review, in whole or in part, if the parties that requested a review withdraw the request within 90 days of the date of publication of notice of initiation of the requested review. Monterey Mushrooms, Inc. withdrew its request for review before the 90-day deadline, and no other party requested an administrative review of the antidumping duty order on certain preserved mushrooms from India for the POR. Therefore, in response to Monterey Mushrooms, Inc.'s withdrawal of its request for review, and pursuant to 19 CFR 351.213(d)(1), the Department is rescinding in whole the administrative review of the antidumping duty order on certain preserved mushrooms from India for the period February 1, 2010, through January 31, 2011.

Assessment

The Department will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties on all appropriate entries. Antidumping duties shall be assessed at rates equal to the cash deposit of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(1)(i). The Department intends to issue appropriate assessment instructions directly to CBP 15 days after the date of publication of this notice in the **Federal Register.**

Notification to Importers

This notice serves as the only reminder to importers 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 antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification Regarding Administrative Protective Order

This notice serves as the only reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

This notice is published in accordance with section 777(i)(1) of the Act, and 19 CFR 351.213(d)(4).

Dated: July 14, 2011.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2011–18294 Filed 7–19–11; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–601]

Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China: Rescission of Antidumping Duty New Shipper Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On June 17, 2011, the Department of Commerce (''Department'') issued its preliminary intent to rescind the new shipper review (''NSR'') of Xiang Yang Automobile Bearing Co., Ltd. (''ZXY'').[1] We gave interested parties an opportunity to comment on the Intent to Rescind Memorandum. We did not receive any comments from the interested parties. We are rescinding this NSR because we have found that ZXY exported subject merchandise to the United States more than one year prior to its request for an NSR.

DATES: *Effective Date:* July 20, 2011.

FOR FURTHER INFORMATION CONTACT: Andrew Medley, 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) 482–4987.

SUPPLEMENTARY INFORMATION:

Case History

On January 14, 2011, the Department received a timely request from ZXY for an NSR of the antidumping duty order on tapered roller bearings and parts thereof, finished and unfinished, from the People's Republic of China (''PRC''). On February 4, 2011, the Department published the initiation of the NSR with a June 1, 2010, through November 30, 2010 period of review (''POR'').[2]

On June 17, 2011, the Department issued a memorandum announcing its intent to rescind this NSR for ZXY because ZXY shipped subject merchandise to the United States more than one year prior to its request for an NSR. *See* Intent to Rescind Memorandum. The Department did not receive any comments in response to the Intent to Rescind Memorandum.

Scope of the Order

Imports covered by the order are shipments of tapered roller bearings and parts thereof, finished and unfinished, from the PRC; flange, take up cartridge, and hanger units incorporating tapered roller bearings; and tapered roller housings (except pillow blocks) incorporating tapered rollers, with or without spindles, whether or not for automotive use. These products are currently classifiable under Harmonized Tariff Schedule of the United States (''HTSUS'') item numbers 8482.20.00, 8482.91.00.50, 8482.99.15, 8482.99.45, 8483.20.40, 8483.20.80, 8483.30.80, 8483.90.20, 8483.90.30, 8483.90.80, 8708.99.80.15 [3] and 8708.99.80.80.[4] Although the HTSUS item numbers are provided for convenience and customs purposes, the written description of the scope of the order is dispositive.

Rescission of Review

As stated in the Intent to Rescind Memorandum, the Department has determined that ZXY is not a new shipper, because ZXY shipped subject merchandise one year prior to its request for an NSR. Therefore, ZXY is not entitled to an NSR for this entry currently under review because ZXY did not fulfill the requirements under 19 CFR 351.214(c) that the NSR be requested within one year of the date on which subject merchandise was first entered, or withdrawn from warehouse, for consumption. Accordingly, we are rescinding this NSR. Because the Department is rescinding this NSR, we are not determining whether ZXY is separate from the PRC-wide entity, and we are not calculating a company-specific rate for ZXY.

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of this rescission of the NSR for all shipments of subject merchandise exported by ZXY, entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by section 751(a)(2)(C) of the Tariff Act of 1930, as amended (''Act''): (1) For subject merchandise exported by ZXY (regardless of producer), as part of the PRC-wide entity, the cash deposit rate will be 92.84 percent; and (2) for subject merchandise manufactured by ZXY, but exported by any party other than ZXY, the cash deposit rate will be the rate applicable to the exporter. These cash deposit requirements will remain in effect until further notice.

Liquidation

Because the POR of this NSR falls within the POR of the next administrative review of TRBs from the PRC (June 1, 2010 through May 31, 2011), and the initiation of that administrative review has not yet occurred, the Department will not order liquidation of entries for the PRC-entity (of which ZXY is a part) at this time. Upon completion of the June 1, 2010, through May 31, 2011, administrative review, the Department will issue assessment instructions to U.S. Customs and Border Protection as appropriate.

This notice serves as a 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 antidumping duties occurred and the subsequent assessment of double antidumping duties.

Administrative Protective Orders

This notice also serves as a reminder to parties subject to administrative protective order (''APO'') of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance

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[1] *See* Memorandum to the File, from Wendy J. Frankel, Office Director, through Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, Intent to Rescind the New Shipper Review of Xiang Yang Automobile Bearing Co., Ltd. (''ZXY''), dated June 17, 2011 (''Intent to Rescind Memorandum'').

[2] *See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished From the People's Republic of China: Initiation of Antidumping Duty New Shipper Review,* 76 FR 6397 (February 4, 2011).

[3] Effective January 1, 2007, the HTSUS subheading 8708.99.8015 is renumbered as 8708.99.8115. See United States International Trade Commission (''USITC'') publication entitled, ''Modifications to the Harmonized Tariff Schedule of the United States Under Section 1206 of the Omnibus Trade and Competitiveness Act of 1988,'' USITC Publication 3898 (December 2006) found at *http://www.usitc.gov.*

[4] Effective January 1, 2007, the HTSUS subheading 8708.99.8080 is renumbered as 8708.99.8180; *see id.*

with 19 CFR 351.305, 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.

We are issuing and publishing this determination in accordance with section 777(i) of the Act, 19 CFR 351.214(h) and 351.221(b)(5).

Dated: July 14, 2011.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2011–18293 Filed 7–19–11; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–928]

Uncovered Innerspring Units From the People's Republic of China: Extension of Preliminary Results of Antidumping Duty New Shipper Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (the ''Department'') is extending the time limit for the preliminary results of the new shipper review of uncovered innerspring units (''innersprings'') from the People's Republic of China (''PRC''). The period of review for this review is February 1, 2010, through August 4, 2010.

DATES: *Effective Date:* July 20, 2011.

FOR FURTHER INFORMATION CONTACT: Paul Walker, 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) 482–0413.

Background

On October 7, 2010 the Department published a notice of initiation in the **Federal Register** of the new shipper review in the antidumping duty order on innersprings from the PRC for Foshan Nanhai Jiujiang Quan Li Spring Hardware Factory (''Quan Li'') and Foshan Yongnuo Import & Export Co., Ltd. (''Yongnuo'').[1] On March 28, 2011, the Department extended the deadline for the preliminary results of this review to June 1, 2011.[2] On June 13, 2011, the Department extended the deadline for the preliminary results of this review to July 15, 2011.[3]

Statutory Time Limits

Section 751(a)(2)(B)(iv) of the Tariff Act of 1930, as amended (the ''Act''), and section 351.214(i)(1) of the Department's regulations require the Department to issue the preliminary results of a new shipper review within 180 days after the date on which the new shipper review was initiated and final results within 90 days after the date on which the preliminary results are issued. However, the Department may extend the deadline for completion of the preliminary results of a new shipper review to 300 days if it determines that the case is extraordinarily complicated.[4]

Extension of Time Limit for Preliminary Results of Review

The Department has determined that the review is extraordinarily complicated as the Department must analyze the responses to supplemental questionnaires concerning Quan Li's and Yongnuo's sales practices and factors of production. Moreover, the Department needs additional time to analyze the *bona fide* nature of Quan Li's and Yongnuo's sales, which includes gathering data from U.S. Customs and Border Protection. Based on the timing of the case and the additional information that must be gathered, the preliminary results of this new shipper review cannot be completed within the current time limits.

Therefore, the Department is extending the time limit for completion of the preliminary results of this new shipper review by an additional 11 days from the July 15, 2011, deadline. As a result, the preliminary results will now be due no later than July 26, 2011. The final results continue to be due 90 days after the issuance of the preliminary results.

We are issuing and publishing this notice in accordance with sections 751(a)(2)(B)(iv) and 777(i) of the Act.

Dated: July 7, 2011.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2011–18304 Filed 7–19–11; 8:45 am]

BILLING CODE 3510–DS–P

[1] *See Uncovered Innerspring Units from the People's Republic of China: Initiation of Antidumping Duty New Shipper Review,* 75 FR 62107 (October 7, 2010).

[2] *See Uncovered Innerspring Units from the People's Republic of China: Extension of Preliminary Results of Antidumping Duty New Shipper Review,* 76 FR 17107 (March 28, 2011).

[3] *See Uncovered Innerspring Units from the People's Republic of China: Extension of Preliminary Results of Antidumping Duty New Shipper Review,* 76 FR 34207 (June 13, 2011).

[4] *See* section 751(a)(2)(B)(iv) of the Act; *see also* section 351.214(i)(2) of the Department's regulations.

DEPARTMENT OF COMMERCE

International Trade Administration

Application(s) for Duty-Free Entry of Scientific Instruments

Pursuant to Section 6(c) of the Educational, Scientific and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, as amended by Pub. L. 106–36; 80 Stat. 897; 15 CFR part 301), we invite comments on the question of whether instruments of equivalent scientific value, for the purposes for which the instruments shown below are intended to be used, are being manufactured in the United States.

Comments must comply with 15 CFR 301.5(a)(3) and (4) of the regulations and be postmarked on or before August 9, 2011. Address written comments to Statutory Import Programs Staff, Room 3720, U.S. Department of Commerce, Washington, DC 20230. Applications may be examined between 8:30 a.m. and 5 p.m. at the U.S. Department of Commerce in Room 3720.

Docket Number: 11–039. *Applicant:* Virginia Polytechnic Institute, Department of Engineering Science and Mechanics, 225 Norris Hall MC 0219, Blacksburg, VA 24061. *Instrument:* Nano test platform. *Manufacturer:* Micro Materials Ltd., UK. *Intended Use:* The instrument will be used to study the mechanical behavior of metals (steel, aluminum, brass copper), ceramics, and polymers (polyethylene, epoxies) under different loadings such as compression, fatigue, creep, impact, scratch and friction. *Justification for Duty-Free Entry:* No instruments of the same general category being manufactured in the United States support the technical requirements for high temperature nanoindentations, nanoimpact, nanofatigue and wet stage nanoindentation. *Application accepted by Commissioner of Customs:* June 28, 2011.

Docket Number: 11–040. *Applicant:* University of Colorado at Boulder, Attn: Stuart Littlefield, Procurement Service Center, 1800 Grant Street, Suite 500, Denver, CO 80202. *Instrument:* Low-temperature atomic force microscope. *Manufacturer:* attocube systems AG, Germany. *Intended Use:* The instrument will be used to study nano-scale domain formation associated with phase transitions, transition temperatures, and domain size and order, of transition metal oxides, especially magnetoelectric multiferroics, manganites, vanadates, and superconductors. *Justification for Duty-Free Entry:* No instruments of the same general category, or comparable instruments that could otherwise be used for the intended purpose, are being manufactured in the United States. *Application accepted by Commissioner of Customs:* June 28, 2011.

Docket Number: 11–041. *Applicant:* Washington University, 660 South Euclid Avenue, Saint

Louis, MO 63110–1093. *Instrument:* Transmission electron microscope. *Manufacturer:* JEOL Ltd., Japan. *Intended Use:* The instrument will be used to provide dependable ultrastructural analysis to NIH-sponsored investigators, extending their capacity to ask disease-related and basic science questions with a more sophisticated approach to analyzing the relationship of subcellular elements. *Justification for Duty-Free Entry:* No instruments of the same general category, or comparable instruments that could otherwise be used for the intended purpose, are being manufactured in the United States. *Application accepted by Commissioner of Customs:* June 30, 2011.

Dated: July 12, 2011.

Gregory W. Campbell,

Director, Subsidies Enforcement Office, Office of Policy, Import Administration.

[FR Doc. 2011–18298 Filed 7–19–11; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Wichita State University, et al.; Notice of Decision on Applications for Duty-Free Entry of Scientific Instruments

This is a decision pursuant to Section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, as amended by Pub. L. 106–36; 80 Stat. 897; 15 CFR Part 301). Related records can be viewed between 8:30 a.m. and 5 p.m. in Room 3720, U.S. Department of Commerce, 14th and Constitution Ave., NW., Washington, DC 20230.

Comments: None received. *Decision:* Approved. *Reasons:* We know of no instruments of equivalent scientific value to the foreign instruments described below, for the intended purposes, that were being manufactured in the United States at the time of their order.

Docket Number: 11–013. *Applicant:* Wichita State University, 1845 Fairmont Street, Wichita, KS 67260. *Instrument:* Field emission scanning electron microscope. *Manufacturer:* Carl Zeiss SMT, Germany. *Intended Use:* See application notice at 76 FR 34207, June 13, 2011.

Docket Number: 11–029. *Applicant:* University of California, Santa Barbara, CA 93106. *Instrument:* Josephson Junction Deposition System (Electron Beam Evaporation Unit with Load Lock Model MEB 550S). *Manufacturer:* Plassys Bestek SAS, France. *Intended Use:* See application notice at 76 FR 34207, June 13, 2011.

Dated: July 12, 2011.

Gregory W. Campbell,

Director, Subsidies Enforcement Office, Office of Policy, Import Administration.

[FR Doc. 2011–18296 Filed 7–19–11; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

University of Chicago Argonne, LLC, et al.; Notice of Decision on Applications for Duty-Free Entry of Scientific Instruments

This is a decision pursuant to Section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, as amended by Pub. L. 106–36; 80 Stat. 897; 15 CFR Part 301). Related records can be viewed between 8:30 a.m. and 5 p.m. in Room 3720, U.S. Department of Commerce, 14th and Constitution Ave, NW., Washington, DC 20230.

Docket Number: 10–073. *Applicant:* University of Chicago Argonne, LLC, 9700 South Cass Avenue, Argonne, IL 60439. *Instrument:* Chemical Mechanical Polishing (CMP) Tool. *Manufacturer:* Logitech Ltd., UK. *Intended Use:* See application notice at 76 FR 34207, June 13, 2011. *Comments:* None received. *Decision:* Approved. *Reasons:* We know of no instrument of equivalent scientific value to the foreign instrument described above, for such purposes as this is intended to be used, that was being manufactured in the United States at the time of its order.

Dated: July 12, 2011.

Gregory W. Campbell,

Director, Subsidies Enforcement Office Office of Policy, Import Administration.

[FR Doc. 2011–18295 Filed 7–19–11; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

Proposed Information Collection; Comment Request; NIST MEP Client Impact Survey

AGENCY: National Institute of Standards and Technology (NIST), Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before September 19, 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 and instructions should be directed to Christopher Carbone, (301) 975–2952, *ccarbone@nist.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

Sponsored by the National Institute of Standards and technology (NIST), the Manufacturing Extension Partnership (MEP) is a national network of locally-based manufacturing extension centers working with small manufacturers to assist them to improve their productivity, profitability, and enhance their economic competitiveness. The information collected will provide the MEP with information regarding MEP Center performance in the delivery of technology, and business solutions to U.S.-based manufacturers. The collected information will assist in determining the performance of the MEP Centers at both local and national levels, provide information critical to monitoring and reporting on MEP programmatic performance, and assist management in policy decisions. Responses to the collection of information are mandatory per the regulations governing the operation of the MEP Program (15 CFR Parts 290, 291, 292, and H.R. 1274—section 2). The information collected will include MEP customer inputs regarding their sales, costs, investments, employment, and exports. Customers will only be surveyed annually under this collection. Data collected in this survey is confidential.

II. Method of Collection

Information will be collected electronically.

III. Data

OMB Control Number: 0693–0021.

Form Number: None.

Type of Review: Regular submission (extension of a currently approved information collection).

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 10,000.

Estimated Time per Response: 15 minutes.

Estimated Total Annual Burden Hours: 2,500.

Estimated Total Annual Cost to Public: $0.

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: July 14, 2011.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2011–18189 Filed 7–19–11; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

Proposed Information Collection; Comment Request; Evacuation Movement and Behavior Questionnaire

AGENCY: National Institute of Standards and Technology (NIST).

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before September 19, 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 and instructions should be directed to Erica Kuligowski, *erica.kuligowski@nist.gov*, 301–975–2309.

SUPPLEMENTARY INFORMATION:

I. Abstract

NIST will be collecting data on evacuation behavior and movement of occupants from approximately 50 high-rise building evacuation drills in cities across the United States at a rate of several buildings per year. The proposed data collection will consist of questionnaires that will be handed out to occupants who have evacuated previously-identified high-rise buildings as a part of a scheduled evacuation drill. The purpose of these questionnaires is to obtain information (anonymously) on: (1) The background of the occupant (occupant demographics, previous training and education in fire safety, and previous experience in fire evacuations); (2) actions and decisions made by the occupant on his/her floor during the building evacuation; and (3) actions and decisions made by the occupant during the building evacuation via the stairs and/or elevators. This information is necessary to better inform building and life safety code requirements, building occupant education and training about fire safety, and tools that are currently used to assess the life safety of tall buildings in the United States.

High-rise buildings of interest include buildings of varying heights (*e.g.*, 1–10 stories, 11–20 stories, 21–35 stories, and 35+ stories) and of varying occupancy types (*e.g.*, residential, office, and assembly occupancies).

II. Method of Collection

This data will be collected via paper questionnaires that are handed out by the city or building's fire department staff or NIST staff to occupants after the scheduled evacuation drill has taken place. The questionnaires will be returned to fire department staff or each questionnaire will be equipped with a NIST-addressed envelope and pre-paid postage.

III. Data

OMB Control Number: 0693–0051.

Form Number: None.

Type of Review: Regular submission (extension of a currently approved information collection).

Affected Public: Individuals or households.

Estimated Number of Respondents: 20,000.

Estimated Time per Response: 10 minutes.

Estimated Total Annual Burden Hours: 3,334.

Estimated Total Annual Cost to Public: $0.

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: July 14, 2011

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2011–18190 Filed 7–19–11; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA576

Marine Mammals; File No. 16472

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

ACTION: Notice; receipt of application.

SUMMARY: Notice is hereby given that the NMFS Southwest Fisheries Science Center, Antarctic Ecosystem Research Division, La Jolla, California, (Responsible Party: George Watters, PhD, Director), has applied in due form for a permit to conduct research on marine mammals in the Antarctic.

DATES: Written, telefaxed, or e-mail comments must be received on or before August 19, 2011.

ADDRESSES: The application and related documents are available for review by selecting ''Records Open for Public Comment'' from the *Features* box on the Applications and Permits for Protected Species (APPS) home page, *https://apps.nmfs.noaa.gov,* and then selecting File No. 16472 from the list of available applications.

These documents are also available upon written request or by appointment in the following offices:

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301) 427–8401; fax (301) 713–0376; and

Southwest Region, NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802–4213; phone (562) 980–4001; fax (562) 980–4018.

Written comments on this application should be submitted to the Chief, Permits, Conservation and Education Division, at the address listed above. Comments may also be submitted by facsimile to (301) 713–0376, or by e-mail to *NMFS.Pr1Comments@noaa.gov.* Please include the File No. in the subject line of the e-mail comment.

Those individuals requesting a public hearing should submit a written request to the Chief, Permits, Conservation and Education Division at the address listed above. The request should set forth the specific reasons why a hearing on this application would be appropriate.

FOR FURTHER INFORMATION CONTACT: Tammy Adams or Amy Sloan, (301) 427–8401.

SUPPLEMENTARY INFORMATION: The subject permit is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*), and the regulations governing the taking and importing of marine mammals (50 CFR Part 216).

The applicant requests a five-year permit to take Antarctic fur seals (*Arctocephalus gazella*), southern elephant seals (*Mirounga leonina*), crabeater seals (*Lobodon carcinophagus*), leopard seals (*Hydrurga leptonyx*), Ross seals (*Ommatophoca rossii*), and Weddell seals (*Leptonychotes weddellii*) for life history studies and census surveys for abundance and distribution of pinnipeds in the South Shetland Islands, Antarctica, as part of a long-term ecosystem monitoring program established in 1986. The applicant also requests permission to import tissue samples collected from any animals captured and from salvaged carcasses of any species of pinniped or cetacean found in the study area.

The applicant requests annual capture of: 200 Antarctic fur seal adults and juveniles; 600 Antarctic fur seal pups; 50 leopard seal adults and juveniles; 50 southern elephant seal adults and juveniles; 100 southern elephant seal pups; 30 Weddell seal adults and juveniles; and 20 Weddell seal pups. Research on captured animals would include tissue sampling, attachment of scientific instruments, application of marks (flipper tags, hair bleach or dye), morphometric measurement, tooth extraction, and stomach content sampling. An additional 23,000 Antarctic fur seals, 1,100 southern elephant seals, 100 crabeater seals, 100 leopard seals, 200 Weddell seals, and 5 Ross seals would be taken annually by harassment during aerial and ground surveys, including behavioral observations and photo-identification. The applicant has requested an annual incidental mortality allowance of: 3 Antarctic fur seal adults or juveniles; 2 Antarctic fur seal pups; 2 leopard seal adults or juveniles; 2 southern elephant seal adults or juveniles; 2 southern elephant seal pups; 2 Weddell seal adults or juveniles; and 2 Weddell seal pups.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), an initial determination has been made that the activity proposed is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of the application to the Marine Mammal Commission and its Committee of Scientific Advisors.

Dated: July 13, 2011.

P. Michael Payne,

Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2011–18326 Filed 7–19–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA582

New England Fishery Management Council; Public Meeting

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

ACTION: Notice; Public meeting.

SUMMARY: The New England Fishery Management Council (Council) is scheduling a public meeting of its Scientific and Statistical Committee, on August 9–10, 2011, to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

DATES: This meeting will be held on Tuesday, August 9 at 10 a.m. and Wednesday, August 10, 2011 at 9 a.m.

ADDRESSES: The meeting will be held at the Seaport Hotel, 200 Seaport Boulevard, Ste 500, Boston, MA 02210; *telephone:* (617) 385–4000; *fax:* (617) 385–4001.

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:

Tuesday, August 9, 2011–Wednesday, August 10, 2011

The Scientific and Statistical Committee (SSC) will continue to develop the methods for setting ABCs for the Northeast Multispecies FMP for FY 2012–14. Additionally, the SSC will review analyses provided by the Whiting PDT in response to the guidance it received at the April 12–13, 2011 SSC meeting and recommend ABCs for the stocks of silver hake, red hake and white hake skate fishery for inclusion in Amendment 19 (small mesh multispecies component) to the

Northeast Multispecies Fishery Management Plan.

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 listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens 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, Executive Director, at (978) 465–0492, at least 5 days prior to the meeting date.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: July 15, 2011.

Tracey L. Thompson,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2011–18277 Filed 7–19–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA471

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental To Conducting Air-to-Surface Gunnery Missions in the Gulf of Mexico

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

ACTION: Notice; proposed incidental harassment authorization; request for comments.

SUMMARY: NMFS received an application from the U.S. Air Force (USAF), Eglin Air Force Base (Eglin AFB), for renewal of an Incidental Harassment Authorization (IHA) to take marine mammals, by harassment, incidental to conducting air-to-surface (A–S) gunnery missions in the Gulf of Mexico (GOM). The USAF's activities are considered military readiness activities. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS requests comments on its proposal to issue an IHA to Eglin AFB to take, by harassment, several species of marine mammal during the specified activity for a period of 1 year.

DATES: Comments and information must be received no later than August 19, 2011.

ADDRESSES: Comments on the application should be addressed to Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910. The mailbox address for providing e-mail comments is *ITP.Hopper@noaa.gov.* NMFS is not responsible for e-mail comments sent to addresses other than the one provided here. Comments sent via e-mail, including all attachments, must not exceed a 10-megabyte file size.

Instructions: All comments received are a part of the public record and will generally be posted to *http://www.nmfs.noaa.gov/pr/permits/incidental.htm* without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

A copy of the application containing a list of the references used in this document and NMFS' 2008 Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) may be obtained by writing to the address specified above, telephoning the contact listed below (see **FOR FURTHER INFORMATION CONTACT**), or visiting the internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm.* Documents cited in this notice may also be viewed, by appointment, during regular business hours, at the aforementioned address.

FOR FURTHER INFORMATION CONTACT: Brian D. Hopper or Candace Nachman, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth. NMFS has defined ''negligible impact'' in 50 CFR 216.103 as ''* * * an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.''

Section 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the U.S. can apply for an authorization to incidentally take small numbers of marine mammals by harassment. Section 101(a)(5)(D) establishes a 45-day time limit for NMFS review of an application followed by a 30-day public notice and comment period on any proposed authorizations for the incidental harassment of marine mammals. Within 45 days of the close of the comment period, NMFS must either issue or deny the authorization.

The National Defense Authorization Act (NDAA) (Pub. L. 108–136) removed the ''small numbers'' and ''specified geographical region'' provisions and amended the definition of ''harassment'' as it applies to a ''military readiness activity'' to read as follows (section 3(18)(B) of the MMPA):

> (i) Any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild [Level A Harassment]; or (ii) Any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered [Level B Harassment].

Summary of Request

NMFS originally received an application on February 13, 2003, from Eglin AFB for the taking, by harassment, of marine mammals incidental to programmatic mission activities within the Eglin Gulf Test and Training Range (EGTTR). The EGTTR is described as the airspace over the GOM that is controlled by Eglin AFB. A notice of receipt of Eglin AFB's application and Notice of Proposed IHA and request for 30-day public comment published on January 23, 2006 (71 FR 3474). A 1-year IHA was subsequently issued to Eglin AFB for this activity on May 3, 2006 (71 FR 27695, May 12, 2006).

On January 29, 2007, NMFS received a request from Eglin AFB for a renewal of its 2006–2007 IHA, which expired on May 2, 2007. This application addendum requested revisions to three components of the IHA requirements: Protected species surveys; ramp-up procedures; and sea state restrictions. A Notice of Proposed IHA and request for 30-day public comment published on May 30, 2007 (72 FR 29974). A 1-year IHA was subsequently issued to Eglin AFB for this activity on December 11, 2008 (73 FR 78318, December 22, 2008) and was effective through December 10, 2009.

On February 17, 2009, NMFS received a request from Eglin AFB for a renewal of its 2008–2009 IHA, which was valid through December 10, 2009. No modifications to the activity location, the mission activities, or the mitigation and monitoring measures that were required under the 2008–2009 IHA were requested by Eglin AFB at that time. A Notice of Proposed IHA and request for 30-day public comment published on October 19, 2009 (74 FR 53474). A 1-year IHA was subsequently issued to Eglin AFB for this activity on January 27, 2010 (75 FR 5045, February 1, 2010), which expired on January 26, 2011.

On May 16, 2011, NMFS received a request from Eglin AFB for a renewal of its IHA, which expired on January 26, 2011. This application is the one considered by NMFS for this request. Eglin AFB has not had coverage for these activities since expiration of the third IHA. However, Eglin AFB has not conducted these activities during the period without MMPA coverage and will wait to resume these training missions until a new MMPA authorization is issued by NMFS.

A–S gunnery operations may potentially impact marine mammals at or near the water surface. Marine mammals could potentially be harassed, injured, or killed by exploding and non-exploding projectiles, and falling debris (USAF, 2002). However, based on analyses provided in the USAF's 2002 Final Programmatic EA (PEA), Eglin's Supplemental Information Request (2003), and NMFS' 2008 EA, as well as for reasons discussed later in this document, NMFS concurs with Eglin that gunnery exercises are not likely to result in any injury or mortality to marine mammals. Potential impacts resulting from A–S test operations include direct physical impacts (DPI) resulting from ordnance. Eglin AFB has requested to take six cetacean species by Level B harassment. The requested species include: dwarf sperm whale (*Kogia simus*); pygmy sperm whale (*K. breviceps*); Atlantic bottlenose dolphin (*Tursiops truncatus*); Atlantic spotted dolphin (*Stenella frontalis*); pantropical spotted dolphin (*S. attenuata*); and spinner dolphin (*S. longirostris*). In addition, although Eglin AFB's acoustic model predicted the take of two cetacean species by Level A harassment (two Atlantic bottlenose dolphin and one Atlantic spotted dolphin), neither NMFS nor Eglin AFB anticipate that injurious Level A harassment will result from the proposed A–S gunnery missions because of Eglin AFB's standard mitigation measures; therefore, NMFS is not proposing to authorize Level A takes of marine mammals.

Description of the Specified Activity

A–S gunnery missions, a ''military readiness activity'' as defined under 16 U.S.C. 703 note, involve surface impacts of projectiles and small underwater detonations with the potential to affect cetaceans that may occur within the EGTTR. These missions typically involve the use of 25-mm (0.98-in), 40-mm (1.57-in), and 105-mm (4.13-in) gunnery rounds containing, 0.0662 lb (30 g), 0.865 lb (392 g), and 4.7 lbs (2.1 kg) of explosive, respectively. Live rounds must be used to produce a visible surface splash that must be used to ''score'' the round (the impact of inert rounds on the sea surface would not be detected). The USAF has developed a 105-mm training round (TR) that contains less than 10 percent of the amount of explosive material (0.35 lb; 0.16 kg) as compared to the ''Full-Up'' (FU) 105-mm (4.13 in) round. The TR was developed as one method to mitigate effects on marine life during nighttime A–S gunnery exercises when visibility at the water surface is poor. However, the TR cannot be used in the daytime since the amount of explosive material is insufficient to be detected from the aircraft.

Water ranges within the EGTTR that are typically used for the gunnery operations are located in the GOM offshore from the Florida Panhandle (areas W–151A, W–151B, W–151C, and W–151D as shown in Figure 1–2 in Eglin's 2011 application). Data indicate that W–151A (Figure 1–3 in Eglin's application) is the most frequently used water range due to its proximity to Hurlburt Field, but activities may occur anywhere within the EGTTR.

Eglin AFB proposes to conduct these mission activities year round during both daytime and nighttime hours. Therefore, NMFS proposes to make the IHA effective for an entire year from the date of issuance (if the IHA is issued).

As required under the 2006 IHA, the AC–130 gunship aircraft was to conduct at least two complete orbits at a minimum safe airspeed around a prospective target area at a maximum altitude of 1,500 ft (457 m). Based on an amendment requested by Eglin AFB, NMFS required an operational altitude of approximately 4,500 to 10,000 ft (1,372–3,048 m) in the 2008 IHA. Ascent occurs over a 10–15 minute period. Eglin AFB has noted that the search area for these orbits ensures that no vessels (or protected species) are within an area of 5 nm (9.3 km) of the target. The AC–130 continues orbiting the selected target point as it climbs to the mission-testing altitude. During the low altitude orbits and the climb to testing altitude, aircraft crew visually scan the sea surface within the aircraft's orbit circle for the presence of vessels and protected species. Primary responsibility for the surface scan is on the flight crew in the cockpit and personnel stationed in the tail observer bubble and starboard viewing window. The AC–130's optical and electronic sensors are also employed for target clearance. If any marine mammals are detected within the AC–130's orbit circle, either during initial clearance or after commencement of live firing, the aircraft will relocate to another target area and repeat the clearance procedures. A typical distance from the coast for this activity is at least 15 mi (24 km).

When offshore, the crews can scan a 5-nm (9.3-km) radius around the potential impact area to ensure it is clear of surface craft, marine mammals, and sea turtles. Scanning is accomplished using radar, all-light television (TV), infrared sensors (IR), and visual means. An alternative area would be selected if any cetaceans or vessels were detected within a 5-nm (9.3 km) search area. Once the scan is completed, Mk-25 flares are dropped and the firing sequence is initiated.

A typical gunship mission lasts approximately 5 hrs without refueling and 6 hrs when air-to-air refueling is accomplished. A typical mission includes the following sequence of events: (1) 30 min for take-off and to perform airborne sensor alignment, align electro-optical sensors (IR and TV) to heads-up display; (2) 1.5 to 2 hrs of dry fire (no ordnance expended) and includes transition time; (3) 1.5 to 2 hrs of live fire, and includes clearing the area and transiting to and from the range (actual firing activities typically do not exceed 30 min); (4) 1 hr air-to-air refueling, if and when performed; and (5) 30 min of transition work (take-offs, approaches, and landings-pattern work).

The guns are fired during the live-fire phase of the mission. The actual firing can last from 30 min to 1.5 hrs but is typically completed in 30 min. The number and type of A–S gunnery munitions deployed during a mission varies with each type of mission flown. In addition to the 25-, 40-, and 105-mm rounds, marking flares are also deployed as targets. All guns are fired at a specific target in the water, usually the Mk-25 flares, starting with the lowest caliber ordnance or action with the least impact and proceeding to greater caliber sizes. To establish the test target area, two Mk-25 flares are deployed into the center of the 5-nm (9.3-km) radius cleared area (visually clear of aircraft, ships, and surface marine species) on the water's surface. The flare's burn time normally lasts 10 to 20 min but could be much less if actually hit with one of the ordnance projectiles; however, some flares have burned as long as 40 min. Live fires are a continuous event with pauses during the firing usually well under a minute and rarely from 2 to 5 min. Firing pauses would only exceed 10 min if surface boat traffic or marine protected species caused the mission to relocate; if aircraft, gun, or targeting system problems existed; or if more flares needed to be deployed. The Eglin Safety Office has described the gunnery missions as having 95-percent containment with a 99-percent confidence level within a 5-m (16.4-ft) area around the established flare target test area.

Live-fire Event: 25-mm Round

The 25-mm (0.98-in) firing event in a typical mission includes approximately 560 rounds. These rounds are fired in short bursts of 100 rounds. These bursts last approximately 2–3 s with approximately 100 rounds per burst. Based on the very tight target area and extremely small ''miss'' distance, these bursts of rounds all enter the water within a 5-m (16.4-ft) area. Therefore, when calculations of the marine mammal Zone of Influence (ZOI) and take estimates are made later in this document for the 25-mm rounds, calculations will be based on the total number of rounds fired per year divided by 100.

Live-fire Event: 40-mm Round

The 40-mm (1.57 in) firing event in a typical mission includes approximately 64 rounds with approximately 20 rounds per burst. Each burst lasts from about 2 to 10 seconds. Based on the very tight target area and extremely small ''miss'' distance, these bursts of rounds all enter the water within a 5-m (16.4 ft) area. Therefore, when calculations of the marine mammal ZOI and take estimates are made later in this document for the 40-mm rounds, calculations will be based on the total number of rounds fired per year divided by 20.

Live-fire Event: 105-mm Round

The 105-mm firing event in a typical mission includes approximately 30 rounds. These rounds are not fired in bursts but as single shots. The 105-mm firing event lasts approximately 5 min with approximately two rounds per minute. Due to the single firing event of the 105-mm round, the peak pressure of each single 105-mm round is measured at a given distance (91 m (295 ft) for the 105-nm TR and 216 m (709 ft) for the 105-mm FU).

As described in Eglin's 2011 application, gunnery testing in this request includes historical baseline yearly amounts in addition to proposed nighttime gunnery missions. Daytime gunnery testing uses the 105-mm FU round and nighttime gunnery training is proposed using the 105-mm TR. The number of 105-mm rounds including nighttime operations would amount to 2,100. As shown in detail in Table 1, Eglin proposes to conduct a total of 25 daytime missions and 45 nighttime missions annually, expending 16,350 rounds in the daytime and 29,430 rounds at night (750 105-mm FU and 1,350 rounds would be the 105-mm TR).

TABLE 1—ANNUAL SUMMARY OF DAYTIME AND NIGHTTIME GUNNERY TESTING OPERATIONS IN THE EGTTR

Category	Expendable	Number of missions	Rounds per missions	Quantity
Daytime Missions	105 mm HE	25	30	750
	25 mm HEI		64	1,600
	40 mm HEI		560	14,000
Nighttime Missions	105 mm HE	45	30	1,350
	25 mm HEI		64	2,880
	40 mm HEI		560	25,200
Total		70		45,780

Description of Marine Mammals in the Area of the Specified Activity

There are 29 species of marine mammals documented as occurring in Federal waters of the GOM. Of these 29 species of marine mammals, approximately 21 may be found in the vicinity of the proposed action area, the EGTTR. These species are the Bryde's whale (*Balaenoptera edeni*), sperm whale (*Physeter macrocephalus*), dwarf sperm whale (*Kogia sima*), pygmy sperm whale (*K. breviceps*), Atlantic bottlenose dolphin (*Tursiops truncatus*), Atlantic spotted dolphin (*Stenella frontalis*), pantropical spotted dolphin (*S. atenuarta*), Blainville's beaked whale (*Mesoplodon densirostris*), Cuvier's beaked whale (*Ziphius cavirostris*), Gervais' beaked whale (*M. europaeus*), Clymene dolphin (*S. clymene*), spinner dolphin (*S. longirostris*), striped dolphin (*S. coeruleoalba*), killer whale (*Orcinus orca*), false killer whale (*Pseudorca crassidens*), pygmy killer whale (*Feresa attenuata*), Risso's dolphin (*Grampus griseus*), Fraser's dolphin (*Lagenodelphis hosei*), melon-headed whale (*Peponocephala electra*), rough-toothed dolphin (*Steno bredanensis*), and short-finned pilot whale (*Globicephala macrorhynchus*). Of these species, only the sperm whale is listed as endangered under the Endangered Species Act (ESA) and as depleted throughout its range under the MMPA. While some of the other species listed here have depleted status under the MMPA, none of the GOM stocks of those species are considered depleted. Eglin AFB's 2011 MMPA application contains a detailed discussion on the description, status, distribution, regional distribution, diving behavior, and acoustics and hearing for the marine mammals in the EGTTR. Additionally, more detailed information on these species can be found in Wursig *et al.* (2000), NMFS' 2008 EA (see **ADDRESSES**), and in the NMFS U.S. Atlantic and GOM Stock Assessment Reports (SARs; Waring *et al.,* 2009). This latter document is available at:

http://www.nefsc.noaa.gov/publications/tm/tm210/. The West Indian manatee (*Trichechus manatus*) is managed by the U.S. Fish and Wildlife Service and is not considered further in this proposed IHA **Federal Register** notice.

The species most likely to occur in the area of Eglin AFB's proposed activities for which takes have been requested include: Atlantic bottlenose dolphin; Atlantic spotted dolphin; pantropical spotted dolphin; spinner dolphin; and dwarf and pygmy sperm whales. Bryde's whales, sperm whales, Blainville's beaked whales, Cuvier's beaked whales, Gervais' beaked whales, killer whales, false killer whales, pygmy killer whales, Risso's dolphins, Fraser's dolphins, striped dolphins, Clymene dolphins, rough-toothed dolphins, short-finned pilot whales, and melon-headed whales are rare in the project area and are not anticipated to be impacted by the A–S gunnery mission activities. Therefore, these species are not considered further in this proposed IHA **Federal Register** notice.

For all species other than the bottlenose dolphin, density estimates were derived from the Navy OPAREA Density Estimates (NODE) for the GOMEX OPAREA report (DON, 2007). Densities were determined using one of two methods: (1) Model-derived estimates; or (2) SAR or other literature-derived estimates. For the model-based approach, density estimates were calculated for each species within areas containing survey effort. A relationship between these density estimates and associated environmental parameters such as depth, slope, distance from the shelf break, sea surface temperature, and chlorophyll-*a* concentration was formulated using generalized additive models. This relationship was then used to generate a two-dimensional density surface for the region by predicting densities in areas where no survey data exist. All analyses for cetaceans in the GOM were based on data collected through NMFS-derived vessel surveys conducted between 1996 and 2004. Species-specific density estimates derived through spatial modeling were compared with abundance estimates found in the most current SAR to ensure consistency.

Cetacean density estimates provided by various researchers often do not contain adjustments for perception or availability bias. Perception bias refers to the failure of observers to detect animals, although they are present in the survey area and available to be seen. Availability bias refers to animals that are in the survey area, but are not able to be seen because they are submerged when observers are present. Perception and availability bias result in the underestimation of abundance and density numbers (negative bias). The density estimates provided in the NODE report are not corrected for negative bias and, therefore, likely underestimate density. In order to address potential negative bias, density estimates were adjusted using submergence factors. Although submergence time versus surface time probably varies between and among species populations based on geographic location, season, and other factors, submergence times suggested by Moore and Clark (1998) were used for this proposed IHA.

Bottlenose dolphin density estimates were derived from Protected Species Habitat Modeling in the EGTTR (Garrison, 2008). NMFS developed habitat models using recent aerial survey line transect data collected during winter and summer. In combination with remotely sensed habitat parameters (sea surface temperature and chlorophyll), these data were used to develop spatial density models for cetaceans within the continental shelf and coastal waters of the eastern GOM. Encounter rates during the aerial surveys were corrected for sighting probabilities and the probability that animals were available on the surface to be seen. Given that the survey area completely overlaps the present study area and that these survey data are the most recent and best available, these models are considered to best reflect the occurrence of bottlenose dolphins within the study area. Density estimates were calculated for a number of subareas within the EGTTR, and also aggregated into four principal area categories: (1) North-Inshore; (2) South-Inshore; (3) North-Offshore; and (4) South-Offshore. The proposed action would occur within W–151, which is located in the northernmost portion of the EGTTR (Figures 1–2 and 1–3 in Eglin AFB's 2011 application; see ADDRESSES). Therefore, densities in the northern areas are considered to be the most applicable. In order to provide conservative impact estimates, the greatest density between summer and winter seasons was selected. Densities for northern inshore (shoreline to 20 m water depth) and offshore (20 to 200 m water depth) strata were averaged, resulting in an overall density estimate of 0.6319 bottlenose dolphins per square kilometer (km^2) to be used in this proposed IHA.

Cetaceans inhabiting the study area may be grouped as odontocetes (toothed whales, including dolphins) or mysticetes (baleen whales), but most of the cetaceans occurring in the Gulf are odontocetes. Typically, very few baleen whales are found in the Gulf and none are expected to occur within the study area given the known distribution of these species. Within the bulk of the EGTTR, over the west Florida continental shelf, the most common species is the bottlenose dolphin (Garrison, 2008), and the Atlantic spotted dolphin also occurs commonly over the continental shelf (Fulling *et al.,* 2003). In the continental slope waters covered by the EGTTR between the 200 m and 2,000 m isobaths, the most common species include bottlenose dolphins, spinner dolphins, and pantropical spotted dolphins in the deeper part of this area. For conservative analysis, the greatest density between summer and winter was used (Table 3–1 in Eglin AFB's 2011 application; see ADDRESSES).

Potential Effects of the Specified Activity on Marine Mammals

A–S gunnery operations may potentially impact marine mammals at or near the water surface. Marine mammals could potentially be harassed, injured or killed by exploding and non-exploding projectiles, and falling debris (USAF, 2002). However, based on analyses provided in the USAF's Final PEA, Eglin's Supplemental Information Request (2003), and NMFS' 2008 EA, NMFS concurs with Eglin that gunnery exercises are not likely to result in any injury or mortality to marine mammals.

Explosive criteria and thresholds for assessing impacts of explosions on marine mammals were discussed by NMFS in detail in its issuance of an IHA for Eglin's Precision Strike Weapon testing activity (70 FR 48675, August 19, 2005) and are not repeated here. Please refer to that document for this background information. However, one part of the analysis has changed. That information is provided here.

Subsequent to the issuance of the USAF 2002 PEA, NMFS updated one of the dual criteria related to the onset level for temporary threshold shift (TTS; Level B harassment). The USAF 2002 PEA describes the onset of TTS by a single explosion (impulse) based on the criterion in use at that time. Newly available information based on lab controlled experiments that used a seismic watergun to induce TTS in one beluga whale and one bottlenose dolphin (Finneran *et al.,* 2002) showed measured TTS_2 (TTS level 2 min after exposure) was 7 and 6 dB in the beluga at 0.4 and 30 kHz, respectively, after exposure to intense single pulses at 226 dB re: 1 μPa p-p (peak to peak). This sound pressure level (SPL) is equivalent to 23 pounds per square inch (psi). Hearing threshold returned to within 2 dB of the pre-exposure value within 4 min of exposure. No TTS was observed in the bottlenose dolphin at the highest exposure condition (228 dB re 1 µPa p-p). Therefore, NMFS updated the SPL from impulse sound that could induce TTS to 23 psi, from the previous 12 psi. Table 3 in this document outlines the acoustic criteria used by NMFS when addressing noise impacts from explosives. These criteria remain consistent with criteria established for other activities in the EGTTR and other acoustic activities authorized under sections 101(a)(5)(A) and (D) of the MMPA. The 23 psi criterion is used in this document and NMFS' 2008 EA for evaluating the potential for the onset of TTS (Level B harassment) in marine mammals. Additional information on the derivation of the 23 psi criterion can be found in the *Final Environmental Impact Statement/Overseas Environmental Impact Statement for the Shock Trial of the Mesa Verde (LPD 19)* (Department of the Navy, 2008).

TABLE 3—CURRENT NMFS ACOUSTIC CRITERIA WHEN ADDRESSING HARASSMENT FROM EXPLOSIVES

Level B Behavior	176 dB ⅓ Octave SEL (sound energy level).
Level B TTS Dual Criterion.	182 dB ⅓ Octave SEL.
Level A PTS (permanent threshold shift).	205 dB SEL.
Level B Dual Criteria	23 psi.
Level A Injury	13 psi-msec.
Mortality	30.5 psi-msec.

Direct Physical Impacts (DPI)

Potential impacts resulting from A–S test operations include DPI resulting from ordnance. DPI could result from gunnery ammunition falling into the water. Marine mammals swimming at the surface could potentially be injured or killed by projectiles if not sighted and firing discontinued; however, the possibility of DPI to marine mammals is considered highly unlikely. Therefore, the risk of injury or mortality from DPI is discountable. The assumptions made by Eglin AFB for DPI calculations can be found in the USAF 2002 Final PEA under the analysis for Alternative 1.

Anticipated Effects on Habitat

The primary source of marine mammal habitat impact is noise resulting from gunnery missions. However, the noise does not constitute a long-term physical alteration of the water column or bottom topography, as the occurrences are of limited duration and are intermittent in time. The target flare's burn time normally lasts 10 to 20 min. Given this short time during which the environment is lighted and the variable locations they are dropped, no increases in density of phytoplankton or other organisms introducing primary productivity into the waters are expected to affect marine mammal habitat or populations. Also, live fires are a continuous event with pauses during the firing usually well under a minute and rarely from 2 to 5 min. Likewise, surface vessels associated with the missions are present in limited duration and are intermittent as well.

Other sources that may affect marine mammal habitat were considered and potentially include the introduction of fuel, chaff, debris, ordnance, and chemical residues into the water column. Chemical residues can enter the water through ammunition, flares, drones, missiles, and smoke. However, the small quantities of chemical compounds that may potentially be introduced into the marine waters of the eastern GOM would rapidly disperse. These additions would be too small to adversely impact the GOM waters.

Based on this information, NMFS has preliminarily determined that the proposed A–S gunnery mission activities will not have any impact on the food or feeding success of marine mammals in the northern GOM. Additionally, no loss or modification of the habitat used by cetaceans in the GOM is expected. Marine mammals are anticipated to temporarily vacate the area of live fire events. However, these events usually do not last more than 90 to 120 min at a time, and animals are anticipated to return to the activity area during periods of non-activity. Thus, the proposed activity is not expected to have any habitat-related effects that could cause significant or long-term consequences for individual marine mammals or on the food sources that they utilize.

Proposed Mitigation

In order to issue an incidental take authorization (ITA) under sections 101(a)(5)(A) and (D) of the MMPA, NMFS must, where applicable, set forth the permissible methods of taking pursuant to such activity and other means of effecting the least practicable impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for taking for certain subsistence uses (where relevant). The NDAA of 2004 amended the MMPA as it relates to military readiness activities and the ITA process such that ''least practicable impact'' shall include consideration of personnel safety, practicality of implementation, and impact on the effectiveness of the ''military readiness activity''. The training activities described in Eglin AFB's application are considered military readiness activities.

The mitigation measures proposed for inclusion in the IHA are the same as those required in the 2010–2011 IHA (75 FR 5045, February 1, 2010). These measures are virtually identical to the mitigation measures that were required in the 2008 IHA (73 FR 78318, December 22, 2008) and the 2006 IHA (71 FR 27695, May 12, 2006). There were only three differences in the mitigation and monitoring measures between the 2006 and 2008 IHAs. Eglin AFB's 2007 application addendum requested revisions to three components of the IHA requirements: Protected species surveys, ramp-up procedures, and sea state restrictions. A discussion of the differences in the requirements can be found in the 2008 IHA Notice of Issuance (73 FR 78318, December 22, 2008) and NMFS' 2008 EA. The revisions to those three requirements are also included in this proposed IHA. However, the explanations as to why Eglin AFB requested the changes and NMFS' determinations specific to those three requirements are not repeated in this document. Readers should refer to either the 2008 IHA notice or NMFS' 2008 EA (see **ADDRESSES**) for the full explanation.

Development of the Training Round

The largest type of ammunition used during typical gunnery missions is the 105-mm (4.13-in) round containing 4.7 lbs (2.1 kg) of high explosive (HE). This is several times more HE than that found in the next largest round (40 mm/1.57 in). As a mitigation technique, the USAF developed a 105-mm TR that contains only 0.35 lb (0.16 kg) of HE. The TR was developed to dramatically reduce the risk of harassment at night and Eglin AFB anticipates a 96 percent reduction in impact by using the 105-mm TR.

Visual Mitigation

Areas to be used in gunnery missions are visually monitored for marine mammal presence from the AC–130 aircraft prior to commencement of the mission. If the presence of one or more marine mammals is detected, the target area will be avoided. In addition, monitoring will continue during the mission. If marine mammals are detected at any time, the mission will halt immediately and relocate as necessary or be suspended until the marine mammal has left the area. Daytime and nighttime visual monitoring will be supplemented with IR and TV monitoring. As nighttime visual monitoring is generally considered to be ineffective at any height, the EGTTR missions will incorporate the TR.

Ramp-Up Procedures

The rationale for requiring ramp-up procedures is that this process may allow animals to perceive steadily increasing noise levels and to react, if necessary, before the noise reaches a threshold of significance. The AC–130 gunship's weapons are used in two activity phases. First, the guns are checked for functionality and calibrated. This step requires an abbreviated period of live fire. After the guns are determined to be ready for use, the mission proceeds under various test and training scenarios. This second phase involves a more extended period of live fire and can incorporate use of one or any combination of the munitions available (25-, 40-, and 105-mm rounds). The ramp-up procedure shall be required for the initial gun calibration, and, after this phase, the guns may be fired in any order. Eglin AFB and NMFS believe this process will allow marine species the opportunity to respond to increasing noise levels. If an animal leaves the area during ramp-up, it is unlikely to return while the live-fire mission is proceeding. This protocol allows a more realistic training experience. In combat situations, gunship crews would not likely fire the complete ammunition load of a given caliber gun before proceeding to another gun. Rather, a combination of guns would likely be used as required by an evolving situation. An additional benefit of this protocol is that mechanical or ammunition problems on an individual gun can be resolved while live fire continues with functioning weapons. This also diminishes the possibility of a lengthy pause in live fire, which, if greater than 10 min, would necessitate Eglin's re-initiation of protected species surveys (described next).

Other Mitigation

In addition to the development of the TR, the visual mitigation, and the ramp-up procedures already described in this document, additional mitigation measures to protect marine life were included in the 2006, 2008, 2009, and 2010 IHAs and are proposed for inclusion in this proposed IHA. These requirements include:

(1) If daytime weather and/or sea conditions preclude adequate aerial surveillance for detecting marine mammals and other marine life, A–S gunnery exercises must be delayed until adequate sea conditions exist for aerial surveillance to be undertaken. Daytime test firing will be conducted only when sea surface conditions are sea state 4 or less on the Beaufort scale.

(2) Prior to each firing event, the aircraft crew will conduct a visual survey of the 5-nm (9.3-km) wide prospective target area to attempt to sight any marine mammals that may be present (the crew will do the same for sea turtles and *Sargassum* rafts). The AC–130 gunship will conduct at least two complete orbits at a minimum safe airspeed around a prospective target area at a maximum altitude of 6,000 ft (1,829 m). Provided marine mammals (and other protected species) are not detected, the AC–130 can then continue orbiting the selected target point as it climbs to the mission testing altitude. During the low altitude orbits and the climb to testing altitude, the aircraft crew will visually scan the sea surface within the aircraft's orbit circle for the presence of marine mammals. Primary emphasis for the surface scan will be upon the flight crew in the cockpit and personnel stationed in the tail observer bubble and starboard viewing window. The AC–130's optical and electronic sensors will also be employed for target clearance. If any marine mammals are detected within the AC–130's orbit circle, either during initial clearance or after commencement of live firing, the aircraft will relocate to another target and repeat the clearance procedures. If multiple firing events occur within the same flight, these clearance procedures will precede each event.

(3) The aircrews of the A–S gunnery missions will initiate location and surveillance of a suitable firing site immediately after exiting U.S. territorial waters (less than or equal to 12 nm (22 km)). This would potentially restrict most gunnery activities to the shallower continental shelf waters of the GOM where marine mammal densities are typically lower, and thus potentially avoid the slope waters where the more sensitive species (*e.g.,* endangered sperm whales) typically reside.

(4) Observations will be accomplished using all-light TV, IR sensors, and visual means for at least 60 min prior to each exercise.

(5) Aircrews will utilize visual, night vision goggles, and other onboard sensors to search for marine mammals while performing area clearance procedures during night-time pre-mission activities.

(6) If any marine mammals are sighted during pre-mission surveys or during the mission, activities will be immediately halted until the area is clear of all marine mammals for 60 min or the mission location relocated and resurveyed.

(7) If post-detonation surveys determine that an injury or lethal take of a marine mammal has occurred, the test procedure and the monitoring methods must be reviewed with NMFS and appropriate changes must be made, prior to conducting the next air-to-surface gunnery exercise.

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 impact on the affected marine mammal species and stocks and their habitat. Our evaluation of potential measures included consideration of the following factors in relation to one another:

- The manner in which, and the degree to which, the successful implementation of the measure is expected to minimize adverse impacts to marine mammals;
- The proven or likely efficacy of the specific measure to minimize adverse impacts as planned; and
- The practicability of the measure for applicant implementation, including consideration of personnel safety, practicability of implementation, and impact on the effectiveness of the military-readiness activity.

Based on our evaluation of the applicant's proposed measures, as well as other measures considered by NMFS, NMFS has preliminarily determined that the proposed mitigation measures provide the means of effecting the least practicable impact on marine mammal species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, while also considering personnel safety, practicability of implementation, and impact on the effectiveness of the military-readiness activity.

Proposed Monitoring and Reporting

In order to issue an ITA for an activity, Section 101(a)(5)(D) of the MMPA states that NMFS must, where applicable, set forth ''requirements pertaining to the monitoring and reporting of such taking''. The MMPA implementing regulations at 50 CFR 216.104 (a)(13) indicate that requests for ITAs must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the proposed action area.

The Incidental Take Statement in NMFS' Biological Opinion on this action required certain monitoring measures to protect marine life. NMFS also imposed these same requirements, as well as additional ones, under Eglin AFB's 2006, 2008, and 2010 IHAs as they related to marine mammals. NMFS is proposing to include these same measures in the 2011 IHA (if issued). They are:

(1) The A–S gunnery mission aircrews will participate in the marine mammal species observation training. Each crew member will be required to complete the training prior to participating in a gunnery mission. Observers will receive training in protected species survey and identification techniques.

(2) Aircrews will initiate the post-mission clearance procedures beginning at the operational altitude of approximately 15,000 to 20,000 ft (4,572 to 6,096 m) elevation, and then initiate a spiraling descent down to an observation altitude of approximately 6,000 ft (1,829 m) elevation. Rates of descent will occur over a 3 to 5 min time frame.

(3) Eglin will track their use of the EGTTR for test firing missions and protected species observations, through the use of mission reporting forms.

(4) A–S gunnery missions will coordinate with next-day flight activities to provide supplemental post-mission observations for marine mammals in the operations area of the previous day.

(5) A summary annual report of marine mammal observations and A–S activities will be submitted to the NMFS Southeast Regional Office (SERO) and the Office of Protected Resources either at the time of a request for renewal of an IHA or 90 days after expiration of the current IHA if a new IHA is not requested. This annual report must include the following information: (i) Date and time of each air-to-surface gunnery exercise; (ii) a complete description of the pre-exercise and post-exercise activities related to mitigating and monitoring the effects of A–S gunnery exercises on marine mammal populations; (iii) results of the monitoring program, including numbers by species/stock of any marine mammals noted injured or killed as a result of the gunnery exercises and number of marine mammals (by species if possible) that may have been harassed due to presence within the 5-nm activity zone; and (iv) a detailed assessment of the effectiveness of sensor-based monitoring in detecting marine mammals in the area of A–S gunnery operations.

(6) If any dead or injured marine mammals are observed or detected prior to testing, or injured or killed during live fire, a report must be made to NMFS by the following business day.

(7) Any unauthorized takes of marine mammals (*i.e.,* injury or mortality) must be immediately reported to NMFS and to the respective stranding network representative.

Estimated Take by Incidental Harassment

As it applies to a ''military readiness activity'', the definition of harassment is (Section 3(18)(B) of the MMPA):

(i) Any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild [Level A Harassment]; or (ii) Any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered [Level B Harassment].

Take by Level B harassment is anticipated as a result of the A–S gunnery mission activities. The exercises are expected to only affect animals at or very near the surface of the water. Cetaceans in the vicinity of the exercises may incur temporary changes in behavior, and/or temporary changes in their hearing thresholds. Based on the proposed mitigation and monitoring measures described earlier in this document, no serious injury or mortality of marine mammals is anticipated as a result of the A–S gunnery mission activities, and no takes by serious injury or mortality are proposed to be authorized.

Estimating the impacts to marine mammals from underwater detonations is difficult due to complexities of the physics of explosive sound under water and the limited understanding with respect to hearing in marine mammals. Detailed assessments were made in the notice for the 2006 and 2008 IHAs on this action (71 FR 27695, May 12, 2006; 73 FR 78318, December 22, 2008) and are repeated in this **Federal Register** notice. These assessments used, and improved upon, the criteria and thresholds for marine mammal impacts that were developed for the shock trials of the USS SEAWOLF and the USS WINSTON S. CHURCHILL (DDG–81) (Navy, 1998; 2001). The criteria and thresholds used in those actions were adopted by NMFS for use in calculating incidental takes from explosives. Criteria for assessing impacts from Eglin AFB's A–S gunnery exercises include: (1) Mortality, as determined by exposure to a certain level of positive impulse pressure (expressed as pounds per square inch per millisecond or psi-msec); (2) injury, both hearing-related and non-hearing related; and (3) harassment, as determined by a temporary loss of some hearing ability and behavioral reactions. Due to the small amounts of net explosive weight (NEW) for each of the rounds fired in the EGTTR and the mitigation measures proposed by NMFS for implementation, mortality resulting from the resulting sounds generated into the water column from detonations was determined to be highly unlikely and was not considered further by Eglin AFB or NMFS.

Permanent hearing loss is considered an injury and is termed permanent threshold shift (PTS). NMFS, therefore, categorizes PTS as Level A harassment. Temporary loss of hearing ability is termed TTS, meaning a temporary reduction of hearing sensitivity which abates following noise exposure. TTS is considered non-injurious and is categorized as Level B harassment. NMFS recognizes dual criteria for TTS, one based on peak pressure and one based on the greatest ⅓ octave sound exposure level (SEL) or energy flux density level (EFDL), with the more conservative (*i.e.,* larger) of the two criteria being selected for impacts analysis (note: SEL and EFDL are used interchangeably, but with increasing scientific preference for SEL). The peak pressure metric used in previous shock trials to represent TTS was 12 pounds per square inch (psi) which, for the NEW used, resulted in a zone of possible Level B harassment approximately equal to that obtained by using a 182 decibel (dB) re 1 $microPa^2$-s, total EFDL/SEL metric. The 12-psi metric is largely based on anatomical studies and extrapolations from terrestrial mammal data (see Ketten, 1995; Navy, 1999 (Appendix E, CHURCHILL FEIS; and 70 FR 48675 (August 19, 2005)) for background information). However, the results of a more recent investigation involving marine mammals suggest that, for small charges, the 12-psi metric is not an adequate predictor of the onset of TTS but that one should use 23 psi. This explanation is provided earlier in this document.

Documented behavioral reactions occur at noise levels below those considered to cause TTS in marine mammals (Finneran *et al.*, 2002; Schlundt *et al.*, 2000; Finneran and Schlundt, 2004). In controlled experimental situations, behavioral effects are typically defined as alterations of trained behaviors. Behavioral effects in wild animals are more difficult to define but may include decreased ability to feed, communicate, migrate, or reproduce. Abandonment of an area due to repeated noise exposure is also considered a behavioral effect. Analyses in other sections of this document refer to such behavioral effects as "sub-TTS Level B harassment." Schlundt *et al.* (2000) exposed bottlenose dolphins and beluga whales to various pure-tone sound frequencies and intensities in order to measure underwater hearing thresholds. Masking is considered to have occurred because of the ambient noise environment in which the experiments took place. Sound levels were progressively increased until behavioral alterations were noted (at which point the onset of TTS was presumed). It was found that decreasing the sound intensity by 4 to 6 dB greatly decreased the occurrence of anomalous behaviors. The lowest sound pressure levels, over all frequencies, at which altered behaviors were observed, ranged from 178 to 193 dB re 1 μPa for the bottlenose dolphins and from 180 to 196 dB re 1 μPa for the beluga whales. Thus, it is reasonable to consider that sub-TTS (behavioral) effects occur at approximately 6 dB below the TTS-inducing sound level, or at approximately 176 dB in the greatest ⅓ octave band EFDL/SEL.

Table 3 (earlier in this document) summarizes the relevant thresholds for levels of noise that may result in Level A harassment (injury) or Level B harassment via TTS or behavioral disturbance to marine mammals. Mortality and injury thresholds are designed to be conservative by considering the impacts that would occur to the most sensitive life stage (*e.g.,* a dolphin calf). Table 4 provides the estimated ZOI radii for the EGTTR ordnance. At this time, there are no empirical data or information that would allow NMFS to establish a peak pressure criterion for sub-TTS behavioral disruption.

TABLE 4—ESTIMATED RANGE FOR A ZONE OF IMPACT (ZOI) DISTANCE FOR THE EGTTR ORDNANCE.

Expendable	Level A harassment injurious (205 dB) EFD (m)	Level B harassment non-injurious (182 dB) EFD for TTS (m)	Level B harassment non-injurious (23 psi) for TTS (m)	Level B harassment non-injurious (177 dB) EFD for behavior (m)
105-mm FU	22.81	158.26	216.37	281.78
105-mm TR	8.86	49.79	91.45	90.46
40-mm HE	12.52	74.27	123.83	142.11
25-mm HE	0	23.82	52.72	41.24

FU = Full-up; TR = Training Round; HE = High Explosive.

As mentioned previously, the EGTTR live fire events are continuous events with pauses during the firing usually well under a minute and rarely from 2 to 5 min. Live fire typically occurs within a 30 min time frame, including all ordnance fired: 25 mm; 40 mm; and where the 105-mm ordnance are fired as separate rounds with up to 30-s intervals, the 25-mm and the 40-mm are often fired in multiple bursts. These bursts include multiple rounds (20 to 100) within a 2- to 10-s time frame. Eglin notes that even if animal avoidance once firing commences is not considered, the average swim speed (1.5 m/s) of an animal would not allow sufficient time for new animals to re-enter the Level B harassment ZOI (23 psi) within the time frame of a single burst. As such, only the peak pressure of a single round is measured per burst and experienced at a given distance (53 m (161 ft; 25-mm HE), 124 m (400 ft; 40-mm HE)).

It is assumed that the average swim speed per cetacean is approximately 3 knots or 1.5 m/sec. As a conservative scenario, Eglin assumes that there is one animal present within or near the 282 m Level B behavioral harassment ZOI (FU 105-mm round ZOI), which is the largest ZOI evaluated in this analysis, at the time that the 105-mm live firing begins. The overall marine mammal density determination (see Table 3-1 in the IHA application) assumes a uniform distribution of approximately 1.4 animals per km^2, which results in a distance of approximately 843 m between each animal (all species) on average. At this density distribution and typical swim speed, the next available cetacean would approach the perimeter of the 216 m (709 ft) ZOI (23-psi TTS ZOI) in approximately 9.4 min, assuming a straight line path and a continuous swim profile in the direction of the gunnery exercises. With live-fire events for the 105-mm occurring at a rate of approximately 2 rounds/min, approximately 18 to 19 rounds of the 30 round load (or approximately two-thirds of the total load) would be expended within the 9.4 minute time frame. Based on this scenario, one cetacean would be present in the ZOI at the beginning of live fire, and an additional cetacean would enter the ZOI after 9.4 minutes. The remaining 11 to 12 rounds would be expended in approximately 6 minutes, which would not be enough time for an additional animal to enter the ZOI. However, allowing for potential pauses in firing, it may be possible for one additional animal to enter the ZOI, so that up to three cetaceans could be exposed to the 23-psi TTS threshold associated with 105-mm FU ordnance during a typical mission. Therefore, one cetacean would be within the ZOI for every 10 rounds fired (30 divided by 3), on average. The number of rounds required to result in one exposure is considered an event; therefore, the total number of rounds fired per year is divided by 10. It should be noted that this scenario does not take into account the possibility of marine mammals avoiding the area once firing begins.

Based on this discussion, Table 5 in this **Federal Register** document provides Eglin AFB's estimates of the annual number of marine mammals, by species, potentially taken by Level A harassment and Level B harassment, by the gunnery mission noise. It should be noted that these estimates are derived without consideration of the effectiveness of Eglin AFB's proposed mitigation measures (except use of the TR), which are discussed earlier in this document. As indicated in Table 5, Eglin AFB and NMFS estimate that approximately three marine mammals could potentially be exposed to injurious Level A harassment noise levels (205 dB re 1 μPa^2-s or higher); however, neither NMFS nor Eglin AFB anticipate that injurious Level A harassment will result from the proposed A–S gunnery missions because of Eglin AFB's standard mitigation measures, and NMFS is not proposing to authorize Level A takes of marine mammals.

Approximately 212 marine mammals would be exposed annually to non-injurious (TTS) Level B harassment associated with the 182 dB re 1 μPa^2-s threshold. Because these gunnery exercises result in multiple detonations, they have the potential to also result in a temporary modification in behavior by marine mammals at levels below TTS. Based on Eglin AFB and NMFS' estimates, up to 694 marine mammals may experience a behavioral response to these exercises during the time frame of an IHA (see Table 5). Finally, while one would generally expect the threshold for behavioral modification to be lower than that causing TTS, due to a lack of empirical information and data, a dual criteria for Level B behavioral harassment cannot be developed. However, to ensure that takings are covered by this IHA, NMFS estimates that approximately 906 marine mammals of five stocks may incur Level B (harassment) takes during the 1-year period of an IHA. NMFS has preliminarily determined that this number will be significantly lower due to the expected effectiveness of the mitigation measures proposed for inclusion in the IHA (if issued).

Negligible Impact and Preliminary 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 a variety of factors, including but not limited to: (1) The number of anticipated mortalities; (2) the number and nature of anticipated injuries; (3) the number, nature, and intensity, and duration of Level B harassment; and (4) the context in which the takes occur.

The takes from Level B harassment will be due to behavioral disturbance and TTS. Although activities would be permitted to occur year-round and can last for approximately 5 to 6 hours at a time, the actual live-fire portion of the exercise usually only lasts for 90 to 120 min. It is possible that some individuals may be taken more than once if those individuals are located in the exercise area on two different days when exercises are occurring. However, multiple exposures are not anticipated to have effects beyond Level B harassment.

Table 5. Yearly Number of Marine Mammals Potentially Affected by the Gunnery Mission Noise

Species	Adjusted Density (#/km²)	Mortality 30.5 psi-msec	Level A Harassment		Level B Harassment (TTS)		Level B Harassment
			Injurious 205 dB* EFD	Injurious 13 psi-msec	Non-Injurious 182 dB* EFD	Non-Injurious 23 psi Peak Pressure	Non-Injurious 176 dB* EFD For Behavior
Bryde's whale	0.000175	0.00000003	0.000007	0.000000	0.00041	0.00005	0.00137
Sperm whale	0.003345	0.00000060	0.000130	0.000001	0.00783	0.00094	0.02617
Dwarf/pygmy sperm whale	0.001905	0.00002725	0.007019	0.000062	0.40696	0.05371	1.33528
All beaked whales	0.000013	0.00000000	0.000001	0.000000	0.00003	0.00000	0.00010
Killer whale	0.000387	0.00000007	0.000015	0.000000	0.00091	0.00011	0.00303
Pygmy killer whale	0.001189	0.00000021	0.000046	0.000000	0.00278	0.00034	0.00930
False killer whale	0.003023	0.00000054	0.000118	0.000001	0.00708	0.00085	0.02365
Melon-headed whale	0.010050	0.00000180	0.000391	0.000004	0.02353	0.00283	0.07863
Short-finned pilot whale	0.006857	0.00000123	0.000267	0.000002	0.01606	0.00193	0.05365
Rough-toothed dolphin	0.001295	0.00000023	0.000050	0.000000	0.00303	0.00037	0.01013
Bottlenose dolphin	0.631900	0.00903926	2.328211	0.020735	134.99056	17.81699	442.92035
Risso's dolphin	0.012107	0.00000217	0.000471	0.000004	0.02835	0.00341	0.09472
Atlantic spotted dolphin	0.352333	0.00504008	1.298157	0.011561	75.26765	9.93434	246.96226
Pantropical spotted dolphin	0.142900	0.00002562	0.005561	0.000050	0.33464	0.04028	11.11803
Striped dolphin	0.030907	0.00000554	0.001203	0.000011	0.07238	0.00871	0.24181
Spinner dolphin	0.127000	0.00002277	0.004942	0.000045	0.29740	0.03580	0.99363
Clymene dolphin	0.050533	0.00000906	0.001966	0.000018	0.11833	0.01424	0.39536
Fraser's dolphin	0.002115	0.00000038	0.000082	0.000000	0.00495	0.00060	0.01655
All marine mammals	1.378034	0.01417684	3.648637	0.032496	211.58290	27.91551	694.28402

km² = square kilometers; NA = not applicable

*dB= dB re 1 μPa²-s

**Bottlenose dolphin/Atlantic spotted dolphin

Of the 21 marine mammal species or stocks that may be in the vicinity of the EGTTR gunnery mission activities, only the sperm whale is listed as endangered under the ESA and as depleted under the MMPA. Sperm whale occurrence in the area of the proposed activity is unlikely because almost all reported sightings have occurred in water depths greater than 200 m. Occurrence in the deeper portions of W–151 is possible, although based on reported sightings locations, density is expected to low. Therefore, Eglin AFB has not requested and NMFS has not proposed the issuance of take authorizations for this species. While animals may be impacted in the immediate vicinity of the activity, because of the small ZOIs (compared to the vast size of the GOM ecosystem where these species live) and the small amounts of explosives used in the A–S gunnery exercises, NMFS has preliminarily determined that there will not be a substantial impact on marine mammals or on the normal functioning of the nearshore or offshore GOM ecosystems. The proposed activity is not expected to impact rates of recruitment or survival of marine mammals since neither mortality (which would remove individuals from the population) nor injury are anticipated to occur. Although the proposed activity is anticipated to result in Level B harassment of marine mammals (both by behavioral disturbance and TTS), the level of harassment is not anticipated to impact rates of recruitment or survival of marine mammals.

Additionally, the mitigation and monitoring measures proposed to be implemented (described earlier in this document) are expected to further minimize the potential for harassment. The protected species surveys will require Eglin AFB to search the area for marine mammals, and if any are found in the live fire area, then the exercise must be suspended until the animal(s) has left the area or relocated. Moreover, the aircrews of the A–S gunnery missions will initiate location and surveillance of a suitable firing site immediately after exiting U.S. territorial waters (less than or equal to 12 nm (22 km)). This would potentially restrict most gunnery activities to the shallower continental shelf waters of the GOM where marine mammal densities are typically lower, and thus potentially avoid the slope waters where the more sensitive species (*e.g.*, endangered sperm whales) typically reside.

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 Eglin AFB's A–S gunnery mission exercises will result in the incidental take of marine mammals, by Level B harassment only, and that the total taking from the A–S gunnery mission exercises will have a negligible impact on the affected species or stocks.

Impact on Availability of Affected Species or Stock for Taking for Subsistence Uses

There are no relevant subsistence uses of marine mammals implicated by this action. Therefore, NMFS has preliminarily determined that the total taking of affected species or stocks would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

Endangered Species Act (ESA)

A Biological Opinion issued by NMFS on October 20, 2004, concluded that the A–S gunnery exercises in the EGTTR are unlikely to jeopardize the continued existence of species listed under the ESA that are within the jurisdiction of NMFS or destroy or adversely modify critical habitat. NMFS has preliminarily determined that this action, including the modifications to the mitigation and monitoring measures in the previous IHAs issued to Eglin AFB and proposed for inclusion in the 2011 IHA (if issued), does not have effects beyond that which was analyzed in that previous consultation, it is within the scope of that action, and reinitiation of consultation is not necessary. However, prior to issuance of this IHA, NMFS will make a final determination whether additional consultation is necessary.

National Environmental Policy Act (NEPA)

The USAF prepared a Final PEA in November 2002 for the EGTTR activity. NMFS made the USAF's 2002 Final PEA available upon request on January 23, 2006 (71 FR 3474). In accordance with NOAA Administrative Order 216–6 (Environmental Review Procedures for Implementing the National Environmental Policy Act, May 20, 1999), NMFS reviewed the information contained in the USAF's 2002 Final PEA, and, on May 1, 2006, determined that the document accurately and completely described the proposed action, the alternatives to the proposed action, and the potential impacts on marine mammals, endangered species, and other marine life that could be impacted by the preferred alternative and the other alternatives. Accordingly, NMFS adopted the USAF's 2002 Final PEA under 40 CFR 1506.3 and made its own FONSI on May 16, 2006. The NMFS FONSI also took into consideration updated data and information contained in NMFS' **Federal Register** document noting issuance of an IHA to Eglin AFB for this activity (71 FR 27695, May 12, 2006), and previous notices (71 FR 3474, January 23, 2006; 70 FR 48675, August 19, 2005).

As the issuance of the 2008 IHA to Eglin AFB amended three of the mitigation measures for reasons of practicality and safety, NMFS reviewed the USAF's 2002 Final PEA and determined that a new EA was warranted to address: (1) The proposed modifications to the mitigation and monitoring measures; (2) the use of 23 psi as a change in the criterion for estimating potential impacts on marine mammals from explosives; and (3) a cumulative effects analysis of potential environmental impacts from all GOM activities (including Eglin mission activities), which was not addressed in the USAF's 2002 Final PEA. Therefore, NMFS prepared a new EA in December 2008 and issued a FONSI for its action on December 9, 2008. Based on those findings, NMFS determined that it was not necessary to complete an environmental impact statement for the issuance of an IHA to Eglin AFB for this activity. NMFS has preliminarily determined that this proposed activity is within the scope of NMFS' 2008 EA and FONSI.

Proposed Authorization

As a result of these preliminary determinations, NMFS proposes to authorize the take of several species of marine mammals incidental to the USAF, Eglin AFB, for their A–S gunnery mission activities in the GOM provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated.

Dated: July 12, 2011.

James H. Lecky,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2011–18324 Filed 7–19–11; 8:45 am]

BILLING CODE 3510–22–P

COMMODITY FUTURES TRADING COMMISSION

Agency Information Collection Activities Under OMB Review

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describes the nature of the information collection and its expected costs and burden; it includes the actual data collection instruments [if any].

DATES: Comments must be submitted on or before August 19, 2011.

FOR FURTHER INFORMATION OR A COPY CONTACT: Mark Bretscher, Division of Clearing and Intermediary Oversight, Commodity Futures Trading Commission, 525 W. Monroe, Suite

1100, Chicago, IL 60661, (312) 596–0529; Fax (312) 596–0711; *e-mail: mbretscher@cftc.gov* and refer to OMB Control No. 3038–0026.

SUPPLEMENTARY INFORMATION:

Title: Gross Collection of Exchange-Set Margins for Omnibus Accounts (OMB Control No. 3038–0026). This is a request for extension of a currently approved information collection.

Abstract: Commission Regulation 1.58 requires futures commission merchants to collect exchange-set margin for omnibus accounts on a gross, rather than a net, basis. This rule is promulgated pursuant to the Commission's rulemaking authority contained in Sections 4c, 4d, 4f, 4g and 8a of the Commodity Exchange Act, 7 USC 6c, 6d, 6f, 6g and 12a (2000).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for the CFTC's regulations were published on December 30, 1981. *See* 46 FR 63035 (Dec. 30, 1981). The **Federal Register** notice with a 60-day comment period soliciting comments on this collection of information was published on May 18, 2011 (76 FR 28754).

Burden statement: The respondent burden for this collection is estimated to average .08 hours per response. These estimates include the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; and transmit or otherwise disclose the information.

Respondents/Affected Entities: 125.

Estimated number of responses: 500.

Estimated total annual burden on respondents: 40 hours.

Frequency of collection: On occasion.

Send comments regarding the burden estimated or any other aspect of the information collection, including suggestions for reducing the burden, to the addresses listed below. Please refer to OMB Control No. 3038–0026 in any correspondence.

Mark Bretscher, Division of Clearing and Intermediary Oversight, Commodity Futures Trading Commission, 525 W. Monroe, Suite 1100, Chicago, IL 60661, and Office of Information and Regulatory Affairs, Office of Management and Budget, *Attention:* Desk Officer for CFTC, 725 17th Street, Washington, DC 20503.

Dated: July 14, 2011.

David A. Stawick,

Secretary of the Commission.

[FR Doc. 2011–18281 Filed 7–19–11; 8:45 am]

BILLING CODE 6351–01–P

DEPARTMENT OF DEFENSE

Department of the Navy

Notice of Availability of Record of Decision for the Final Environmental Impact Statement for the Keyport Range Complex Extension

AGENCY: Department of the Navy, DoD.

ACTION: Notice.

SUMMARY: The Department of the Navy (Navy), after carefully weighing the environmental consequences of the proposed action as presented in the Final Environmental Impact Statement (FEIS), announces its decision to extend the operational areas of the Naval Sea Systems Command Naval Undersea Warfare Center Keyport Range Complex and increase the number of days of activities and the number of activities per day, in furtherance of the Navy's statutory obligations under Title 10 of the United States Code governing the roles and responsibilities of the Navy. In its decision, the Navy considered applicable laws and executive orders, including an analysis of the effects of its actions in compliance with the Endangered Species Act, the Coastal Zone Management Act, and the National Historic Preservation Act, and the requirements of Executive Order (EO) 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations and EO 13045, Protection of Children from Environmental Health Risks and Safety Risks.

Implementation of the proposed action could begin immediately.

SUPPLEMENTARY INFORMATION: The complete text of the Navy's Record of Decision (ROD) is available for public viewing on the project Web site at: *http://www.navsea.navy.mil/nuwc/keyport/Environmental/EIS.aspx* along with copies of the FEIS and supporting documents. Single copies of the ROD will be made available upon request by contacting the FEIS Project Manager, Ms. Kimberly Kler, 360–396–0927.

Dated: July 13, 2011.

L.M. Senay,

Lieutenant, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. 2011–18232 Filed 7–19–11; 8:45 am]

BILLING CODE 3810–FF–P

DEFENSE NUCLEAR FACILITIES SAFETY BOARD

Privacy Act; System of Records

AGENCY: Defense Nuclear Facilities Safety Board.

ACTION: Notice of systems of records.

SUMMARY: Each Federal agency is required by the Privacy Act of 1974, 5 U.S.C. 552a, to publish a description of the systems of records containing personal information as defined by the Privacy Act. In this notice, the Defense Nuclear Facilities Safety Board (DNFSB) updates the descriptions of the eight systems it currently maintains, and announces the creation of a ninth system.

FOR FURTHER INFORMATION CONTACT: Richard A. Azzaro, General Counsel, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004–2901, (202) 694–7000.

SUPPLEMENTARY INFORMATION: The Board has previously maintained eight systems of records under the Privacy Act. The Board has created a new system, DNFSB–9, Occupational Beryllium Exposure Records, but the creation of this new system does not involve the collection of additional information or changes in the use or storage of records. Instead, it is only a minor records management reorganization for streamlining purposes. The records now to be found in DNFSB–9 were originally maintained in DNFSB–5, which is now limited to Occupational Radiation Exposure Records.

DNFSB–1

SYSTEM NAME:

Personnel Security Files.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004–2901.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

DNFSB employees, applicants for employment with DNFSB, DNFSB contractors and consultants, and other individuals requiring access to classified materials and facilities.

CATEGORIES OF RECORDS IN THE SYSTEM:

Personnel security folders and requests for security clearances (Forms SF 86, 86A, 87, and 312) and Department of Energy (DOE) Forms 5631.18, 5631.20, 5631.21, and 5631.29. In addition, records including the following information:

1. Security clearance request information;

2. Security education and foreign travel lectures;

3. Security infractions;

4. Names of individuals visiting DNFSB offices; and

5. Personal identity verification documents (*e.g.,* photographs, fingerprint cards, and proofs of identity) maintained for Federal identification badge and access purposes.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

42 U.S.C. 2286.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

DNFSB—to determine which individuals should have access to classified material; to be able to transfer clearances to other facilities for visitor control purposes; and to verify the identity of its employees and contractors.

DOE—to determine eligibility for security clearances.

Other Federal and State agencies—to determine eligibility for security clearances.

DNFSB will disclose information to appropriate agencies, entities, and persons when DNFSB: (1) Suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised; (2) determines that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by DNFSB or another agency or entity) that rely upon the compromised information; and (3) deems the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DNFSB's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper records and electronic files.

RETRIEVABILITY:

By name, social security number, and numeric code.

SAFEGUARDS:

Access is limited to authorized DNFSB employees only. Paper records are stored in locked offices and locked file cabinets, and electronic records are maintained on a password-protected desktop personal computer (PC). The Security Management Officer's office remains locked when not in use.

RETENTION AND DISPOSAL:

Records retention and disposal requirements are contained in the ''General Records Schedules'' published by the National Archives and Records Administration, Washington, DC. Paper records are shredded before disposal and electronic files are destroyed by secure, permanent methods.

SYSTEM MANAGER AND ADDRESS:

Security Management Officer, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004–2901.

NOTIFICATION PROCEDURE:

Requests made by individuals to determine if DNFSB–1 records include their personal information should be directed to the Privacy Act Officer, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004–2901. Required proof of identification: complete name, social security number, and date of birth.

RECORD ACCESS PROCEDURES:

Individuals requesting permission to access DNFSB–1 records that include their personal information should be directed to the Privacy Act Officer, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004–2901. Required proof of identification before viewing records: complete name, social security number, date of birth, and individual must show official photo identification (*e.g.,* driver's license, passport, or government identification).

CONTESTING RECORD PROCEDURES:

Individuals contesting any DNFSB–1 records that include their personal information should be directed to the Privacy Act Officer, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004–2901. Required proof of identification before viewing records: complete name, social security number, date of birth, and individual must show official photo identification (*e.g.,* driver's license, passport, or government identification).

RECORD SOURCE CATEGORIES:

Subject individuals, Questionnaire for Sensitive Positions (SF 86), agency files, official visitor logs, contractors, and DOE Personnel Security Branch.

SYSTEM EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:

None.

DNFSB–2

SYSTEM NAME:

Time and Attendance Records.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004–2901.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

DNFSB employees.

CATEGORIES OF RECORDS IN THE SYSTEM:

Time and attendance records to include names, addresses, social security numbers, service computation dates, leave usage data with corresponding balances, and authorizations for overtime and compensatory time.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

42 U.S.C. 2286.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

DNFSB—to enter and maintain payroll, time, and attendance data for DNFSB employees.

Bureau of the Public Debt—to process and maintain payroll, time, and attendance data for DNFSB employees.

Treasury Department—to collect withholding taxes and issue savings bonds.

Internal Revenue Service—to process Federal income taxes.

State and Local Governments—to process state and local income taxes.

Savings Institutions—to credit accounts for savings made through payroll deductions.

Health Insurance Carriers—to process insurance claims.

DNFSB will disclose information to appropriate agencies, entities, and persons when DNFSB: (1) Suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised; (2) determines that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by DNFSB or another agency or entity) that rely upon the compromised information; and (3) deems the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DNFSB's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper records and electronic files.

RETRIEVABILITY:

By name, social security number, and alphanumeric code.

SAFEGUARDS:

Access is limited to authorized DNFSB employees only. Paper records are stored in locked file cabinets and electronic records are maintained on a password-protected desktop PC.

RETENTION AND DISPOSAL:

Records retention and disposal requirements are contained in the ''General Records Schedules'' published by the National Archives and Records Administration, Washington, DC. Paper records are shredded before disposal and electronic files are destroyed by secure, permanent methods.

SYSTEM MANAGER AND ADDRESS:

General Manager, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004–2901.

NOTIFICATION PROCEDURE:

Requests made by individuals to determine if DNFSB–2 records include their personal information should be directed to the Privacy Act Officer, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004–2901. Required proof of identification: complete name, social security number, and date of birth.

RECORD ACCESS PROCEDURES:

Individuals requesting permission to access DNFSB–2 records that include their personal information should be directed to the Privacy Act Officer, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004–2901. Required proof of identification before viewing records: complete name, social security number, date of birth, and individual must show official photo identification (*e.g.,* driver's license, passport, or government identification).

CONTESTING RECORD PROCEDURES:

Individuals contesting any DNFSB–2 records that include their personal information should be directed to the Privacy Act Officer, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004–2901. Required proof of identification before viewing records: complete name, social security number, date of birth, and individual must show official photo identification (*e.g.,* driver's license, passport, or government identification).

RECORD SOURCE CATEGORIES:

Subject individuals, timekeepers, supervisors, the Bureau of the Public Debt for payroll records, and the Internal Revenue Service and State officials for withholding and tax information.

SYSTEM EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:

None.

DNFSB–3

SYSTEM NAME:

Drug Testing Program Records.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Division of Human Resources, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004–2901. Duplicate systems may exist, in whole or in part, at contractor testing laboratories and collection/evaluation facilities.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

DNFSB employees and applicants for employment with DNFSB.

CATEGORIES OF RECORDS IN THE SYSTEM:

Records including the following information:

1. Pre-employment drug test requests or results, random tests, confirmatory tests, and follow-up tests;
2. Information supplied by employees or applicants contesting positive test results;
3. Information supplied by individuals concerning alleged drug abuse by DNFSB employees or applicants; and
4. Written statements or medical evaluations of attending physicians or information regarding prescription or nonprescription drugs.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Executive Order 12564, ''Drug-Free Federal Workplace,'' September 15, 1986, 51 FR 32889, codified at 5 U.S.C. 7301, note (1987).

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

Information in these records may be used by a Medical Review Officer (MRO) and DNFSB management:

1. To identify substance abusers within the agency;
2. To initiate counseling and rehabilitation programs;
3. To take personnel actions;
4. To take personnel security actions; and
5. For statistical purposes.

DNFSB will disclose information to appropriate agencies, entities, and persons when DNFSB: (1) Suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised; (2) determines that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by DNFSB or another agency or entity) that rely upon the compromised information; and (3) deems the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DNFSB's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Test records are maintained on paper in file folders. Records used for initiating a random drug test are maintained on the Random Employee Selection Automation System. This is a password-protected, stand-alone system that resides on a desktop computer.

RETRIEVABILITY:

Records maintained in file folders are indexed and accessed by name and social security number. Random drug testing records are accessed via a computer database that includes employees' names, social security numbers, and job titles.

SAFEGUARDS:

Access usage rights are limited to authorized DNFSB employees only. The Division of Human Resources records are stored in a locked file cabinet. Records in laboratory collection and evaluation facilities are stored under appropriate security measures so that access is limited and controlled.

RETENTION AND DISPOSAL:

Records retention and disposal requirements are contained in the ''General Records Schedules'' published by the National Archives and Records Administration, Washington, DC. Paper records are shredded before disposal and electronic files are destroyed by secure, permanent methods.

SYSTEM MANAGER AND ADDRESS:

Director, Division of Human Resources, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004–2901.

RECORD NOTIFICATION PROCEDURE:

Requests made by individuals to determine if DNFSB–3 records include their personal information should be directed to the Privacy Act Officer, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004–2901. Required proof of identification: complete name, social security number, and date of birth.

RECORD ACCESS PROCEDURES:

Individuals requesting permission to access DNFSB–3 records that include their personal information should be directed to the Privacy Act Officer, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004–2901. Required proof of identification before viewing records: complete name, social security number, date of birth, and individual must show official photo identification (*e.g.,* driver's license, passport, or government identification).

CONTESTING RECORD PROCEDURES:

Individuals contesting any DNFSB–3 records that include their personal information should be directed to the Privacy Act Officer, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004–2901. Required proof of identification before viewing records: complete name, social security number, date of birth, and individual must show official photo identification (*e.g.,* driver's license, passport, or government identification).

RECORD SOURCE CATEGORIES:

DNFSB employees and applicants who have been identified for drug testing, who have been tested, or who have admitted abusing drugs prior to being tested; physicians' statements regarding medical evaluations or authorized prescriptions for drugs; individuals providing information through a pre-employment drug use questionnaire; individuals providing information concerning alleged drug abuse by DNFSB employees or applicants, including but not limited to: specimen collection, laboratories for analysis, and medical evaluations; and DNFSB staff administering the drug testing program to ensure the achievement of a drug-free workplace.

SYSTEM EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:

Pursuant to 5 U.S.C. 552a(k)(5), DNFSB has exempted portions of this System of Records from 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (H), (I), and (f). The exemption is invoked for information in the System of Records that would disclose the identity of a source who furnished information concerning alleged drug abuse by DNFSB employees or applicants.

DNFSB–4

SYSTEM NAME:

Personnel Files.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004–2901.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

DNFSB employees and applicants for employment with DNFSB.

CATEGORIES OF RECORDS IN THE SYSTEM:

Records including the following information:

1. Name, social security number, sex, date of birth, home address, grade level, family information, and occupational code;
2. Federal employment application materials;
3. Assigned Position Description;
4. Telework Agreement (if applicable);
5. Records on suggestions, awards, and bonuses;
6. Training requests, authorization data, and training course evaluations;
7. Employee appraisals, appeals, grievances, and complaints;
8. Employee disciplinary actions;
9. Employee retirement records;
10. Employment transfers;
11. Promotions, payroll changes, and benefits elections; and
12. Proof of identity documents.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

42 U.S.C. 2286.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

DNFSB—to maintain personnel files on DNFSB employees to facilitate processing of personnel actions.

Bureau of the Public Debt—to maintain Official Personnel Folders for DNFSB.

Office of Personnel Management—to maintain transfer and retirement records for the calculation of benefits and collection of anonymous statistical reports.

Federal Retirement Thrift Investment Board—to invest employee contributions in selected funds, track financial performance of employee investments, and provide performance reports.

Social Security Administration—to maintain Social Security records for the calculation of benefits.

Department of Labor—to process Workmen's Compensation claims.

Department of Defense Military Retired Pay Offices—to adjust military retirement.

Veterans Administration—to evaluate veteran's benefits to which the individual may be entitled.

States' Departments of Employment Security—to determine entitlement to unemployment compensation or other state benefits.

Federal, State, or Local government agencies—to investigate individuals in connection with security clearances, and administrative or judicial proceedings. Private Organizations—to verify employees' employment status with DNFSB.

DNFSB will disclose information to appropriate agencies, entities, and persons when DNFSB: (1) Suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised; (2) determines that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by DNFSB or another agency or entity) that rely upon the compromised information; and (3) deems the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with

DNFSB's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper records and electronic files.

RETRIEVABILITY:

By name and social security number.

SAFEGUARDS:

Access is limited to authorized DNFSB employees only. Paper records are stored in locked file cabinets and electronic files are password-protected.

RETENTION AND DISPOSAL:

Records retention and disposal requirements are contained in the ''General Records Schedules'' published by the National Archives and Records Administration, Washington, DC. Paper records within DNFSB are shredded before disposal and electronic files are destroyed by secure, permanent methods.

SYSTEM MANAGER AND ADDRESS:

Director, Division of Human Resources, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004–2901.

NOTIFICATION PROCEDURE:

Requests made by individuals to determine if DNFSB–4 records include their personal information should be directed to the Privacy Act Officer, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004–2901. Required proof of identification: complete name, social security number, and date of birth.

RECORD ACCESS PROCEDURES:

Individuals requesting permission to access DNFSB–4 records that include their personal information should be directed to the Privacy Act Officer, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004–2901. Required proof of identification before viewing records: complete name, social security number, date of birth, and individual must show official photo identification (*e.g.,* driver's license, passport, or government identification).

CONTESTING RECORD PROCEDURES:

Individuals contesting any DNFSB–4 records that include their personal information should be directed to the Privacy Act Officer, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004–2901. Required proof of identification before viewing records: complete name, social security number, date of birth, and individual must show official photo identification (*e.g.,* driver's license, passport, or government identification).

RECORDS SOURCES CATEGORIES:

Individual employees, official personnel records, Office of Personnel Management, State employment agencies, educational institutions, and supervisors.

SYSTEM EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:

None.

DNFSB–5

SYSTEM NAME:

Occupational Radiation Exposure Records.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004–2901.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

DNFSB employees.

CATEGORIES OF RECORDS IN THE SYSTEM:

Occupational radiation exposure information.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

42 U.S.C. 2286.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

DNFSB—to monitor employees' occupational radiation exposures during their employment with DNFSB.

DOE—to monitor radiation exposure of visitors, including DNFSB employees, to the various DOE facilities in the United States.

Other Federal and State Health Institutions—to monitor occupational radiation exposure of DNFSB personnel.

DNFSB will disclose information to appropriate agencies, entities, and persons when DNFSB: (1) Suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised; (2) determines that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by DNFSB or another agency or entity) that rely upon the compromised information; and (3) deems the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DNFSB's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper records and electronic files.

RETRIEVABILITY:

By name, social security number, and date of birth.

SAFEGUARDS:

Access is limited to authorized DNFSB employees and contractors only. Paper records are stored in locked file cabinets with appropriate Privacy Act markings in a controlled-access area. Electronic files are password-protected or encrypted and stored on a dedicated computer.

RETENTION AND DISPOSAL:

Records retention and disposal requirements are contained in the ''General Records Schedules'' published by the National Archives and Records Administration, Washington, DC. Paper records are shredded before disposal and electronic files are destroyed by secure, permanent methods.

SYSTEM MANAGER AND ADDRESS:

Director, Division of Human Resources, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004–2901.

NOTIFICATION PROCEDURE:

Requests made by individuals to determine if DNFSB–5 include their personal information should be directed to the Privacy Act Officer, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004–2901. Required proof of identification: complete name, social security number, and date of birth.

RECORD ACCESS PROCEDURES:

Individuals requesting permission to access DNFSB–5 records that include their personal information should be directed to the Privacy Act Officer, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004–2901. Required proof of identification before viewing records: complete name, social security number, date of birth, and individual must show official photo identification (*e.g.,* driver's license, passport, or government identification).

CONTESTING RECORD PROCEDURES:

Individuals contesting any DNFSB–5 records that include their personal information should be directed to the Privacy Act Officer, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004–2901. Required proof of identification before viewing records: complete name, social security number, date of birth, and individual must show official photo identification (*e.g.,* driver's license, passport, or government identification).

RECORD SOURCE CATEGORIES:

Subject individuals, previous employee records, DOE occupational Radiation Exposure Monitoring System (REMS), whole body counts, bioassays, dosimeters, and film badges.

SYSTEM EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:

None.

DNFSB–6

SYSTEM NAME:

DNFSB Staff Resumé Book.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004–2901.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

DNFSB's technical and legal employees.

CATEGORIES OF RECORDS IN THE SYSTEM:

A summary of each DNFSB technical and legal employee's educational background and work experience with emphasis on areas relevant to the individual's work at DNFSB.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

42 U.S.C. 2286.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

DNFSB—to provide DNFSB Board Members and staff an understanding of the technical and legal qualifications of DNFSB's employees to facilitate work assignments and for work planning purposes.

DNFSB will disclose information to appropriate agencies, entities, and persons when DNFSB: (1) Suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised; (2) determines that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by DNFSB or another agency or entity) that rely upon the compromised information; and (3) deems the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DNFSB's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper records and electronic files.

RETRIEVABILITY:

By name.

SAFEGUARDS:

The Resumé Book is not accessible via the Internet or DNFSB's Public Reading Room. Access to the Resumé Book is limited to current DNFSB employees as determined by the Chairman. Paper records are stored in locked file cabinets or in locked desk drawers.

RETENTION AND DISPOSAL:

Records retention and disposal requirements are contained in the ''General Records Schedules'' published by the National Archives and Records Administration, Washington, DC. Out-of-date paper records are shredded before disposal and electronic files are destroyed by secure, permanent methods.

SYSTEM MANAGER AND ADDRESS:

Director, Division of Information Technology and Security, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004–2901.

NOTIFICATION PROCEDURE:

Requests made by individuals to determine if DNFSB–6 records include their personal information should be directed to the Privacy Act Officer, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004–2901. Required proof of identification: complete name, social security number, and date of birth.

RECORD ACCESS PROCEDURES:

Individuals requesting permission to access DNFSB–6 records that include their personal information should be directed to the Privacy Act Officer, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004–2901. Required proof of identification before viewing records: complete name, social security number, date of birth, and individual must show official photo identification (*e.g.,* driver's license, passport, or government identification).

CONTESTING RECORD PROCEDURES:

Individuals contesting any DNFSB–6 records that include their personal information should be directed to the Privacy Act Officer, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004–2901. Required proof of identification before viewing records: complete name, social security number, date of birth, and individual must show official photo identification (*e.g.,* driver's license, passport, or government identification).

RECORD SOURCE CATEGORIES:

Subject individuals.

SYSTEM EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:

None.

DNFSB–7

SYSTEM NAME:

Supervisor Files.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004–2901.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

DNFSB's technical, legal, and administrative employees.

CATEGORIES OF RECORDS IN THE SYSTEM:

Records including the following information:

1. Information used to write annual or mid-year performance appraisals, proposed awards, or proposed honors;
2. Documented written correspondence, employee's work samples, hard-copy of electronic communications, confidential supervisor notations, and employee performance records; and
3. Information used to contact personnel during non-duty hours, such as personal cell phone numbers and home phone numbers.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

42 U.S.C. 2286.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

DNFSB—to be used by supervisors to write annual or mid-year performance appraisals for their employees or to propose awards or honors; to be used in connection with disciplinary or adverse actions.

DNFSB will disclose information to appropriate agencies, entities, and persons when DNFSB: (1) Suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised; (2) determines that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by DNFSB or another agency or entity) that rely upon the compromised information; and (3) deems the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DNFSB's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper records and electronic files.

RETRIEVABILITY:

By name.

SAFEGUARDS:

Access is limited to the direct supervisor and administrative personnel who maintain the records. Paper records are stored in locked offices, locked file cabinets, or in locked desk drawers, and electronic files are password-protected.

RETENTION AND DISPOSAL:

Records retention and disposal requirements are contained in the ''General Records Schedules'' published by the National Archives and Records Administration, Washington, DC. Out-of-date paper records are shredded before disposal and electronic files are destroyed by secure, permanent methods.

SYSTEM MANAGER AND ADDRESS:

Director, Division of Information Technology and Security, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004–2901.

NOTIFICATION PROCEDURE:

Requests made by individuals to determine if DNFSB–7 records include their personal information should be directed to the Privacy Act Officer, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004–2901. Required proof of identification: complete name, social security number, and date of birth.

RECORD ACCESS PROCEDURES:

Individuals requesting permission to access DNFSB–7 records that include their personal information should be directed to the Privacy Act Officer, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004–2901. Required proof of identification before viewing records: complete name, social security number, date of birth, and individual must show official photo identification (*e.g.,* driver's license, passport, or government identification).

CONTESTING RECORD PROCEDURES:

Individuals contesting any DNFSB–7 records that include their personal information should be directed to the Privacy Act Officer, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004–2901. Required proof of identification before viewing records: complete name, social security number, date of birth, and individual must show official photo identification (*e.g.,* driver's license, passport, or government identification).

RECORD SOURCE CATEGORIES:

Subject individuals.

SYSTEM EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:

None.

DNFSB–8

SYSTEM NAME:

Travel, Procurement, and Administrative Files.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004–2901.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM: DNFSB EMPLOYEES, APPLICANTS FOR EMPLOYMENT WITH DNFSB, AND DNFSB CONTRACTORS AND CONSULTANTS.

CATEGORIES OF RECORDS IN THE SYSTEM:

1. Official travel documents including names, addresses, social security numbers, dates of birth, passport numbers, relocation records, and travel credit card numbers;
2. Purchase credit card numbers, invoices, and payment records;
3. Employee credit evaluations, credit check information, and travel/purchase card histories;
4. Parking permit records;
5. Public transit subsidy applications and issuance records;
6. Contracts/purchase orders; and
7. Miscellaneous reimbursements.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

42 U.S.C. 2286.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

DNFSB—to process travel- and procurement-related documents.

General Services Administration—to reimburse DNFSB employees, applicants for employment, and consultants for travel-related expenses and miscellaneous reimbursements, and to reimburse contractors for services rendered.

General Accounting Office and Auditors—to verify accuracy and legality of disbursements.

Travel Agencies—to process travel itineraries.

DNFSB will disclose information to appropriate agencies, entities, and persons when DNFSB: (1) Suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised; (2) determines that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by DNFSB or another agency or entity) that rely upon the compromised information; and (3) deems the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DNFSB's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper records and electronic files.

RETRIEVABILITY:

By name, social security number, travel dates, relocation dates, and alphanumeric code.

SAFEGUARDS:

Access is limited to authorized DNFSB employees only. Paper records are stored in locked file cabinets and electronic records are maintained on a password-protected desktop PC.

RETENTION AND DISPOSAL:

Records retention and disposal requirements are contained in the ''General Records Schedules'' published by the National Archives and Records Administration, Washington, DC. Paper records are shredded before disposal and electronic files are destroyed by secure, permanent methods.

SYSTEM MANAGER AND ADDRESS:

Director, Division of Acquisition and Finance, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004–2901.

NOTIFICATION PROCEDURE:

Requests made by individuals to determine if DNFSB–8 records include their personal information should be directed to the Privacy Act Officer, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004–2901. Required proof of identification: complete name, social security number, and date of birth.

RECORD ACCESS PROCEDURES:

Individuals requesting permission to access DNFSB–8 records that include their personal information should be directed to the Privacy Act Officer, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004–2901. Required proof of identification before viewing records: complete name, social security number, date of birth, and individual must show official photo identification (*e.g.,* driver's license, passport, or government identification).

CONTESTING RECORD PROCEDURES:

Individuals contesting any DNFSB–8 records that include their personal information should be directed to the Privacy Act Officer, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004–2901. Required proof of identification before viewing records: complete name, social security number, date of birth, and individual must show official photo identification (*e.g.,* driver's license, passport, or government identification).

RECORD SOURCE CATEGORIES:

Subject individuals, General Services Administration for official accounting records, and travel agency contracts.

SYSTEM EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:

None.

DNFSB–9

SYSTEM NAME:

Occupational Beryllium Exposure Records.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004–2901.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

DNFSB employees and contractors.

CATEGORIES OF RECORDS IN THE SYSTEM:

Occupational beryllium exposure information.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

42 U.S.C. 2286.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

DNFSB—to assist DNFSB employees and contractors who may have been exposed to beryllium and wish to be informed of any applicable DOE beryllium disease screening and prevention programs.

DOE—to assist DOE in identifying DNFSB employees and contractors who may have been exposed to beryllium while visiting or working at various DOE defense nuclear facilities throughout the United States.

DNFSB will disclose information to appropriate agencies, entities, and persons when DNFSB: (1) Suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised; (2) determines that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by DNFSB or another agency or entity) that rely upon the compromised information; and (3) deems the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DNFSB's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper records and electronic files.

RETRIEVABILITY:

By name.

SAFEGUARDS:

Access is limited to authorized DNFSB employees and contractors only. Paper records are stored in locked file cabinets with appropriate Privacy Act markings in a controlled-access area. Electronic files are password-protected or encrypted and are stored on a dedicated computer.

RETENTION AND DISPOSAL:

Records retention and disposal requirements are contained in the ''General Records Schedules'' published by the National Archives and Records Administration, Washington, DC. Paper records within DNFSB are shredded before disposal and electronic files are destroyed by secure, permanent methods.

SYSTEM MANAGER AND ADDRESS:

Director, Division of Human Resources, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004–2901.

NOTIFICATION PROCEDURE:

Requests made by individuals to determine if DNFSB–9 records include their personal information should be directed to the Privacy Act Officer, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004–2901. Required proof of identification: complete name, social security number, and date of birth.

RECORD ACCESS PROCEDURES:

Individuals requesting permission to access DNFSB–9 records that include their personal information should be directed to the Privacy Act Officer, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004–2901. Required proof of identification before viewing records: complete name, social security number, date of birth, and individual must show official photo identification (*e.g.,* driver's license, passport, or government identification).

CONTESTING RECORD PROCEDURES:

Individuals contesting any DNFSB–9 records that include their personal information should be directed to the Privacy Act Officer, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004–2901. Required proof of identification before viewing records: complete name, social security number, date of birth, and individual must show official photo identification (*e.g.,* driver's license, passport, or government identification).

RECORD SOURCE CATEGORIES:

DOE requests for identification of personnel for beryllium exposure surveys or possible exposures.

SYSTEM EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:

None.

Dated: July 14, 2011.

Peter S. Winokur,

Chairman.

[FR Doc. 2011–18227 Filed 7–19–11; 8:45 am]

BILLING CODE 3670–01–P

DEPARTMENT OF EDUCATION

National Assessment Governing Board; Meeting

AGENCY: U.S. Department of Education, National Assessment Governing Board.

ACTION: Notice of open meeting and partially closed sessions.

SUMMARY: This notice sets forth the schedule and proposed agenda of a forthcoming meeting of the National Assessment Governing Board (Board) and also describes the functions of the Board. Notice of this meeting is required under Section 10(a)(2) of the Federal Advisory Committee Act. This notice is intended to notify members of the general public of their opportunity to attend. Individuals who will need special accommodations in order to attend the meeting (*e.g.*: interpreting services, assistive listening devices, materials in alternative format) should notify Munira Mwalimu at 202–357–6938 or at *Munira.Mwalimu@ed.gov* no later than July 22, 2011. We will attempt to meet requests after this date, but cannot guarantee availability of the requested accommodation. The meeting site is accessible to individuals with disabilities.

Dates: August 4–6, 2011.

Times:

August 4: Committee Meetings:

Ad Hoc Committee: Open Session: 9:30 a.m.–11:00 a.m.

Assessment Development Committee: Closed Session: 11:30 a.m.–4:15 p.m.

Executive Committee: Open Session: 4:30 p.m.–5:30 p.m.; Closed Session: 5:30 p.m.–6:00 p.m.

August 5:

Full Board: Open Session: 8:30 a.m.–10:00 a.m.; Closed Session: 12:45 p.m.–1:45 p.m.; Open Session: 1:45 p.m.–4:30 p.m.

Committee Meetings:

Assessment Development Committee: Closed Session: 10:15 a.m.–12:30 p.m.

Committee on Standards, Design and Methodology: Open Session: 10:15 a.m.–12:00 p.m.

Closed Session: 12:00 p.m.–12:30 p.m.

Reporting and Dissemination Committee: Open Session: 10:15 a.m.–12:30 p.m.

August 6:

Nominations Committee: Closed Session: 7:30 a.m.–8:15 a.m.

Full Board: Open Session: 8:30 a.m.–10:30 a.m.

Location: The Ritz-Carlton Hotel, 1150 22nd Street, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Munira Mwalimu, Operations Officer, National Assessment Governing Board, 800 North Capitol Street, NW., Suite 825, Washington, DC 20002–4233, Telephone: (202) 357–6938.

SUPPLEMENTARY INFORMATION: The National Assessment Governing Board (Board) is established under section 412 of the National Education Statistics Act of 1994, as amended.

The Board is established to formulate policy guidelines for the National Assessment of Educational Progress (NAEP). The Board's responsibilities include the following: selecting subject areas to be assessed, developing assessment frameworks and specifications, developing appropriate student achievement levels for each grade and subject tested, developing standards and procedures for interstate and national comparisons, developing guidelines for reporting and disseminating results, and releasing initial NAEP results to the public.

On August 4, from 9:30 a.m. to 11:00 a.m., the Ad Hoc Committee on Parent Engagement will meet in open session. From 11:30 a.m. to 4:15 p.m. the Assessment Development Committee will meet in closed session to review secure test items for the 2012 Economics assessment at grade 12 and the 2013 Pilot Writing computer-based assessment at grade 4. The Assessment Development Committee will also review secure task outlines for the 2013 Pilot of the Technology and Engineering Literacy assessment at grade 8. The Board will be provided with specific test materials/questions for review that cannot be discussed/disclosed in an open meeting. Premature disclosure of these secure test items and materials would significantly impede implementation of the NAEP assessments, and is therefore protected by exemption 9(B) of section 552b(c) of Title 5 of the United States Code.

On August 4, from 4:30 p.m. to 5:30 p.m., the Executive Committee will meet in open session and thereafter in closed session from 5:30 p.m. to 6:00 p.m. During the closed session, the Committee will receive a briefing from the National Center for Education Statistics (NCES) on options for NAEP contracts covering assessment years beyond 2011 and address budget implications for the NAEP assessment schedule. The discussion of contract options and costs will address the congressionally mandated goals and Board policies on NAEP assessments. This part of the meeting must be conducted in closed session because public discussion of this information would disclose independent government cost estimates and contracting options, adversely impacting the confidentiality of the contracting process. Public disclosure of information discussed would significantly impede implementation of the NAEP contracts, and is therefore protected by exemption 9(B) of section 552b(c) of Title 5 of the United States Code.

On August 5, the full Board will meet in open session from 8:30 a.m. to 10:00 a.m. The Board will review and approve the meeting agenda and meeting minutes from the May 2011 Board meeting, followed by the Chairman's remarks. The Executive Director of the Governing Board will then provide a report to the Board, followed by updates from the Commissioner of the National Center for Education Statistics (NCES) and the Director of the Institute of Education Sciences (IES). The Board will then discuss ways of improving student achievement and closing achievement gaps. Following these sessions, the Board will recess for Committee meetings from 10:15 a.m. to 12:30 p.m.

The Governing Board's standing committees, the Assessment Development Committee, and the Reporting and Dissemination Committee and the Committee on Standards, Design and Methodology will meet on August 5 from 10:15 a.m. to 12:30 p.m. The Reporting and Dissemination Committee will meet in open session from 10:15 a.m. to 12:30 p.m.

The Assessment Development Committee (ADC) will meet in closed session from 10:15 a.m. to 12:30 p.m. During the closed meeting the ADC will complete their review of secure NAEP test items for the 2012 Economics assessment at grade 12 and the 2013 Pilot Writing computer-based assessment at grade 4 which the Committee began to review on Thursday, August 4 in closed session. In addition, the ADC will receive a closed session briefing on embargoed data from cognitive lab studies of 4th grade students in preparation for the 2012 computer-based Writing Pilot assessment. Following that writing briefing, the ADC will receive an update on embargoed data from cognitive lab studies of 8th graders on the computer-based Technology and Engineering Literacy (TEL) assessment, in preparation for the 2013 TEL Pilot. The Board will be provided with specific test materials/questions for review that cannot be discussed/disclosed in an open meeting. Premature disclosure of these secure test items and materials would significantly impede implementation of the NAEP assessments, and is therefore protected by exemption 9(B) of section 552b(c) of Title 5 United States Code.

The Committee on Standards, Design and Methodology will meet in open session from 10:15 a.m. to 12:00 p.m., and in closed session from 12:00 p.m. to 12:30 p.m. During the closed session, the Committee will receive a briefing on secure data collected from the NAEP writing assessment regarding student uses of computer based options for the assessment and student responses collected as part of the assessment. The Board will be provided with specific assessment data for review that cannot be discussed/disclosed in an open meeting. Premature disclosure of these secure test results would significantly impede implementation of the NAEP assessments, and is therefore protected by exemption 9(B) of section 552b(c) of Title 5 United States Code.

On August 5, from 12:45 p.m. to 1:45 p.m. the full Board will meet in closed session to receive a briefing from NCES on the 2009 NAEP State Mapping Study. The Board will be provided with embargoed data and results that cannot be discussed in an open meeting prior to their official release by the National Center for Education Statistics on a date to be determined. Premature disclosure of these results would significantly impede implementation of the NAEP assessment program, and is therefore protected by exemption 9(B) of section 552b(c) of Title 5 United States Code.

From 2:00 p.m. to 3:00 p.m. in open sessions, the Board will receive updates from the Common Core State Assessment Consortia. Following this session, from 3:15 p.m. to 4:30 p.m., the Board will receive an overview of recent NAEP Report Card releases and discuss policy implications. The August 5, 2011 session of the Board meeting is scheduled to conclude at 4:30 p.m.

On August 6, 2011, the Nominations Committee will meet in closed session from 7:30 a.m. to 8:15 a.m. to receive an update on the status of finalists for Board terms beginning on October 1, 2011. Following the update, the Committee will discuss nominations for the 2011–2012 cycle. These discussions pertain solely to internal personnel rules and practices of an agency and will disclose information of a personal nature where disclosure would constitute an unwarranted invasion of personal privacy. As such, the discussions are protected by exemptions 2 and 6 of section 552b(c) of Title 5 of the United States Code.

On August 6, the full Board will meet in open session from 8:30 a.m. to 10:30 a.m. From 8:30 a.m. to 9:30 a.m., the Board will receive an *Inside NAEP* briefing on maintaining NAEP Trends. The Board is scheduled to receive Committee reports and take action on Committee recommendations. The August 6, 2011 session of the Board meeting is scheduled to adjourn at 10:00 a.m.

Detailed minutes of the meeting, including summaries of the activities of the closed sessions and related matters that are informative to the public and consistent with the policy of section 5 U.S.C. 552b(c) will be available to the public within 14 days of the meeting. Records are kept of all Board proceedings and are available for public inspection at the U.S. Department of Education, National Assessment Governing Board, Suite #825, 800 North Capitol Street, NW., Washington, DC, from 9:00 a.m. to 5:00 p.m. Eastern Time, Monday through Friday.

Electronic Access to This Document: You may view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister/index.html*. 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.

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*.

Dated: July 14, 2011.

Cornelia S. Orr,

Executive Director, National Assessment Governing Board, U.S. Department of Education.

[FR Doc. 2011–18183 Filed 7–19–11; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

[Docket No. EERE–2006–BC–0132]

RIN 1904–AC18

Building Energy Standards Program: Determination Regarding Energy Efficiency Improvements in the Energy Standard for Buildings, Except Low-Rise Residential Buildings, ANSI/ASHRAE/IESNA Standard 90.1–2007

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notice of final determination.

SUMMARY: The Department of Energy (DOE) has determined that the 2007 edition of the *Energy Standard for Buildings, Except Low-Rise Residential Buildings,* American National Standards Institute (ANSI)/American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE) Illuminating Engineering Society of North America (IESNA) Standard 90.1–2007, (Standard 90.1–2007) would achieve greater energy efficiency in buildings subject to the code, than the 2004 edition (Standard 90.1–2004 or the 2004 edition). Also, DOE has determined that the quantitative analysis of the energy consumption of buildings built to Standard 90.1–2007, as compared with buildings built to Standard 90.1–2004, indicates national source energy savings of approximately 3.9 percent of commercial building energy consumption. Additionally, DOE has determined site energy savings are estimated to be approximately 4.6 percent. Upon publication of this affirmative final determination, States are required to certify that they have reviewed the provisions of their commercial building code regarding energy efficiency, and as necessary, updated their code to meet or exceed Standard 90.1–2007. Additionally, this notice provides guidance to States on Certifications, and Requests for Extensions of Deadlines for Certification Statements.

DATES: Certification statements by the States must be provided by July 20, 2013

ADDRESSES: Certification Statements must be addressed to the Buildings Technologies Program-Building Energy Codes Program Manager, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Forrestal Building, Mail Station EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121.

FOR FURTHER INFORMATION CONTACT: Michael Erbesfeld, U.S. Department of

Energy, Office of Energy Efficiency and Renewable Energy, Forrestal Building, Mail Station EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121, (202) 287–1874, e-mail: *michael.erbesfeld@ee.doe.gov.* For legal issues contact Mrs. Kavita Vaidyanathan, U.S. Department of Energy, Office of the General Counsel, Forrestal Building, Mail Station GC–71, 1000 Independence Avenue, SW., Washington, DC 20585–0121, (202) 586–0669, e-mail: *Kavita.Vaidyanathan@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

A. Statutory Requirements

Title III of the Energy Conservation and Production Act, as amended (ECPA), establishes requirements for the Building Energy Efficiency Standards Program. (42 U.S.C. 6831 *et seq.*) Section 304(b) of ECPA provides that whenever the ANSI/ASHRAE/IESNA Standard 90.1–1989 (Standard 90.1–1989 or 1989 edition), or any successor to that code, is revised, the Secretary must make a determination, not later than 12 months after such revision, whether the revised code would improve energy efficiency in commercial buildings and must publish notice of such determination in the **Federal Register**. (42 U.S.C. 6833 (b)(2)(A)) The Secretary may determine that the revision of Standard 90.1–1989 or any successor thereof, improves the level of energy efficiency in commercial buildings. If so, then not later than two years after the date of the publication of such affirmative determination, each State [1] is required to certify that it has reviewed and updated the provisions of its commercial building code regarding energy efficiency with respect to the revised or successor code. (42 U.S.C. 6833(b)(2)(B)(i)) The State must include in its certification a demonstration that the provisions of its commercial building code, regarding energy efficiency, meet or exceed the revised standard. (42 U.S.C. 6833(b)(2)(B)(i))

If the Secretary makes a determination that the revised standard will not improve energy efficiency in commercial buildings, State commercial codes shall meet or exceed the last revised standard for which the Secretary has made a positive determination. (42 U.S.C. 6833(b)(2)(B)(ii)). On December 30, 2008, the Secretary published a determination in the **Federal Register** updating the reference code to Standard 90.1–2004. 73 FR 79868.

ECPA also requires the Secretary to permit extensions of the deadlines for the State certification if a State can demonstrate that it has made a good faith effort to comply with the requirements of Section 304 of ECPA and that it has made significant progress in doing so. (42 U.S.C. 6833(c))

B. Background

1. Publication of Standard 90.1–2007

ASHRAE and the Illuminating Engineering Society of North America (IESNA) approved the publication of the 2007 edition of *Energy Standard for Buildings Except Low-rise Residential Buildings,* in December 2007.

The Standard was developed under ANSI-approved consensus standard procedures. Standard 90.1 is under continuous maintenance by a Standing Standard Project Committee (SSPC) for which the ASHRAE Standard Committee has established a documented program for regular publication of addenda or revisions, including procedures for timely, documented, consensus action on requests for change to any part of the standard. The ANSI approves addenda prior to their publication by ASHRAE and IESNA and therefore prior to their inclusion in a new version of Standard 90.1. ANSI approved the final addendum for inclusion in Standard 90.1–2007 on December 18, 2007. The 2007 edition was published in December 2007.

2. Preliminary Determination

DOE published in the **Federal Register** a Notice of Preliminary Determination for Standard 90.1–2007 that the 2007 edition would achieve greater energy efficiency in buildings subject to the code, than the 2004 edition. 75 FR 54117, September 30, 2010. In arriving at a final determination, the DOE first reviewed all significant changes between the 2004 edition and the 2007 edition of Standard 90.1. Standard 90.1 is complex and covers a broad spectrum of the energy related components and systems in buildings ranging from simple storage buildings to complex hospitals and laboratories.

The size of buildings addressed range from those smaller than single family homes to the largest buildings in the world. The approach to development of the standard used in the 2007 edition was not changed from that used for the 2004 edition, with no changes to the scope or the way components are defined. DOE determined that because no significant changes were made to the structure, scope, or component definitions of Standard 90.1–2004, a similar methodology used for the analysis of Standard 90.1–2004 could be utilized for the analysis of Standard 90.1–2007, consisting of a qualitative comparison of the textual changes to requirements in Standard 90.1–2007 from Standard 90.1–2004, and a quantitative estimate of the energy savings developed from whole building simulations of a standard set of buildings constructed to both Standards over a range of U.S. climates. DOE chose to modify several details of how the quantitative analysis would be done, including changes in the simulation tool used, the building models, and the procedure and data for weighting of results by building type and climate. A detailed discussion of the analysis methodology, which was subject to public comment in 2009, can be found in the Notice of Preliminary Determination for Standard 90.1–2007. 75 FR 54117 (Sept. 30, 2010)

3. Public Comments Regarding the Preliminary Determination

DOE accepted public comments on the preliminary determination for Standard 90.1–2007 until October 4, 2010. DOE received submissions from a total of five different entities.

[1] The term ''State'' is defined to include each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory and possession of the United States. (42 U.S.C. 6832(11))

The Responsible Energy Codes Alliance (RECA) submitted a written comment (Docket No. EERE–2006–BC–0132–0004.1, pgs. 2–4) stating that it strongly supports the Department's determination that the 2007 edition of ASHRAE Standard 90.1 would achieve greater energy efficiency in buildings than the 2004 edition. RECA also commented that the Department should follow up individually with each State to ensure that States are complying with their obligations under federal law and that the Department should make the certification letters that States submit available on the Department's Web site, along with any additional materials provided by the Department to support state compliance. RECA went on to comment that the Department's decision to publish a Notice of Preliminary Determination rather than a Notice of Determination is unnecessary to comply with the Energy Policy Act and that adding an extra level of administrative procedure is likely to further delay determinations on future editions of the model energy codes. Lastly, RECA commented that the Secretary of Energy should carefully consider the magnitude of each addendum approved for ASHRAE 90.1 in between publications and exercise statutory discretion to issue determinations any time the code would be significantly improved.

In response to RECA's comment concerning following up with the States in their certification efforts, DOE notes that under section 304(d) and (e) of ECPA DOE provides technical assistance and funding to States to implement the requirements of Section 304, and to improve and implement State commercial building energy efficiency codes, including increasing and verifying compliance with such codes. As certification letters are received from the States, they will be made public on the Department's Web site at *http://www.energycodes.gov/states/.* The certification letters will also be forwarded to the State Energy Program for their consideration. DOE further notes that a listing of those States that have submitted certification letters from their respective governors under the requirements of the American Recovery and Reinvestment Act is available at *http://www.energy.gov/InYourState.htm.* The letters can be found on each State's Web site under Recovery Act activity.

With regard to issuing a preliminary determination, the Department believes that there is value in providing an opportunity for public comment on its analysis, particularly given that a positive determination could potentially impact States. Lastly, DOE interprets the language in Section 304(b)(2) of ECPA to mean that when a comprehensive revision of the ASHRAE Standard is published (which in this case is ASHRAE Standard 90.1–2007), then that revised or successor standard triggers the Secretary's obligation to issue a determination as to whether the revised standard improves energy efficiency. While the addenda process is part of the ongoing maintenance of the standard and thus continually modifies or revises existing standard over time, it would be an unreasonable reading of the statute to categorize each addenda in this maintenance process as a ''revised or successor standard'' within the meaning of Section 304(b)(2) of ECPA, so as to require a determination by the Secretary. Such an interpretation of the statute would put an unreasonable burden both on the States and DOE. For the States, a determination by the Secretary requires some State action, and what is required depends upon whether the Secretary issues an affirmative or a negative determination. If the Secretary were to issue a determination after each addenda was published, the States would be constantly required to change their codes. This would affect the stability and certainty of State commercial building codes.

The American Chemistry Council (ACC) submitted a written comment (Docket No. EERE–2006–BC–0132–0005.1, pg. 1) stating that it strongly supports the Department's determination that the 2007 edition of ASHRAE Standard 90.1 would achieve greater energy efficiency in buildings than the 2004 edition.

The Edison Electric Institute (EEI) submitted a written comment (Docket No. EERE–2006–BC–0132–0002.1, pgs. 2–3) supporting the preliminary determination with a suggested modification to the estimated source energy savings. EEI has one concern about the analysis from the **Federal Register** notice, and that is the statement: ''To estimate primary energy, all electrical energy use intensities were first converted to primary energy using a factor of 10,800 Btus primary energy per kWh'' and ''Natural Gas EUI's in the prototypes were converted to primary energy using a factor of 1.089 Btus primary energy per Btu of site natural gas energy use''. EEI stated that the electricity estimate value of 10,800 is overstated as EIA ''assigns'' a heat rate to all renewable electricity generation, which accounted for over 10.4% of U.S. generation in 2009. This type of ''accounting'' overstates the primary energy usage from electricity by a significant amount (over 10.4%). EEI also stated concerns over the natural gas estimate value appearing to only estimate upstream energy losses for domestic land-based gas drilling activities, while ignoring the losses associated with the importation of liquefied natural gas (LNG), increased energy associated with deepwater offshore drilling, increased energy and other energy losses associated with the hydraulic fracturing process (energy used to move and heat water, energy used to move and pump sand, and the energy used to produce and mix all of the chemicals used in the process), and energy losses from the flaring of natural gas due to imports of imported petroleum products.

EEI further stated that there is no agreement among entities that have performed recent analyses as to what the correct upstream multipliers should be and that a review of these documents shows significant differences in the estimates. EEI stated that since there is no agreement among different parties as to what the appropriate multipliers are, with all of the variability in assumptions, that DOE publish its determination on the basis of site energy analytics, which can be measured and verified with real world data that has much lower uncertainty and error ranges.

The Department has chosen to be consistent within their energy analyses by using Energy Information Administration's (EIA) conversion factors solely and by choosing not to mix and match conversion factors. DOE recognizes that these conversion factors are estimates and not true conversion factors due to some types of utility energy inputs not having known conversion factors and other inputs having multiple generally accepted conversion factors. See a more detailed discussion at *http://www.eia.doe.gov/emeu/mecs/mecs94/ei/elec.html.* That said, DOE still believes that despite the fact that these are estimates, the source energy analysis is important to the discussion of global resources and environmental issues. It should also be noted that the site energy savings are provided in the determination. Ultimately the focus of this determination is on estimating whether the adoption of the revised standard as the basis of State building codes would result in energy savings as compared to the previous version.

The Building Codes Assistance Project (BCAP) submitted a written comment (Docket No. EERE–2006–BC–0132–0003.1, pgs. 1–2) supporting the DOE's determination and suggests that DOE follow up with the States after publication of the Final Determination as well as making public which States comply with the statutory requirements to submit certification letters within two years of publication. As stated above in response to RECA's comments, DOE intends to make public the certification letters received from States, and under section 304(e) of ECPA DOE provides funding and technical assistance to States to implement the requirements of Section 304, and to improve and implement State residential and commercial building energy efficiency codes, including increasing and verifying compliance with such codes.

The Natural Resources Defense Council (NRDC) submitted a written comment (Docket No. EERE–2006–BC–0132–0006.1, pgs. 2–4) stating the following three issues: (1) They urge DOE to use this opportunity to clarify States' commitments with regards to updating and implementing their building energy codes; (2) clarify the limits of preemption under section 327 of the Energy Policy and Conservation Act (EPCA) (42 U.S.C. 6297); and (3) revise the energy efficiency standards for Federal buildings to reflect the most recent model energy codes. In regards to NRDC's first comment see response to RECA's comments above. In addition, Section III below describes the process for States to file certification statements with DOE.

NRDC's second comment is in reference to the preemption requirements applicable to the Federal energy efficiency standards for appliances. Essentially, section 307(f) of ECPA limits the ability of State and local building codes to require minimum energy efficiency levels of covered appliances. (See, 42 U.S.C. 6297(e)) It is important to note that today's final determination does not require States to adopt a specific building code. Today's final determination requires a State to review and update as necessary the provisions of its commercial building code regarding energy efficiency to ensure that the State's code provisions meet or exceed the energy efficiency requirements of Standard 90.1–2007. (42 U.S.C. 6833(b)(2)(B)(i)) Section 304 of ECPA does not prescribe how State code provisions must achieve the required energy efficiencies. Given that this final determination does not require States to adopt a specific method for achieving energy efficiency levels of covered appliances but rather it allows for States to adopt building codes that meet or exceed the energy efficiency requirements of Standard 90.1–2007. As such, there is no potential conflict between the State code provisions of ECPA and the preemption language in EPCA.

In response to NRDC's final comment, DOE intends to update the baseline standards for Federal buildings that reference Standard 90.1 following the issuance of this final determination for Standard 90.1–2007.

II. Summary of the Comparative Analysis

DOE's preliminary qualitative analysis was not revised from the preliminary determination for Standard 90.1–2007. DOE considers the preliminary qualitative analysis to be final and in support of this final determination for Standard 90.1–2007. The preliminary quantitative analysis was revised to reflect updated energy cost values based on EIA statistics for 2010. Both analyses can be found at *http://www.energycodes.gov/status/determinations_com.stm,* [Docket No. EERE–2006–BC–0132].

A. Qualitative Analysis

1. Discussion of Detailed Textual Analysis

DOE performed a detailed analysis of the differences between the textual requirements and stringencies of the two editions of Standard 90.1 in the scope of the standard, the building envelope requirements, the building lighting and power requirements, and the building mechanical equipment requirements.

The emphasis of the detailed requirement and stringency analysis was on looking at the specific changes that ASHRAE made in going from Standard 90.1–2004 to Standard 90.1–2007. ASHRAE publishes changes to their standards as addenda to the preceding standard and then bundles all the addenda together to form the next edition. ASHRAE processed 44 addenda to Standard 90.1–2004 to create Standard 90.1–2007. Each of these addenda was evaluated by DOE in preparing this determination.

In addition, each standard has multiple ways to demonstrate compliance, including a prescriptive set of requirements by section of the standard, various tradeoff approaches within those same sections, and a whole building performance method (Energy Cost Budget; ''ECB''). For each addendum we identified whether it applies to the prescriptive requirements, or one of the tradeoff paths provided for in the envelope, lighting, or mechanical sections, or the ECB whole building performance path. For each addendum DOE identified the impact on the stringency for that path to compliance.

DOE's review and evaluation indicates that there are significant differences between the 2004 edition and the 2007 edition. DOE's overall conclusion is that the 2007 edition will improve the energy efficiency of commercial buildings.

However, DOE identified two changes in textual requirements that taken alone appear to represent a reduction in stringencies and could decrease energy efficiency. The two changes are:

• Addendum p, which broadens the implicit definition of ''visually impaired'' as used in exceptions provided in the standard, which allow for lighting power to not be included in the calculated lighting power densities subject to maximum limits, and

• Addendum av, which provides for an explicit shading credit allowed for louvered projections, where such a credit was not explicitly provided for in 90.1–2004.

DOE believes that in these cases, the reduction in stringency was not considered a major impact. For the other addenda, DOE determined that the remaining addenda either represented no change in stringency, or indicated a positive change in stringency corresponding to improved efficiency. Overall, DOE concluded the changes in textual requirements and stringencies are ''positive,'' in the sense that they would improve energy efficiency in commercial construction.

2. Results of Detailed Textual Analysis

A qualitative analysis of all addenda to Standard 90.1–2004 that were included in Standard 90.1–2004 was conducted. All 44 addenda processed by ASHRAE in the creation of Standard 90.1–2007 from Standard 90.1–2004 were evaluated by DOE for their impact on energy efficiency. DOE determined whether that addenda would have a positive, neutral, or negative impact on overall building efficiency. Table-1 shows the potential number of positive and negative changes for each section of Standard 90.1.

The results of the textual analysis indicate that the majority of changes (30 of the total of 44 listed) were neutral. These include editorial changes, changes to reference standards, changes to alternative compliance paths, and other changes to the text of the standard that may improve the usability of the standard, but do not generally improve or degrade the energy efficiency of building. There were 11 changes that were evaluated as having a positive impact on energy efficiency and 2 changes that were evaluated as having a negative impact on energy efficiency.

The 2 negative impacts on energy efficiency include:

1. Addendum p—Expanded lighting power exceptions allowed for use with the visually impaired; and
2. Addendum av—Allowance for louvered overhangs.

The 11 positive impacts on energy efficiency include:

1. Addendum c—Increased requirement for building vestibules;
2. Addendum h—Removal of data processing centers from exceptions to HVAC requirements;
3. Addendum q—Removal of hotel room exceptions to HVAC requirements;
4. Addendum v—Modification of demand controlled ventilation requirements;
5. Addendum ac—Modification of fan power limitations;
6. Addendum ai—Modification of retail display lighting requirements;
7. Addendum ak—Modification of cooling tower testing requirements;
8. Addendum an—Modification of commercial boiler requirements;
9. Addendum ar—Modification of part load fan requirements;
10. Addendum as—Modification of opaque envelope requirements; and
11. Addendum at—Modification of fenestration envelope requirements.

The results of the textual analysis are shown in Table 1. Overall, the potential positive impacts outweigh the potential negative impacts in a simple numerical comparison.

TABLE 1—RESULTS OF TEXTUAL ANALYSIS BY SECTION OF STANDARD 90.1

Section of standard	Number of changes made to section	Number of positive (energy saving) changes	Number of unquantifiable changes	Number of neutral (no energy saving) changes	Number of negative (energy increasing) changes
Title, Purpose, and Scope	0	0	0	0	0
Definitions	0	0	0	0	0
Administration and Enforcement	0	0	0	0	0
Envelope and Normative Appendices	11	3	0	7	1
HVAC Equipment and Systems	13	6	0	7	0
Service Water Heating	0	0	0	0	0
Power	0	0	0	0	0
Lighting	9	2	1	5	1
Energy Cost Budget and Appendix G Performance Rating Method	7	0	0	7	0
Normative and Informative References	4	0	0	4	0
Overall	44	11	1	30	2

B. Quantitative Analysis

1. Discussion of Whole Building Energy Analysis

The quantitative comparison of ASHRAE Standard 90.1–2007 was carried out using whole-building energy simulations of buildings built to both ASHRAE Standard 90.1–2004 and ASHRAE Standard 90.1–2007. DOE used the EnergyPlus whole building simulation tool to simulate 15 representative building types in 15 U.S. climate locations, each climate location selected to be representative of one of the 15 U.S climate zones used in the definition of building energy code criteria in ASHRAE Standard 90.1–2004 and Standard 90.1–2007. The simulations were developed using specific building prototypes based on the DOE commercial reference building models developed for DOE's Net-Zero Energy Commercial Building Initiative.

For each building prototype simulated in each climate the energy use intensities (EUI) by fuel type and by end-use were extracted. These EUIs by fuel type for each building were then weighted to national average EUI figures using weighting factors based on the relative square footage of construction represented by that prototype in each of the 15 climate regions. These weighting factors were based on commercial building construction starts data for a five-year period from 2003 to 2007. The source of data was the McGraw-Hill Construction Projects Starts Database (MHC). The MHC database captures over 90% of new commercial construction in any given year and the collection process is independently monitored to ensure the coverage of most of the commercial construction in the U.S. The data is used by other federal agencies such as the U.S. Census Bureau, the Federal Reserve and the U.S. Department of Health and Human Services (HHS) for characterizing building construction in the U.S. For the purpose of developing construction weighting factors, the strength of this data lies in the number of samples, the characterization of each sample in terms of building end-use and size and number of stories, the frequency of data collection, and the detailed location data. In addition, the MHC database can be used to identify multifamily residential buildings that would be covered under ASHRAE Standard 90.1.

DOE's prototypes reflect the use of two fuel types, electricity and natural gas. Using the weighting factors, DOE was able to establish an estimate of the relative reduction in building energy use, as determined by a calculated reduction in weighted average site EUI for each building prototype. Site energy refers to the energy consumed at the building site. In a corresponding fashion, DOE was also able to calculate a reduction in terms of weighted average primary EUI and in terms of weighted average energy cost intensity (ECI) in $/sq. ft. of building floorspace. Primary energy as used here refers to the energy required to generate and deliver energy to the site. To estimate primary energy, all electrical energy use intensities were first converted to primary energy using a factor of 10,918 Btus primary energy per kWh (based on the 2010 estimated values reported in Table 2 of the EIA Annual Energy Outlook, release date December 2009, available at *http://www.eia.doe.gov/oiaf/archive/aeo10/aeoref_tab.html*). The conversion factor of 10,918 was calculated from Table 2 by summing the commercial electricity value of 4.62 quads with the electricity losses value of 10.17 quads and then dividing that sum by the commercial value. ((4.62 + 10.17)/4.62 = 3.2) This yields an electricity ratio of 3.2 for converting how much primary (source) electricity is required per unit of site required electricity. This ratio of 3.2 is then multiplied by 3,412 Btu per kWh, producing a value of 10,918 Btus primary energy per kWh of site energy.

Natural Gas EUIs in the prototypes were converted to primary energy using a factor of 1.090 Btus primary energy per Btu of site natural gas use (based on the 2010 national energy use estimated shown in Table 2 of the AEO 2010). This natural gas source energy conversion factor was calculated by dividing the natural gas subtotal of 23.15 quads (sum of all natural gas usage, including usage for natural gas field production, leases, plant fuel, and pipeline (compression) supply) by the delivered natural gas total of 21.23 quads (sum of four primary energy sectors (residential, commercial, industrial, and transportation).

a. Calculation of Energy Cost Index

To estimate the reduction in energy cost index, DOE relied on national average commercial building energy prices of $0.1027/kWh of electricity and $10.06 per 1000 cubic feet ($0.9796/therm) of natural gas, based on EIA statistics for 2010 (the last complete year of data available in Table 5.3 Average Retail Price of Electricity to Ultimate Consumers: Total by End-Use Sector for the commercial sector—available from EIA at *http://www.eia.doe.gov/cneaf/electricity/epm/table5_3.html* and for 2009 (the last complete year of data available from the EIA Natural Gas Annual Summary for the commercial sector available at *http://tonto.eia.doe.gov/dnav/ng/ng_pri_sum_dcu_nus_a.htm.*) DOE recognizes that actual fuel costs will vary somewhat by building type within a region, and will in fact vary more across regions. Nevertheless, DOE believes that the use of simple national average figures illustrates whether there will be energy cost savings sufficient for the purposes of the DOE determination.

b. Calculation of Energy Use Intensities

Energy use intensities developed for each representative building type were weighted by total national square footage of each representative building type to provide an estimate of the difference between the national energy use in buildings constructed to both editions of the Standard 90.1. Note that the 15 buildings types used in the determination reflect approximately 80% of the total square footage of commercial construction including multi-family buildings greater than three stories covered under ASHRAE Standard 90.1.

Note that only differences between new building requirements were considered in this quantitative analysis. Changes to requirements in the 2007 edition that pertain to existing buildings only are addressed in the detailed textual analysis only.

c. Application to Additions and Renovations

Both the 2007 and 2004 editions address additions and renovations to existing buildings. Since DOE has found insufficient data to characterize renovations in terms of what energy using features are utilized, DOE has not determined that the results obtained from the whole building prototypes used would reasonably reflect the EUI benefits that would accrue to renovated floor space. For this reason, renovated floor space is not included in the DOE weighting factors. Building additions on the other hand are believed to be substantially equivalent to new construction. For this reason, FW Dodge construction data on additions has been incorporated into the overall weighting factors. Floor space additions reflect approximately 13 percent of new construction floor space based on data captured in the FW Dodge dataset.

d. Ventilation Rate Assumptions

The quantitative analysis assumed the same base ventilation level for buildings constructed to Standard 90.1–2004 and Standard 90.1–2007. Neither edition of Standard 90.1 specifies ventilation rates for commercial building construction. ASHRAE has a separate ventilation standard for commercial construction, ASHRAE Standard 62.1 *Ventilation for Acceptable Indoor Air Quality*. This standard is cited only in a few exceptions within the mechanical sections of either ASHRAE 90.1–2004 or ASHRAE 90.1–2007, with each edition referencing a different version of standard 62.1. ASHRAE 90.1–2004 lists ASHRAE 62.1–1999 in its table of references. ASHRAE 90.1–2007 lists ASHRAE 62.1–2004 in its table of references. The latest version of ASHRAE Standard 62 is Standard 62.1–2007.

Ventilation rates can have significant impact on the energy use of commercial buildings. States and local jurisdictions typically specify the ventilation requirements for buildings within their respective building codes and can set these requirements independent of the energy code requirements. Because of the limited reference to ventilation within either the 2004 or the 2007 edition of ASHRAE 90.1, the requirements that States certify that their energy codes meet or exceed the 2007 edition of ASHRAE 90.1 would in general not require modification of State ventilation code requirements. However, in many cases, ventilation requirements can be traced back to requirements found in one or another version of ASHRAE Standard 62.1. For the purpose of the quantitative analysis, DOE assumed ventilation rate for the simulation prototypes based on the requirements ASHRAE 62.1–2004. DOE also performed a sensitivity analysis which calculated the quantitative impacts assuming a ventilation rate based on ASHRAE Standard 62.1–1999.

2. Results of Whole Building Energy Analysis

The quantitative analysis of the energy consumption of buildings built to Standard 90.1–2007, as compared with buildings built to Standard 90.1–2004, indicates national primary energy savings of approximately 3.9 percent of commercial building energy consumption based on the weighting factors for the 15 buildings simulated. Site energy savings are estimated to be approximately 4.6 percent. Using national average fuel prices for electricity and natural gas DOE estimated a reduction in energy expenditures of 3.9 percent would result from the use of ASHRAE Standard 90.1–2007 as compared to ASHRAE Standard 90.1–2004. As identified previously, these estimated savings figures do not include energy savings from equipment or appliance standards that would be in place due to Federal requirements regardless of their presence in the ASHRAE Standard 90.1–2007.

Tables 2 and 3 show the aggregated energy use and associated energy savings by building type for the 15 building prototypes analyzed and on an aggregated national basis for the 2004 and 2007 editions, respectively. For each edition of Standard 90.1, the national building floor area weight used to calculate the national impact on building EUI or building ECI, is presented. The national average electricity and gas building energy use intensity is presented separately for each building prototype analyzed, electricity being the predominant energy usage in all prototypes. National-average site energy use intensities range from over five hundred Btu per square foot annually for the Fast Food prototype to approximately 28 Btu per square foot annually for the Non-refrigerated Warehouse type. Source energy use intensities and building energy cost intensities ($/sf-yr) are also presented. Further details on the quantitative analysis can be found in the full quantitative analysis report available at *http://www.energycodes.gov/implement/determinations_90.1-2007.stm.*

TABLE 2—ESTIMATED ENERGY USE INTENSITY BY BUILDING TYPE—2004 EDITION

Building type	Building prototype	Building type floor area weight %	Whole building EUI data for building population kBtu/ft2-yr				
			Electric EUI	Gas EUI	Site EUI	Source EUI	ECI $/ft^2-yr
Office	Small Office	6.16	35.6	3.6	39.2	117.8	$1.11
	Medium Office	6.64	42.1	4.2	46.3	139.2	1.31
	Large Office	3.65	34.4	5.7	40.1	116.2	1.09
Retail	Stand-Alone Retail	16.76	56.1	15.0	71.1	195.7	1.84
	Strip Mall	6.23	55.2	20.1	75.2	198.3	1.86
Education	Primary School	5.49	47.9	23.5	71.4	178.9	1.68
	Secondary School	11.38	43.7	19.5	63.1	160.9	1.51
Healthcare	Outpatient Health Care	4.80	106.7	54.7	161.4	400.8	3.76
	Hospital	3.79	96.3	57.6	153.9	370.9	3.48
Lodging	Small Hotel	1.89	48.3	26.1	74.3	182.8	1.71
	Large Hotel	5.44	68.5	84.4	152.9	311.0	2.91
Warehouse	Non-Refrigerated Warehouse	18.36	14.5	10.7	25.2	58.1	0.54
Food Service	Fast-Food Restaurant	0.64	226.5	326.1	552.6	1080.0	10.10
	Sit-Down Restaurant	0.72	179.3	202.1	381.4	794.0	7.43
Apartment	Mid-Rise Apartment	8.04	32.5	10.1	42.7	115.1	1.08
National		100	48.1	24.2	72.3	180.3	1.69

TABLE 3—ESTIMATED ENERGY USE INTENSITY BY BUILDING TYPE—2007 EDITION

Building type	Building prototype	Building type floor area weight %	Whole building EUI data for building population kBtu/ft2-yr				
			Electric EUI	Gas EUI	Site EUI	Source EUI	ECI $/ft^2-yr
Office	Small Office	6.16	35.3	3.3	38.6	116.6	$1.10
	Medium Office	6.64	40.2	4.3	44.5	133.2	1.25
	Large Office	3.65	34.3	4.6	38.9	114.7	1.08
Retail	Stand-Alone Retail	16.76	51.4	13.3	64.7	178.9	1.68
	Strip Mall	6.23	52.3	16.9	69.2	185.8	1.74
Education	Primary School	5.49	46.7	19.9	66.6	171.1	1.61
	Secondary School	11.38	42.5	16.6	59.1	154.2	1.45
Healthcare	Outpatient Health Care	4.80	102.1	52.8	154.9	384.3	3.60
	Hospital	3.79	95.8	56.2	152.0	367.7	3.45
Lodging	Small Hotel	1.89	46.5	24.7	71.2	175.7	1.65
	Large Hotel	5.44	69.1	79.1	148.2	307.3	2.88
Warehouse	Non-Refrigerated Warehouse	18.36	14.5	10.6	25.2	58.0	0.54
Food Service	Fast-Food Restaurant	0.64	222.1	319.5	541.6	1058.7	9.90
	Sit-Down Restaurant	0.72	177.5	200.0	377.6	785.9	7.35
Apartment	Mid-Rise Apartment	8.04	31.8	9.0	40.8	111.7	1.05
National		100	46.5	22.5	69.0	173.3	1.63

Table 4 presents the estimated percent energy savings (based on change in EUI) between the 2004 and 2007 editions. Overall, considering those differences that can be reasonably quantified, the 2007 edition is expected to increase the energy efficiency of commercial buildings. Numbers in Table 5 represent percent energy savings; thus, negative numbers represent increased energy use. There is a decrease in gas EUI for all building types except medium office. This decrease in gas EUI represents the majority of the national site energy savings from the 2007 edition. There is a decrease in electrical EUI for all building prototypes except for large hotel.

TABLE 4—ESTIMATED PERCENT ENERGY SAVINGS WITH 2007 EDITION—BY BUILDING TYPE

Building type	Building prototype	Building type floor area weight %	Percent savings in whole building energy use intensity (%)				
			Electric EUI	Gas EUI	Site EUI	Source EUI	ECI
Office	Small Office	6.16	0.8	9.0	1.5	1.0	1.0
	Medium Office	6.64	4.6	−2.3	3.9	4.3	4.4
	Large Office	3.65	0.3	18.0	2.8	1.3	1.3
Retail	Stand-Alone Retail	16.76	8.3	11.2	9.0	8.6	8.6
	Strip Mall	6.23	5.2	15.6	8.0	6.3	6.3
Education	Primary School	5.49	2.5	15.4	6.8	4.4	4.3
	Secondary School	11.38	2.6	14.8	6.3	4.2	4.2
Healthcare	Outpatient Health Care	4.80	4.2	3.4	4.0	4.1	4.1
	Hospital	3.79	0.6	2.3	1.2	0.9	0.9

TABLE 4—ESTIMATED PERCENT ENERGY SAVINGS WITH 2007 EDITION—BY BUILDING TYPE—Continued

Building type	Building prototype	Building type floor area weight %	Percent savings in whole building energy use intensity (%)				
			Electric EUI	Gas EUI	Site EUI	Source EUI	ECI
Lodging	Small Hotel	1.89	3.6	5.2	4.2	3.9	3.9
	Large Hotel	5.44	−1.0	6.3	3.0	1.2	1.2
Warehouse	Non-Refrigerated Warehouse	18.36	0.0	0.7	0.3	0.2	0.2
Food Service	Fast Food Restaurant	0.64	1.9	2.0	2.0	2.0	2.0
	Sit-Down Restaurant	0.72	1.0	1.0	1.0	1.0	1.0
Apartment	Mid-Rise Apartment	8.04	2.1	11.5	4.3	3.0	3.0
National		100	3.4	6.9	4.6	3.9	3.9

C. Final Determination Statement

DOE qualitative analysis shows that the changes in textual requirements and stringencies are ''positive,'' in the sense that they would improve energy efficiency in commercial construction.

DOE's quantitative analysis shows that for the 15 prototype buildings, a weighted average national improvement in new building efficiency of 3.7 percent, when considering source energy, and by 4.4 percent, when considering site energy.

As both the 2004 and 2007 editions cover existing buildings, to the extent that these standards are applied to existing buildings in retrofits or in new construction addition, the 2007 edition should also improve the efficiency of the existing building stock.

DOE has, therefore, concluded that Standard 90.1–2007 receive an affirmative determination under Section 304(b) of the ECPA.

III. Filing Certification Statements With DOE

A. Review and Update

Upon publication of this affirmative final determination, each State is required to review and update, as necessary, the provisions of its commercial building energy code to meet or exceed the provisions of the 2007 edition of Standard 90.1. (42 U.S.C. 6833(b)(2)(B)(i)) This action is required to be taken not later than two years from the date of publication of this notice of final determination, unless an extension is provided.

The DOE recognizes that some States do not have a State commercial building energy code or have a State code that does not apply to all commercial buildings. If local building energy codes regulate commercial building design and construction rather than a State code, the State must review and make all reasonable efforts to update as authorized those local codes to determine whether they meet or exceed the 2007 edition of Standard 90.1. States may base their certifications on reasonable actions by units of general purpose local government. Each such State must still review the information obtained from the local governments and gather any additional data and testimony for its own certification.

Note that the applicability of any State revisions to new or existing buildings would be governed by the State building codes. However, it is our understanding that generally, the revisions would not apply to existing buildings unless they are undergoing a change that requires a building permit.

States should be aware that the DOE considers high-rise (greater than three stories) multi-family residential buildings, hotel, motel, and other transient residential building types of any height as commercial buildings for energy code purposes. Consequently, commercial buildings, for the purposes of certification, would include high-rise (greater than three stories) multi-family residential buildings, hotel, motel, and other transient residential building types of any height.

B. Certification

Section 304(b) of ECPA, as amended, requires each State to certify to the Secretary of Energy that it has reviewed and updated the provisions of its commercial building energy code regarding energy efficiency to meet or exceed the Standard 90.1–2007 edition. (42 U.S.C. 6833 (b)) The certification must include a demonstration that the provisions of the State's commercial building energy code regarding energy efficiency meet or exceed Standard 90.1–2007. If a State intends to certify that its commercial building energy code already meets or exceeds the requirements of Standard 90.1–2007, the State should provide an explanation of the basis for this certification, *e.g.,* Standard 90.1–2007 is incorporated by reference in the State's building code regulations. The chief executive of the State (*e.g.,* the Governor) or a designated State official, such as the Director of the State energy office, State code commission, utility commission, or equivalent State agency having primary responsibility for commercial building energy codes, would provide the certification to the Secretary. Such a designated State official would also provide the certifications regarding the codes of units of general purpose local government based on information provided by responsible local officials.

ECPA also requires the Secretary to permit extensions of the deadlines for the State certification if a State can demonstrate that it has made a good faith effort to comply with the requirements of Section 304 of ECPA and that it has made significant progress in doing so. (42 U.S.C. 6833(c))

DOE does list the States that have filed certifications and those that have or have not adopted new codes on the DOE Energy Efficiency and Renewable Energy Web site at *http://www.energycodes.gov/states/.* The letters can also be found on each State's Web site under Recovery Act activity. Under Section 304(d) and (3) of ECPA, once a State has adopted a new commercial code, DOE typically provides software, training, and support for the new code as long as the new code is based on the national model codes (in this case, ASHRAE Standard 90.1).

Some States develop their own codes that are only loosely related to the national model codes and DOE does not typically provide technical support for those codes. However, DOE does provide grants to these States through grant programs administered by the National Energy Technology Laboratory (NETL). DOE does not prescribe how each State adopts and enforces its energy codes.

It should be noted that the 2010 edition of Standard 90.1 has been published by ASHRAE, and DOE has prepared a preliminary determination on which comments will be taken. Were DOE to make a positive determination on the 2010 edition, the 2010 edition would supersede the 2007 edition. If the 2010 edition of the Standard 90.1 is finalized before the 2 year deadline to file a certification for the 2007 positive determination then a state may file just one certification to address both determinations.

C. Request for Extensions To Certify

Section 304(c) of ECPA requires that the Secretary permit an extension of the deadline for complying with the certification requirements described above, if a State can demonstrate that it has made a good faith effort to comply with such requirements and that it has made significant progress toward meeting its certification obligations. (42 U.S.C. 6833(c)) Such demonstrations could include one or both of the following: (1) A plan for response to the requirements stated in section 304; and/or (2) a statement that the State has appropriated or requested funds (within State funding procedures) to implement a plan that would respond to the requirements of Section 304 of ECPA. This list is not exhaustive.

IV. Regulatory Analysis

A. Review Under Executive Order 12866

Today's action is a significant regulatory action under section 3(f)(1) of Executive Order 12866, ''Regulatory Planning and Review'' (58 FR 51735 (Oct. 4, 1993)). Accordingly, today's action was reviewed by the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB).

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires the preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' (67 FR 53461 (Aug. 16, 2002)), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process (68 FR 7990). DOE has made its procedures and policies available on the Office of General Counsel's Web site: *http://www.gc.doe.gov.*

DOE has reviewed today's final determination under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. Today's final determination of improved energy efficiency between the ASHRAE 2004 and 2007 of Standard 90.1 requires States to undertake an analysis of their respective building codes and to update codes, if necessary. As such, the only entities directly regulated by this final determination would be States. DOE does not believe that there will be any direct impacts on small entities such as small businesses, small organizations, or small governmental jurisdictions.

On the basis of the foregoing, DOE certifies that this final determination would not have a significant economic impact on a substantial number of small entities. Accordingly, DOE has not prepared a regulatory flexibility analysis for this final determination. DOE's certification and supporting statement of factual basis will be provided to the Chief Counsel for Advocacy of the Small Business Administration pursuant to 5 U.S.C. 605(b).

C. Review Under the National Environmental Policy Act of 1969

DOE has determined that today's action is covered under the Categorical Exclusion found in DOE's National Environmental Policy Act regulations at paragraph A.6. of Appendix A to subpart D, 10 CFR Part 1021. That Categorical Exclusion applies to actions that are strictly procedural, such as rulemaking establishing the administration of grants. Today's action is required by Title III of ECPA, as amended, which provides that whenever the Standard 90.1–1989, or any successor to that code, is revised, the Secretary must make a determination, not later than 12 months after such revision, whether the revised code would improve energy efficiency in commercial buildings and must publish notice of such determination in the **Federal Register.** (42 U.S.C. 6833(b)(2)(A)) If the Secretary determines that the revision of Standard 90.1–1989 or any successor thereof, improves the level of energy efficiency in commercial buildings then no later than two years after the date of the publication of such affirmative determination, ECPA requires each State to certify that it has reviewed and updated the provisions of its commercial building code regarding energy efficiency with respect to the revised or successor code. (42 U.S.C. 6833(b)(2)(B)(i)) If the Secretary makes a determination that the revised standard will not improve energy efficiency in commercial buildings then State commercial codes shall meet or exceed the last revised standard for which the Secretary has made a positive determination. (42 U.S.C. 6833(b)(2)(B)(ii)) Therefore, DOE has determined that the Secretary's determination is not a major federal action that would have direct environmental impacts. Accordingly, DOE has not prepared an environmental assessment or an environmental impact statement.

D. Review Under Executive Order 13132, ''Federalism''

Executive Order 13132, 64 FR 43255 (Aug. 4, 1999), imposes certain requirements on agencies formulating and implementing policies or regulations that pre-empt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions.

DOE has reviewed the statutory authority. Congress found that:

(1) Large amounts of fuel and energy are consumed unnecessarily each year in heating, cooling, ventilating, and providing domestic hot water for newly constructed residential and commercial buildings because such buildings lack adequate energy conservation features;

(2) Federal voluntary performance standards for newly constructed buildings can prevent such waste of energy, which the Nation can no longer afford in view of its current and anticipated energy shortage;

(3) The failure to provide adequate energy conservation measures in newly constructed buildings increases long-term operating costs that may affect adversely the repayment of, and security for, loans made, insured, or guaranteed by Federal agencies or made by federally insured or regulated instrumentalities; and

(4) State and local building codes or similar controls can provide an existing means by which to assure, in coordination with other building requirements and with a minimum of Federal interference in State and local transactions, that newly constructed buildings contain adequate energy conservation features. (42 U.S.C. 6831)

Pursuant to Section 304(b) of ECPA, DOE is statutorily required to determine whether the most recent versions of ASHRAE 90.1 would improve the level of energy efficiency in commercial buildings as compared to the previous version. If DOE makes a positive determination, the statute requires each State to certify that it has reviewed and updated the provisions of its commercial building code regarding energy efficiency with respect to the revised or successor codes. (42 U.S.C. 6833(b)(2)(B)(i))

Executive Order 13132, 64 FR 43255 (Aug. 4, 1999) requires meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications unless ''funds necessary to pay the direct costs incurred by the State and local governments in complying with the regulation are provided by the Federal Government.'' (62 FR 43257) Pursuant to Section 304(e) of ECPA, the Secretary is required to ''provide incentive funding to States to implement the requirements of [Section 304], and to improve and implement State residential and commercial building energy efficiency codes, including increasing and verifying compliance with such codes. In determining whether, and in what amount, to provide incentive funding under this subsection, the Secretary shall consider the actions proposed by the State to implement the requirements of this section, to improve and implement residential and commercial building energy efficiency codes, and to promote building energy efficiency through the use of such codes.'' (42 U.S.C. 6833(e)) Therefore, consultation with States and local officials regarding this determination was not required.

However, DOE notes that State and local governments were invited to participate in the development Standard 90.1–2007. Standard 90.1–2007, was developed in a national American National Standards Institute consensus process open to the public and in which State and local governments participate along with DOE and other interested parties. It is the product of a series of amendments to the prior addition of the standard. Each addendum is put out for national public review. Anyone may submit comments, and in the process comments were received from State and local governments. Comments on the addendum are received, reviewed and resolved through a consensus process. Members of the standards project committee have included representatives of State and local governments.

DOE annually holds a national building energy codes workshop at which the progress on development of the model energy codes are presented, along with discussion and sharing of problems and successes in adoption, implementation, and enforcement of building energy codes. The predominate attendance of these workshops are State and local officials responsible for building energy codes. They are consistently encouraged and urged to participate in the model building energy code processes, which will be the subject of DOE's next determinations under section 304 of ECPA. Thus, State and local officials have had the opportunity to participate in the development of the standard through the ASHRAE process. Some have done so.

Similarly, the comments of States and local governments about provisions of the developing Standard 90.1–2007 were received in formal comment periods and heard and addressed in ASHRAE committee deliberations open to the public. In addition, concerns and issues about adoption, implementation and enforcement issues were presented and discussed at informal sessions at the Department's annual national workshops on building energy codes. DOE believes that the above process has given State and local jurisdictions extensive opportunity to comment on and express their concerns on Standard 90.1–2007, the subject of this determination.

On issuance of this determination that Standard 90.1–2007 would improve the energy efficiency of commercial buildings, ECPA requires the States to certify to the Secretary that it has reviewed and updated the provisions of its commercial building code regarding energy efficiency to meet or exceed the requirements of Standard 90.1–2007. DOE notes that ECPA sets forth this requirement for States. (42 U.S.C. 6833(b)(2)(B)(i)) States are given broad freedom to either adopt Standard 90.1–2007 or develop their own code that meets equivalent energy efficiency.

E. Review Under the Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) generally requires Federal agencies to examine closely the impacts of regulatory actions on State, local, and tribal governments. Subsection 101(5) of Title I of that law defines a Federal intergovernmental mandate to include any regulation that would impose upon State, local, or tribal governments an enforceable duty, except a condition of Federal assistance or a duty arising from participating in a voluntary Federal program. Title II of that law requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and tribal governments, in the aggregate, or to the private sector, other than to the extent such actions merely incorporate requirements specifically set forth in a statute. Section 202 of that title requires a Federal agency to perform a detailed assessment of the anticipated costs and benefits of any rule that includes a Federal mandate which may result in costs to State, local, or tribal governments, or to the private sector, of $100 million or more. Section 204 of that title requires each agency that proposes a rule containing a significant Federal intergovernmental mandate to develop an effective process for obtaining meaningful and timely input from elected officers of State, local, and tribal governments.

Today's action requires each State under Section 304 of ECPA to review and update, as necessary, the provisions of its commercial building energy code to meet or exceed the provisions of the 2007 edition of Standard 90.1. (42 U.S.C. 6833(b)(2)(B)(i)) The statutory requirements of ECPA require DOE to provide a determination irrespective of costs. While the processes that States may undertake to update their codes vary widely, as a general rule a State at a minimum would need to:

- Evaluate Standard 90.1–2007 using the background material provided by DOE.
- Compare the existing State commercial building energy code to Standard 90.1–2007 to see if an update is needed.
- Update the State commercial building energy code to meet or exceed Standard 90.1–2007.

DOE evaluated the potential for State activity to exceed $100 million in any one year. The approach looked at the three steps for minimum activity listed in the previous paragraph—evaluate, compare and update. A fourth potential step of providing training on the new code was also considered as some States may consider training on the new code to be an integral part of adopting the new code. For the three steps of minimum activity, DOE estimated the following:

Evaluate Standard 90.1–2007—DOE estimated a minimum of 8 hours of review per State and a maximum review time of 500 hours of review per State (12.5 work weeks). The minimum review time of 8 hours (one day) is the estimated minimum amount of time can see States taking to review Standard 90.1–2007. Simply reading and reviewing the **Federal Register** notice, the qualitative analysis document and the quantitative analysis document will take the average person several hours. Deciding on whether or not to upgrade to Standard 90.1–2007 may take another couple of hours. The maximum review time of 500 hours (62.5 day, 3 working months) upper limit was estimated as the amount of time that a state that was not familiar with energy codes at all or which has a particularly arduous review process within the state would take to review these documents.

(1) A cost per hour of $100 per hour was assumed based on actual rates

proposed in subcontracts associated with compliance studies funded by DOE. The average rate calculated from these subcontracts for 10 types of building officials from 6 States was $93.41, so DOE chose to round this up to $100 per hour.

a. Low estimate—8 hours * 50 States * $100 per hour = $40,000.

b. High estimate—500 hours * 50 States * $100 per hour = $2,500,000.

(2) Compare Standard 90.1–2007 to existing state code—Assuming the State is familiar with its code and has performed an effective evaluation of Standard 90.1 in the first step, the range of potential costs should be similar to Step 1. (See Step 1 for discussion of 8 hour and 500 hour times and $100 per hour cost estimate).

a. Low estimate—8 hours * 50 States * $100 per hour = $40,000.

b. High estimate—500 hours * 50 States * $100 per hour = $2,500,000.

(3) Update the State Codes to meet or exceed Standard 90.1–2007—Adopting a new energy code could be as simple as updating an order within the State, or it could be very complex involving hearings, testimony, etc. Again, the range of potential costs should be similar to Step 1. (See Step 1 for discussion of origin of 8 hour and 500 hour times and $100 per hour cost estimate).

a. Low estimate—8 hours * 50 States * $100 per hour = $40,000.

b. High estimate—500 hours * 50 States * $100 per hour = $2,500,000.

The potential range of total costs to States to under these assumptions would be $120,000 to $7.5 million. This range is well below the $100 million threshold in the Unfunded Mandates Act. DOE has also considered potential costs were States to include providing training on the new code.

(4) Train Code officials on New Code—Assuming every jurisdiction has at least one person that needs to be trained on energy code. There are roughly 40,000 general purpose local governments, or jurisdictions, in the U.S. The total number of jurisdictions in the U.S. that enforce energy codes is not known with any degree of certainty. The National League of Cities publishes an estimate of the number of local governments in the U.S. at *http://www.nlc.org/about_cities/cities_101/142.aspx.* Their summary indicates the following:

- 19,429 Municipal governments;
- 16,504 Town or Township governments;
- 3,034 County governments;
- 13,506 School districts; and
- 35,052 Special district governments.

DOE believes it is reasonable to assume that all of the municipal governments, town or township governments, and county governments could be required to acquire training on Standard 90.1–2007 in order to enforce this standard as an adopted energy code. In addition, the 50 state governments would be required to acquire training. This number adds up to 19,429+16,504+3,034+50 = 38,667. Another widely mentioned estimate of the total number of code adopting jurisdictions in the U.S. is 44,000. This number is based on the National Conference of States on Building Codes and Standards (NCBCS). See, for example, *http://www.ncsbcs.org/newsite/New%20Releases/RW_Presentation_060602.htm.* Both these estimates are in reasonable agreement and so DOE assumed that there are 40,000 potential jurisdictions that potentially would need training on a new energy code. This number is likely to be on the extreme high end of possible values. DOE believes there are approximately 38,000 to 44,000 jurisdictions that could adopt energy codes. Many of those jurisdictions do not adopt energy codes and many of those jurisdictions have already adopted Standard 90.1–2007 or the 2009 IECC as evidenced by the BECP maps that show 14 States have already adopted 90.1–2007 or the equivalent. DOE believes that 40,000 is very much on the high side of the estimate for jurisdictions that may need training on Standard 90.1–2007, but in the absence of a lower defensible value, DOE has chosen to use this higher conservative number.

Based on training experiences of the Building Energy Codes Program staff, with conducting training sessions for jurisdictional staff regarding Standard 90.1, one full-day (8 hours) of training is normally sufficient. Therefore we have used 8 hours as a low estimate and 16 hours as a high estimate for training hours required if a jurisdiction were to adopt Standard 90.1–2007.

a. Low estimate—8 hours * 40,000 jurisdictions * $100 per hour = $32,000,000.

b. High Estimate—16 hours * 40,000 jurisdictions * $100 per hour = $64,000,000.

Adding the potential training costs of $32 million to $64 million to the costs for the 3 steps indicates a potential total costs ranging from $32.12 million to $71.5 million. The high end of this estimate is less than the $100 million threshold in the Unfunded Mandates Act. Accordingly, no further action is required under the Unfunded Mandates Reform Act of 1995.

F. Review Under the Treasury and General Government Appropriations Act of 1999

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

G. Review Under the Treasury and General Government Appropriations Act of 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516, note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed today's action under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

H. Review Under Executive Order 13211

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to the OMB a Statement of Energy Effects for any proposed significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (3) is designated by the Administrator of the Office of Information and Regulatory Affairs (OIRA) as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use, should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

Today's action would not have a significant adverse effect on the supply, distribution, or use of energy and is therefore not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

I. Review Under Executive Order 13175

Executive Order 13175. ''Consultation and Coordination with Indian tribal Governments'' (65 FR 67249 (Nov. 9, 2000)), requires DOE to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' ''Policies that have tribal implications'' refers to regulations that have ''substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.'' Today's regulatory action is not a policy that has ''tribal implications'' under Executive Order 13175. DOE has reviewed today's action under Executive Order 13175 and has determined that it is consistent with applicable policies of that Executive Order.

Issued in Washington, DC, on July 13, 2011.

Kathleen Hogan,

Deputy Assistant Secretary for Energy Efficiency, Office of Technology Development, Energy Efficiency and Renewable Energy.

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DEPARTMENT OF ENERGY

[Docket No. EERE–2006–BC–0132]

RIN 1904–AC42

Building Energy Standards Program: Preliminary Determination Regarding Energy Efficiency Improvements in the Energy Standard for Buildings, Except Low-Rise Residential Buildings, ANSI/ASHRAE/IESNA Standard 90.1–2010

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notice of preliminary determination.

SUMMARY: The Department of Energy (DOE) has preliminarily determined that the 2010 edition of the *Energy Standard for Buildings, Except Low-Rise Residential Buildings,* American National Standards Institute (ANSI)/American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE) Illuminating Engineering Society of North America (IESNA) Standard 90.1–2010, (Standard 90.1–2010 or the 2010 edition) would achieve greater energy efficiency in buildings subject to the code, than the 2007 edition (Standard 90.1–2007 or the 2007 edition). Also, DOE has preliminarily determined that the quantitative analysis of the energy consumption of buildings built to Standard 90.1–2010, as compared with buildings built to Standard 90.1–2007, indicates national source energy savings of approximately 18.2 percent of commercial building energy consumption. Additionally, DOE has preliminarily determined site energy savings are estimated to be approximately 18.5 percent. If these determinations are finalized, States would be required to certify that they have reviewed the provisions of their commercial building code regarding energy efficiency, and as necessary, updated their code to meet or exceed the energy efficiency of Standard 90.1–2010. Additionally, this notice provides guidance to States on Certifications, and Requests for Extensions of Deadlines for Certification Statements, should the preliminary determination be adopted as final.

DATES: Comments on the preliminary determination must be provided by August 19, 2011.

ADDRESSES: You may submit comments, identified by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail: ASHRAE90.1-2010–DET-0050@ee.doe.gov.* Include RIN 1904–AC42 in the subject line of the message.
- *Postal Mail:* Michael Erbesfeld, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Forrestal Building, Mail Station EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121, Please submit one signed paper original.
- *Hand Delivery/Courier:* Michael Erbesfeld, U.S. Department of Energy, Building Technologies Program, Room 6003, 1000 Independence Avenue, SW., Washington, DC 20585–0121.

Instructions: All submissions must include the agency name, Department of Energy, and docket number, EERE–2006–BC–0132, or Regulatory Information Number (RIN), 1904–AC42, for this preliminary determination.

FOR FURTHER INFORMATION CONTACT: Michael Erbesfeld, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Forrestal Building, Mail Station EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121, (202) 287–1874, e-mail: *michael.erbesfeld@ee.doe.gov.* For legal issues contact Mrs. Kavita Vaidyanathan, U.S. Department of Energy, Office of the General Counsel, Forrestal Building, GC–71, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586–0669, e-mail: *Kavita.Vaidyanathan@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

A. Statutory Requirements

Title III of the Energy Conservation and Production Act, as amended (ECPA), establishes requirements for the Building Energy Efficiency Standards Program. (42 U.S.C. 6831 *et seq.*) Section 304(b), as amended, of ECPA provides that whenever the ANSI/ASHRAE/IESNA Standard 90.1–1989 (Standard 90.1–1989 or 1989 edition), or any successor to that code, is revised, the Secretary must make a determination, not later than 12 months after such revision, whether the revised code would improve energy efficiency in commercial buildings and must publish notice of such determination in the **Federal Register**. (42 U.S.C. 6833 (b)(2)(A)) The Secretary may determine that the revision of Standard 90.1–1989 or any successor thereof, improves the level of energy efficiency in commercial buildings. If so, then not later than two years after the date of the publication of such affirmative determination, each State is required to certify that it has reviewed and updated the provisions of its commercial building code regarding energy efficiency with respect to the revised or successor code. (42 U.S.C. 6833(b)(2)(B)(i)) The State must include in its certification a demonstration that the provisions of its commercial building code, regarding energy efficiency, meet or exceed the revised standard. (42 U.S.C. 6833(b)(2)(B)(i))

If the Secretary makes a determination that the revised standard will not improve energy efficiency in commercial buildings, State commercial codes shall meet or exceed the last revised standard for which the Secretary has made a positive determination. (42 U.S.C. 6833(b)(2)(B)(ii)). Published elsewhere in this **Federal Register** issue is the DOE's final determination updating the reference code to Standard 90.1–2007.

ECPA also requires the Secretary to permit extensions of the deadlines for the State certification if a State can demonstrate that it has made a good faith effort to comply with the requirements of Section 304(c) of ECPA and that it has made significant progress in doing so. (42 U.S.C. 6833(c))

B. Background

1. Publication of Standard 90.1–2010

ASHRAE and the Illuminating Engineering Society of North America (IESNA) approved the publication of the 2010 edition of *Energy Standard for Buildings Except Low-rise Residential Buildings,* in October 2010.

The Standard was developed under ANSI-approved consensus standard procedures. Standard 90.1 is under continuous maintenance by a Standing Standard Project Committee (SSPC) for which the ASHRAE Standard Committee has established a documented program for regular publication of addenda or revisions, including procedures for timely, documented, consensus action on requests for change to any part of the standard. The American National Standards Institute (ANSI) approves addenda prior to their publication by ASHRAE and IESNA and prior to their inclusion in a new version of Standard 90.1. ANSI approved the final addendum for inclusion in Standard 90.1–2010 on July 24, 2010. Appeals were made to several addenda and the results of the appeals process was not final until October 15, 2010. The 2010 edition was published on October 28, 2010.

2. Analysis Methodology

In arriving at a preliminary determination, the DOE first reviewed all significant changes between the 2010 edition and the 2007 edition of Standard 90.1. Standard 90.1 is complex and covers a broad spectrum of the energy related components and systems in buildings ranging from simple storage buildings to complex hospitals and laboratories. The size of buildings addressed range from those smaller than single family homes to the largest buildings in the world. The approach to development of the standard used in the 2010 edition was not changed from that used for the 2007 edition, with no changes to the scope or the way components are defined. DOE preliminarily determined that because no significant changes were made to the structure, scope, or component definitions of Standard 90.1–2007, a similar methodology used for the analysis of Standard 90.1–2007 could be utilized for the analysis of Standard 90.1–2010, consisting of a qualitative comparison of the textual changes to requirements in Standard 90.1–2010 from Standard 90.1–2007, and a quantitative estimate of the energy savings developed from whole building simulations of a standard set of buildings constructed to both Standards over a range of U.S. climates. DOE used an extension of the procedure used for the Standard 90.1–2007 determination for the quantitative estimate of energy savings. The extension was that additional building types were added to the analysis. DOE used the same simulation tool and data for weighing the results by building type and climate as used for the 90.1–2007 determination.

A discussion of the analysis methodology, which was subject to public comment in 2009, can be found in the Notice of Preliminary Determination for Standard 90.1–2007, which was published in the **Federal Register**. 75 FR 54117 (Sept. 3, 2010)

DOE recognizes that the methodology proposed for the quantitative analysis will be insufficient for determining an absolute quantification of energy savings estimates associated with using Standard 90.1–2010 (*e.g.,* total quads of energy savings) and makes no such claim for the analysis on which this preliminary determination relies. DOE's quantitative analysis includes many of the changes brought about in Standard 90.1–2010 that can be modeled, but this quantitative analysis is not able to quantify accurately all the likely effects of the new standard. In particular, the degree to which the market may react to certain changes brought about following the adoption of a new building code, and the degree to which different requirements are currently being met or will be met in future construction, are exceedingly difficult to ascertain and would affect the absolute quantification of energy savings. However, DOE believes that the quantitative determination process outlined does provide a reasonable approach to establishing whether, in concert, the changes brought about by ASHRAE Standard 90.1–2010 will result in improved energy efficiency in buildings over ASHRAE Standard 90.1–2007.

DOE continues to believe that the preliminary determination should rely on both quantitative and qualitative comparisons. While quantitative estimates of energy savings are indeed a much preferred method of comparison, it is not always possible to simulate or provide appropriate weighting to many features in Standard 90.1. Therefore, DOE will continue to note changes that individually or in net result in increased energy efficiency, even where they could not be accurately quantified. States can use this information when upgrading their energy codes.

DOE continues to believe that the quantitative analysis should be based on the minimum requirements of each standard that reflect the minimum set of options available in new construction. In assessing the impact of those requirements, DOE also believes that assessment should be based on an estimate of typical construction practices. DOE believes that this has been done in the quantitative analysis.

For this preliminary determination, DOE utilized 5 years of previous building construction data, as developed using proprietary F.W. Dodge building statistical data by building type and by location down to the county level and purchased by DOE, to develop weighting factors to weight the building simulation results. (A summary of the data is available in a PNNL report—PNNL–19116—Jarnagin and Bandyopodhyay, 2010, Weighting Factors for the Commercial Building Prototypes used in the Development of ANSI/ASHRAE/IESNA Standard 90.1–2010 at *http://www.pnl.gov/main/publications/external/technical_reports/PNNL-19116.pdf.*) Past determinations have relied on new construction floor space growth estimates extracted from the Energy Information Administration's (EIA) National Energy Modeling System (NEMS) as the basis for weighting energy savings across building types and regions. DOE believes that for the purpose of this analysis the F.W. Dodge construction data provides better mapping of actual construction by region and building type than could be obtained using the EIA/NEMS data. In particular, the use of county-level construction data allowed DOE to develop building construction statistics directly reflecting construction in each of the ASHRAE climate regions, avoiding many assumptions on regional construction volume that would be necessary using the EIA/NEMS data.

Consistent with the previous analysis for Standard 90.1–2007, DOE compared versions of Standard 90.1 ''as a whole'' and did not issue determinations for individual addenda. DOE interprets the language in Section 304(b)(2) of ECPA to mean that when a comprehensive revision of the ASHRAE Standard is published (which in this case is ASHRAE Standard 90.1–2010), then that revised or successor standard triggers the Secretary's obligation to issue a determination as to whether the revised standard improves energy efficiency. This determination is made by comparing the revised or successor standard to the last predecessor standard. While the addenda process is part of the ongoing maintenance of the standard and thus continually modifies or revises the existing standard over time, it would be an unreasonable reading of the statute to categorize each addenda in this maintenance process as a ''revised or successor standard'' within the meaning of Section 304(b)(2) of ECPA, so as to require a determination by the Secretary. Such an interpretation of the statute would put an unreasonable burden both on the States and DOE. For the States, a determination by the Secretary requires some State action, and what is required depends upon whether the Secretary issues an affirmative or a negative determination. If the Secretary were required to issue a determination after each addenda was published, the States would be constantly required to change their codes. This would affect the stability and certainty of State commercial building codes.

The statutory language in Section 304(b) of ECPA states that the Secretary is required to make a determination as to whether any successor standard to ASHRAE Standard 90.1–1989 will improve energy efficiency. (42 U.S.C. 6833(b)(2)(A)) The Secretary must publish a notice of this determination in the **Federal Register**. The language does not require that DOE perform an independent economic analysis as part of the determination process. Section 304(b) of ECPA does not include any reference to language concerning economic justification.

However, Congress did address consideration of the technological feasibility and cost effectiveness of the Voluntary Building Energy Codes. Section 307 of ECPA requires DOE to participate in the ASHRAE process and to assist in determining the cost effectiveness and technical feasibility of the ASHRAE standard. (42 U.S.C. 6836) It also requires DOE to periodically review the economic basis of the voluntary building energy codes and participate in the industry process for review and modification, including seeking adoption of all technologically feasible and economically justified energy efficiency measures. (42 U.S.C. 6836(b))

The fact that the Section 304 of ECPA determination process does not require the Secretary to perform an economic analysis does not diminish the importance that the ASHRAE standards be technologically feasible and economically justified. However, the statute addresses these issues by directing DOE to participate in the ASHRAE process itself.

DOE has chosen to use the same DOE Reference Buildings (formerly called Benchmark buildings) in the quantitative analysis for Standard 90.1–2010 as used in the Standard 90.1–2007 quantitative analysis. The only significant difference is that one additional building model, representing high-rise multi-family construction is now available for use in the analysis.

DOE's preliminary quantitative determination was carried out using the EnergyPlus building simulation tool. DOE switched to use of EnergyPlus for the Standard 90.1–2007 analysis and has continued to use Energy Plus since then. The current version of Energy Plus, EnergyPlus version 4.0, was used for this preliminary determination.

II. Summary of the Comparative Analysis

DOE carried out both a detailed qualitative analysis and a broad quantitative analysis of the differences between the requirements and the stringencies in the 2007 and the 2010 editions of Standard 90.1.

A. Qualitative Analysis

1. Discussion of Detailed Textual Analysis

DOE performed a detailed analysis of the differences between the textual requirements and stringencies of the 2007 and 2010 editions in the scope of the standard, the building envelope requirements, the building lighting and power requirements, and the building mechanical equipment requirements.

The emphasis of DOE's detailed requirement and stringency analysis was on looking at the specific changes that ASHRAE made in going from Standard 90.1–2007 to Standard 90.1–2010. ASHRAE publishes changes to their standards as addenda to the preceding standard and then bundles all the addenda together to form the next edition. ASHRAE processed 109 addenda to Standard 90.1–2007 to create Standard 90.1–2010. Each of these addenda was evaluated by DOE in preparing this preliminary determination.

In addition, each standard has multiple ways to demonstrate compliance, including a prescriptive set of requirements by section of the standard, various tradeoff approaches within those same sections, and a whole building performance method (Energy Cost Budget or ECB). For each addendum DOE identified whether it applies to the prescriptive requirements, or one of the tradeoff paths provided for in the envelope, lighting, or mechanical sections, or the ECB whole building performance path. For each addendum DOE identified the impact on the stringency for that path to compliance.

Overall, DOE found that the vast majority of changes made to Standard 90.1–2007 to create Standard 90.1–2010 were positive or neutral (in the context of energy efficiency). Positive changes greatly outweighed the negative energy efficiency changes. Specifically, of the 109 total changes:

56 were considered positive,
47 were considered neutral,
6 were considered negative.

The 56 positive changes greatly overwhelm the 6 negative changes in terms of a simple numerical comparison. In addition, the 6 negative changes were considered to be ''minor negatives'', with 19 of the positive changes being considered ''major positive'' and an additional 37 positive changes being considered ''minor positive''. Not only do the positive changes outweigh the negative changes in raw numbers, but also in terms of the estimated impact.

2. Results of Detailed Textual Analysis

Table 1 presents the results of DOE's addendum-by-addendum analysis of Standard 90.1–2010. Table 6 is a reformatted and slightly modified version of a table in the preliminary qualitative analysis. The complete preliminary qualitative analysis may be found on the DOE codes Web site at *http://www.energycodes.gov/status/determinations_com.stm.*

TABLE 1—RESULTS OF ADDENDUM-BY-ADDENDUM ANALYSIS

No.	Addendum to Standard 90.1–2007	Section affected	Description of changes	Impact on energy efficiency and reason
1	a	6. Heating, Ventilating, and Air Conditioning.	Remove closed cooling tower requirements from 6.8.1G.	0 (clarifies that requirements do not apply to closed cooling towers).
2	b	6. Heating, Ventilating, and Air Conditioning.	Revises exception a to section 6.5.2.3 to allow for codes other than ASHRAE 62.1 to dictate minimum ventilation rates.	Minor − (allows larger minimum ventilation rates if required by other codes).
3	c	6. Heating, Ventilating, and Air Conditioning.	Adds vivarium to list of spaces that require specific humidity levels to satisfy process needs.	Minor − (allows exception to dehumidification controls for vivariums).
4	d	3. Definitions, Abbreviations, and Acronyms; 5. Building Envelope; 9. Lighting.	Adds exceptions for Solar Heat Gain Coefficient (SHGC) and Visible Transmittance (VT) requirements for skylights; adds requirement for including visible light transmittance test results with construction documents; adds information on determining daylit area under skylights, automatic daylighting controls (with exceptions), and submittal requirements.	Major + (requires daylighting controls under skylights and commissioning of daylighting controls).
5	e	6. Heating, Ventilating, and Air Conditioning.	Changes exhaust air energy recovery requirements and harmonizes requirements in simplified section 6.3.2 with requirements in the 6.5 prescriptive path.	Major + (increased use of heat recovery).
6	f	5. Building Envelope	Requires high albedo roofs in hot climates.	Major + (requires cool roofs in hot climates).
7	g	3. Definitions, Abbreviations, and Acronyms; 5. Building Envelope.	Updates building envelope criteria for metal buildings.	Minor + (increases envelope requirements for metal buildings).
8	h	6. Heating, Ventilating, and Air Conditioning.	Adds another exception to Section 6.5.2.1 Limitation of Simultaneous Heating and Cooling. The exception addresses apparent conflict between standards and allows users to achieve comfort, meet the code, and save energy.	Minor + (allows another exception that saves energy in some applications).
9	i	9. Lighting	Applies a four-zone lighting power density approach to exterior lighting requirements. Deletes the 5% additional power allowance in 9.4.5 and replaces it with a base wattage allowance per site. Defines the four zones and applies the appropriate requirements.	Major + (lowers illuminance requirements in certain zones).
10	j	6. Heating, Ventilating, and Air Conditioning; 12. Normative References; Appendix E. Informative References.	Updates the mechanical test procedures references in the standard. The changes also modify a reference in Table 6.8.1E, the normative references in Chapter 12, and the informative references in Informative Appendix E.	0 (updating references).
11	k	6. Heating, Ventilating, and Air Conditioning.	Updates Tables 6.8.1E and 7.8 to identify specific sections of referenced standards. Table 7.8 also reflects the current federal efficiency levels for residential water heaters and adds a requirement for electric table-top water heaters.	0 (updating tables to reflect current federal standards).
12	l	6. Heating, Ventilating, and Air Conditioning.	Adds minimum efficiency and certification requirements for axial and centrifugal fan closed-circuit cooling towers. Also adds a reference to ATC–105S, The Cooling Technology Institute test standard for closed-circuit cooling towers to Section 12.	0 (Requirement codifies industry standard practice).

TABLE 1—RESULTS OF ADDENDUM-BY-ADDENDUM ANALYSIS—Continued

No.	Addendum to Standard 90.1–2007	Section affected	Description of changes	Impact on energy efficiency and reason
13	m	6. Heating, Ventilating, and Air Conditioning.	Updates chiller efficiency requirements. Establishes additional path of compliance for water-cooled chillers. Combines all water-cooled chillers into one category and adds a new size category for centrifugal chillers at or above 600 tons.	Major + (updates chiller efficiency requirements).
14	n	6. Heating, Ventilating, and Air Conditioning.	Extends Variable Air Volume (VAV) fan control requirements to large single-zone units.	Major + (extends control requirements to another equipment class).
15	o	8. Power	Modifies the scope of Section 8 and adds requirements specific to low voltage dry-type distribution transformers.	0 (implements Federal efficiency standards for transformers).
16	p	6. Heating, Ventilating, and Air Conditioning.	Provides pressure credits for laboratory exhaust systems that allow prescriptive compliance with the standard.	Minor − (increases allowable pressure drop in laboratory exhaust systems).
17	q	5. Building Envelope	Vestibules, remove CZ4 exception	Minor + (applies vestibule requirement in more locations).
18	r	Informative Appendix G. Performance Rating Method.	Changes Informative Appendix G Performance Rating Method into a Normative Appendix. Additionally, some language has been modified to make the Appendix Enforceable.	0 (performance rating method only).
19	s	6. Heating, Ventilating, and Air Conditioning.	Updates the Coefficient of Performance (COP) at 17 °F efficiency levels for commercial heat pumps and introduces a new part-load energy efficiency descriptor (IEER) for all commercial unitary products above 65,000 Btu/h of cooling capacity.	0 (replaces Integrated Part Load Value (IPLV) with Energy Efficiency Ratio (EER) to capture part load performance).
20	t	6. Heating, Ventilating, and Air Conditioning.	Removes the term "replacement" and "new construction" from the product classes listed in Table 6.8.1D and replaces them with the terms "nonstandard size" and "standard size" to clarify that one product class is intended for applications with nonstandard size exterior wall openings while the other is intended for applications with standard size exterior wall openings. Also amends section 6.4.1.5.2 and footnote b to Table 6.8.1D to clarify that nonstandard size packaged terminal equipment have sleeves with an external wall opening less than 16 in. high or less than 42 in. wide to reflect existing applications where the wall opening is not necessarily less than 16 in. high and less than 42 in. wide. However, to avoid a potential abuse of the definition, nonstandard size packaged terminal equipment are required to have a cross-sectional area of the sleeves less than 670 in^2.	0 (clarification of definitions).
21	u	6. Heating, Ventilating, and Air Conditioning.	Adds a new section requiring centrifugal fan open-circuit cooling towers over 1100 gpm at the rating conditions to meet efficiency requirements for axial fan units found in 6.8.1G.	Minor + (applies cooling tower requirements more broadly).

TABLE 1—RESULTS OF ADDENDUM-BY-ADDENDUM ANALYSIS—Continued

No.	Addendum to Standard 90.1–2007	Section affected	Description of changes	Impact on energy efficiency and reason
22	v	6. Heating, Ventilating, and Air Conditioning; 12. Normative References.	Revises section 6.4.2.1 to reference ANSI/ASHRAE/ACCA Standard 183–2007 for sizing heating and cooling system design loads. Adds requirements for calculating pump head.	0 (updates references).
23	w	Normative Appendix G. Performance Rating Method.	Changes footnote to Table G3.1.1A to make it clear that Exception a to Section G3.1.1 also applies here. Changes the exception to G3.1.2.10 on Exhaust Air Energy Recovery for multifamily buildings because they are unlikely to have a centralized exhaust air system needed to effectively recover heat.	0 (performance rating method)
24	x	9. Lighting	Updates requirements for automatic lighting shutoff, adds specific occupancy sensor applications, and provides additional clarification.	Major + (adds occupancy sensor requirements for many specific applications).
25	y	7. Service Water Heating	Establishes ARI 1160 as the test procedure for heat pump pool heaters and requires that the minimum COP of 4 be met at the low outdoor temperature of 50 °F.	Minor + (requires COP be met at lower temperature).
26	aa	9. Lighting	Adds space exceptions for automatic lighting controls.	Minor + (limits automatic-on controls to specific space types).
27	ab	3. Definitions, Abbreviations, and Acronyms; and 9. Lighting.	Adds definitions and provides daylighting control requirements for side-lighted spaces.	Major + (adds daylighting control requirements for side-lighted spaces).
28	ac	3. Definitions, Abbreviations, and Acronyms; 9. Lighting.	Adds incentives to use advanced lighting controls.	0 (alternate compliance path).
29	ad	6. Heating, Ventilating, and Air Conditioning.	Includes certification requirements for liquid-to-liquid heat exchangers to benefit both manufacturers and consumers, allow product comparisons, and provide incentives to manufacturers to improve efficiency in order to gain market share.	0 (documentation only).
30	ae	6. Heating, Ventilating, and Air Conditioning.	Adds a requirement for insulating the surfaces of radiant panels that do not face conditioned spaces.	Minor + (reduced heat loss in radiant panels).
31	af	6. Heating, Ventilating, and Air Conditioning.	Provides requirement for designers, contractors, and owners to properly size system piping (hydronic systems) to balance ongoing energy costs and first costs.	Minor + (requires proper hydronic system sizing).
32	ag	5. Building Envelope	Adds requirement for rigid board insulation overlap.	Minor + (reduces potential for thermal bridging).
33	ai	Normative Appendix G. Performance Rating Method.	Removes requirement for comparing proposed buildings utilizing chilled water with a baseline building with on-site chillers, and instead requires a baseline that also uses purchased chilled water. Details modifications to be made to the baseline HVAC systems when purchased chilled water or heat are included.	0 (alternative compliance path).
34	aj	10. Other Equipment	Updates the text and table of Chapter 10 to comply with new federal law for motors rated at 1.0 horsepower and greater. Adding this information will help designers, end-use customers, and code officials with motor specifications and verifications.	0 (implements Federal motor requirements).

TABLE 1—RESULTS OF ADDENDUM-BY-ADDENDUM ANALYSIS—Continued

No.	Addendum to Standard 90.1–2007	Section affected	Description of changes	Impact on energy efficiency and reason
35	ak	6. Heating, Ventilating, and Air Conditioning.	Adds a pump isolation requirement for systems with multiple chillers and boilers and temperature reset requirement for equipment with a minimum Btu/h. Revises wording to have requirements of 6.5.4.1 apply only to cooling systems. Changes threshold of variable speed systems to 7.5 HP. Adds requirement for differential pressure reset. Does not preclude also implementing chilled water supply temperature setpoint reset. Includes requirements for hydronic Heat Pump and Water-Cooled Unitary Air Conditioners.	Minor + (reduces pumping energy).
36	al	5. Building Envelope	Adds skylight requirements in certain space types (enclosed spaces) to promote daylighting energy savings.	Major + (requires skylights and daylighting in some building types.
37	am	5. Building Envelope	Revise air leakage criteria for fenestration and doors.	Minor + (decreased air leakage).
38	an	5. Building Envelope	Expands table of default U-values for single-digit rafter roofs.	0 (updates default tables).
39	ao	6. Heating, Ventilating, and Air Conditioning.	Repairs know errata to Table 6.8.1E and re-orders the notes to properly organize them. Corrects the error of identifying E_C, which should be listed as Et under "Warm Air Furnaces, Gas-Fired" and also eliminates incorrect and redundant footnotes.	0 (editorial only).
40	ap	6. Heating, Ventilating, and Air Conditioning.	Includes demand controlled ventilation in the simplified approach.	Major + (reduces ventilation energy).
41	aq	Title, 1. Purpose, and 2. Scope	Modify Title Purpose & Scope of ASHRAE 90.1.	0 (no impact now, but does allow future positive additions to Standard 90.1).
42	ar	9. Lighting	Corrects an oversight in previous versions where expanded exterior lighting power limits were put in place but the details of how to calculate the installed power and compare it to the limits was not included. This language revision puts the needed details in the standard.	0 (editorial only).
43	as	6. Heating, Ventilating, and Air Conditioning.	Removes exception for VAV turndown requirements for zones with special pressurization requirements. Reduces laboratory threshold where VAV or heat recovery is required.	Minor + (saves large amount of fan and reheat energy in hospitals).
44	at	6. Heating, Ventilating, and Air Conditioning.	Clears up inconsistencies and conflicts regarding damper requirements in Chapter 6.	0 (editorial only).
45	au	6. Heating, Ventilating, and Air Conditioning.	Updates efficiency tradeoff table for eliminating economizers.	0 (alternate compliance path).
46	av	9. Lighting	Changes Section 9.1.2 to require that in all spaces where alterations take place, all requirements of Section 9 are met. Changes exception so that the lighting power density (LPD) requirements of the standard are met in the altered space if less than 10% of luminaries are replaced.	Major + (expansion of new lighting power densities to more retrofits).

TABLE 1—RESULTS OF ADDENDUM-BY-ADDENDUM ANALYSIS—Continued

No.	Addendum to Standard 90.1–2007	Section affected	Description of changes	Impact on energy efficiency and reason
47	aw	9. Lighting	Recognizes practical design application of excluding bathroom lighting from "master" switch control in hotel/motel guest rooms and adds a requirement to eliminate wasted light in guest room bathrooms. Adds a 5W allowance for night lights that recognizes the practical current design application of guest room bathroom night light use but at a reasonable low level.	Minor − (adds additional lighting allowance).
48	ax	3. Definitions, Abbreviations, and Acronyms; 6. Heating, Ventilating, and Air Conditioning.	Expands requirements for Kitchen Exhaust Systems (formerly Kitc8.4.1hen Hoods). Includes addition of definitions for transfer air, replacement air, and makeup air. Add Table 6.5.7.1.3 defining the maximum exhaust flow rate through various hood types (CFM/Linear Foot of Hood Length). Include provisions for hoods with flows greater than 5,000 CFM. Require performance testing to evaluate design airflow rates and demonstrate capture and containment performance.	Minor + (more stringent kitchen exhaust requirements).
49	ay	9. Lighting	Change that requires users to identify spaces by function.	Minor + (requires users to use proper LPDs).
50	az	9. Lighting	Adds requirements for lighting controls to be functionally tested to ensure proper use and appropriate energy savings.	Minor + (requires testing of lighting systems).
51	ba	6. Heating, Ventilating, and Air Conditioning.	Allows a system performance option that allows for compensating for the insulating value of the piping while maintaining the same net thermal requirements.	0 (alternative compliance path).
52	bc	5. Building Envelope	Clarifies that the requirements in Section 5.5.4.2.3 are also specified for unconditioned spaces.	0 (clarification only).
53	bd	8. Power	Removes emergency circuits not used for normal building operation from the requirements which will lead to increased compliance. Allows for an increased conformance/use of 90.1 standard by eliminating issues of impracticality of feeder drop requirements for emergency circuits and provides significant initial cost savings.	0 (removes emergency circuits from requirements, but only impact is when emergency circuits are activated).
54	bf	3. Definitions, Abbreviations, and Acronyms; 4. Administration and Enforcement; 5. Building Envelope.	Modifies language to include performance requirements for air leakage of the opaque envelope.	Minor + (reduces air leakage allowances in opaque envelope).
55	bg	6. Heating, Ventilating, and Air Conditioning; 12. Normative References.	Establishes a product class for water-to-water heat pumps. Intent is to recognize the technology in 90.1 by requiring minimum energy efficiency standards. Cooling Energy Efficiency Ratios (EERs) and heating COPs are proposed for products with cooling capacities below 135,000 Btu/h at standard rating conditions listed in International Organization for Standardization (ISO) standard 13256–2.	Minor + (adds requirement where no requirement previously existed).

TABLE 1—RESULTS OF ADDENDUM-BY-ADDENDUM ANALYSIS—Continued

No.	Addendum to Standard 90.1–2007	Section affected	Description of changes	Impact on energy efficiency and reason
56	bh	6. Heating, Ventilating, and Air Conditioning.	Provides requirements for multiple zone HVAC systems (that include simultaneous heating and cooling) to include controls that automatically raise the supply air-temperature when the spaces served are not at peak load conditions. Allows an override of the temperature reset if a maximum space humidity setpoint is exceeded. There is an exception from this requirement for warm and humid climate zones 1a, 2a, and 3a.	Major + (requires supply air temperature reset for non-peak conditions).
57	bi	6. Heating, Ventilating, and Air Conditioning.	Updates requirements for piping insulation, including incorporation of new 90.1 SPPC economic criteria used in developing standard requirements. Adds footnotes to address constrained locations and clarify requirements for direct buried piping.	Minor + (reduced piping heat loss/ gain).
58	bj	Normative Appendix G. Performance Rating Method.	Adds an exception within Appendix G that allows users to claim energy cost savings credit for the increased ventilation effectiveness of certain HVAC system designs.	0 (alternative compliance path).
59	bk	3. Definitions, Abbreviations and Acronyms; and 10. Other Equipment.	Includes the minimum efficiency requirements for both Subtype I and Subtype II motors as well as clarifies what specific motor types these requirements apply to.	0 (clarification only).
60	bl	6. Heating, Ventilating, and Air Conditioning.	Corrects the intent of the standard to not exempt all chillers with secondary coolants for freeze protection from coverage by Table 6.8.1C and removes ambiguity. Changes footnote a to Table 6.8.1C in recognition of lower practical scope limits for the lower limit introduced in Addendum M for centrifugal chillers.	Minor + (removes exemption for some chillers).
61	bm	5. Building Envelope	Coordinates terminology for visible transmittance with NFRC 200.	0 (terminology only).
62	bn	5. Building Envelope; 11. Energy Cost Budget Method.	Limits use of poorly oriented fenestration—compliance shown by having more south-facing than west-facing fenestration. Provides exceptions for retail glass and buildings potentially shaded from the south or west. Exception also provided for certain additions and alterations.	Minor + (limits poor fenestration orientation).
63	bo	Normative Appendix G. Performance Rating Method.	Effort to keep requirements of Section 11 and Appendix G consistent with other addenda. Makes changes related to Addenda E, S, and U.	0 (alternative compliance path).
64	bp	9. Lighting	Allows the use of control that provides automatic 50% auto on with the capability to manually activate the remaining 50% and has full auto-off.	Minor + (allows use of additional energy saving control strategy).
65	bq	9. Lighting	Retail lighting additional allowance levels reduced.	Minor + (lower retail lighting energy).
66	br	9. Lighting	Adds an exterior zone 0 to cover very low light requirement areas.	Minor + (reduced exterior lighting energy).

TABLE 1—RESULTS OF ADDENDUM-BY-ADDENDUM ANALYSIS—Continued

No.	Addendum to Standard 90.1–2007	Section affected	Description of changes	Impact on energy efficiency and reason
67	bs	8. Power	Adds requirements to provide a means for non-critical receptacle loads to be automatically controlled based on occupancy or scheduling without additional individual desktop or similar controllers.	Minor + (reduces energy use during unoccupied periods).
68	bt	6. Heating, Ventilating, and Air Conditioning.	Modifies equation for determining the performance adjustment factor for chillers under nonstandard conditions. Adds labeling requirements for chillers to make compliance determinations simpler.	Minor + (chillers that were previously exempt are no longer exempt).
69	bu	3. Definitions, Abbreviations, and Acronyms; and 6. Heating, Ventilating, and Air Conditioning.	Modifies and adds to requirements for computer rooms.	Major + (adds efficiency requirements for data centers).
70	bv	Normative Appendix G. Performance Rating Method.	Effort to keep requirements of Section 11 and Appendix G consistent with other addenda to 90.1. This addendum includes changes to Section 11 and Appendix G due to Addendum Y, AJ, BK, and AX.	0 (alternative compliance paths).
71	bw	6. Heating, Ventilating, and Air Conditioning.	Amends minimum energy efficiency requirements for standard-size package terminal equipment to be consistent with the new federal standards.	0 (implements existing Federal standards).
72	bx	6. Heating, Ventilating, and Air Conditioning.	Supplements changes made in addendums H and AS. Attempts to bring into alignment requirements of ASHRAE 90.1 and ASHRAE 62.1. Limits the reheat supply air temperature from ceiling supply air devices to achieve better room air distribution and reduce short-circuiting of air into ceiling return air inlets. Promotes alternative methods of heating perimeter spaces with high heat losses other than use of a VAV box with terminal reheat.	Minor + (limits reheat supply air temperatures).
73	by	3. Definitions, Abbreviations, and Acronyms;. 9. Lighting	Revision represents a complete review, update, correction, and restructuring of the modeling and calculation basis for the space type and resulting whole building type lighting power densities.	Major + (lowered lighting power densities).
74	ca	6. Heating, Ventilating, and Air Conditioning.	Closes a loophole in the fan power allowances for single zone variable air volume (VAV) systems.	Minor + (removes fan power allowance for VAV systems without terminal units).
75	cb	6. Heating, Ventilating, and Air Conditioning.	Adds requirement for simple systems to meet prescriptive outdoor air damper requirements. Allows backdraft dampers only for exhaust and relief dampers in buildings less than 3 stories in height. Requires backdraft dampers on outdoor air intakes to be protected from wind limiting windblown infiltration through the damper. Moves climate zone 5a to the category of climates that require low leak dampers. Corrects a mistake in Table 6.4.3.4.4. Reformats Table 6.4.3.4.4 for clarity.	Major + (expansion of automatic damper requirements).
76	cc	6. Heating, Ventilating, and Air Conditioning.	Corrects a mistake in the way 8'' pipe was analyzed.	Minor − (increases allowable flow rate in 8'' pipe).

TABLE 1—RESULTS OF ADDENDUM-BY-ADDENDUM ANALYSIS—Continued

No.	Addendum to Standard 90.1–2007	Section affected	Description of changes	Impact on energy efficiency and reason
77	cd	9. Lighting	Additions to (1) strengthen language to actually require exterior control rather than just require the control capability, (2) add bi-level control for general all-night applications such as parking lots to reduce lighting when not needed, and (3) add control for façade and landscape lighting not needed after midnight.	Major + (requires control of exterior lighting—savings during night when lights not needed).
78	ce	9. Lighting	Adds requirements for multilevel control capability (bi-level switching) in all spaces except those specifically exempted.	0 (manual control requirement).
79	cf	9. Lighting	Adds requirements for automatic reduction of stairway lighting within 30 minutes of occupants exiting the zone.	Minor + (energy savings through use of controls in stairways).
80	ch	11. Energy Cost Budget Method; Normative Appendix G. Performance Rating Method.	Clarifies baseline minimum setpoints for fan-powered boxes and VAV reheat boxes. Modifies exceptions to: remove exception originally intended for hospitals and laboratory type spaces, clarify that lab systems with greater than 5000 cfm of exhaust air use a single VAV baseline system; and add exception to the 50% lab VAV minimum airflow to address minimum ventilation requirements lab designers follow to meet codes and accreditation standards.	0 (alternative compliance path).
81	ck	6. Heating, Ventilating, and Air Conditioning.	Expands zone-level demand controlled ventilation to include various forms of system level strategies. It is being added to the prescriptive section, so that it could be traded off using the Energy Cost Budget (ECB) method.	Minor + (expands automatic zone reset in multizone systems).
82	cl	3. Definitions, Abbreviations, and Acronyms;. 5. Building Envelope	Clarifies how to interpret the use of dynamic glazing which are designed to be able to vary a performance property such as Solar Heat Gain Coefficient (SHGC), rather than having just a single value.	0 (alternative compliance path).
83	cn	9. Lighting	Adds two versions of a combined advanced control to the control incentives table (9.6.2). These control system combinations involve personal workstation control and workstation-specific occupancy sensors for open office applications.	0 (alternative compliance path).
84	co	6. Heating, Ventilating, and Air Conditioning.	This proposal makes three amendments to Table 6.8.1A. First, it updates EER and IEER values for all condensing units and water and evaporatively cooled air conditioners with cooling capacities greater than 65,000 Btu/h. Second, the proposal establishes a separate product class for evaporatively cooled air conditioners with different energy efficiency standards. Third, the proposal replaces the IPLV descriptor for condensing units with the new IEER metric and amends the EERs with more stringent values.	Minor + (improves efficiency of minor market products).

TABLE 1—RESULTS OF ADDENDUM-BY-ADDENDUM ANALYSIS—Continued

No.	Addendum to Standard 90.1–2007	Section affected	Description of changes	Impact on energy efficiency and reason
85	cp	3. Definitions, Abbreviations, and Acronyms;. 6. Heating, Ventilating, and Air Conditioning.	Establishes efficiency requirements for Variable Refrigerant Flow (VRF) air conditioners and heat pumps including heat pumps that use a water source for heat rejection.	0 (not more stringent than common practice).
86	cq	6. Heating, Ventilating, and Air Conditioning; Informative Appendix E. Informative References.	Addendum is based on economic analysis using the current scalar value. Nearly all classes are economically justified at seal class A, allowing for the removal of two tables.	Minor + (reduced duct leakage).
87	cr	3. Definitions, Abbreviations, and Acronyms; 11. Energy Cost Budget Method and Normative Appendix G. Performance Rating Method.	Modifies definition of unmet load hour and adds definition for temperature control throttling range. Requires that both baseline and proposed unmet hours not exceed 300. Removes language allowing modification of system coil capacities to reduce unmet hours as needed.	0 (alternative compliance paths).
88	cs	8. Power	Modifies automatic receptacle control requirements and exemptions to eliminate potential practical application issues.	Major+ (minimizes exceptions to switched receptacle requirement.
89	ct	9. Lighting	Reduces the area threshold where side daylighting requires daylight sensor control down to 250 square feet.	Minor + (reduce area requirement for occupancy sensors).
90	cv	10. Other Equipment	Adds requirements for service water pressure booster systems.	Minor + (adds requirements for service water pressure booster systems).
91	cw	11. Energy Cost Budget Method	Revises the Energy Cost Budget for service hot water heaters. Corrects contradiction with section 11.32(b). Provides user instruction for situations where a certain type of service hot water system is not listed in Table 7.8.	0 (alternative compliance path).
92	cy	6. Heating, Ventilating, and Air Conditioning.	Makes several revisions to the economizer requirements in section 6.5.1 and 6.3.2. Updates Table 6.3.2 which allows for the elimination of economizers through the use of higher efficiency HVAC equipment.	Major + (expands use of economizers).
93	cz	9. Lighting	Incorporates bi-level control for parking garages to reduce energy waste during unoccupied periods.	Minor + (reduced parking garage lighting).
94	da	Normative Appendix G. Performance Rating Method.	Establishes that an Appendix G baseline shall be based on the minimum ventilation requirements required by local codes or a rating authority and not the proposed design ventilation rates.	0 (performance rating method).
95	db	Normative Appendix G. Performance Rating Method.	This addendum modifies the design air flow rates for laboratory systems in the baseline building in Appendix G.	0 (performance rating method).
96	dc	9. Lighting	Removes information related to tandem wiring of lighting.	Minor − (tandem wiring no longer used in practice—possible small increase in energy usage).
97	dd	5. Building Envelope; and 9. Lighting	Reduces the area threshold where skylights are required to be designed into building spaces down to 5000 square feet and similarly reduces the threshold where daylighting controls must be applied to 900 square feet.	Major + (requires daylighting controls in more spaces).

TABLE 1—RESULTS OF ADDENDUM-BY-ADDENDUM ANALYSIS—Continued

No.	Addendum to Standard 90.1–2007	Section affected	Description of changes	Impact on energy efficiency and reason
98	de	9. Lighting	Splits the "generic lobby" from common elevator lobbies and lighting power densities were adjusted to reflect specific space needs. Also removes the fitness center audience seating because it's considered a space type that was considered not used and potentially confusing.	0 (allows more lighting power in lobbies but less in elevator lobbies).
99	df	10. Other Equipment	Adds requirements that address excess energy use in elevators due to ventilation fans and cab lighting.	Minor + (small lighting and ventilation savings).
100	dg	3. Definitions, Acronyms, and Abbreviations; and Normative Appendix G. Performance Rating Method.	Adds a definition for the term "field-fabricated fenestration" used in section 5.4.3.2 consistent with Interpretation IC 90.1–2007–01 and similar language in California's Title 24.	0 (clarification of definition).
101	di	3. Definitions, Abbreviations, and Acronyms; 6. Heating, Ventilating, and Air Conditioning.	Adds requirements for enclosed parking garage ventilation.	Minor + (reduced parking garage ventilation energy).
102	dj	6. Heating, Ventilating, and Air Conditioning.	Limits the fan energy allowance for energy recovery devices to values that approximate the results of the economic analysis, with some allowance to permit adequate pressure drop for products near the minimum recovery effectiveness of 50%. A separate allowance is also created for coil runaround loop systems.	Minor + (limits fan energy allowance of energy recovery devices).
103	dk	Normative Appendix C. Methodology for Building Envelope Trade-Off Option in Subsection 5.6.	Adds clarity and instruction to the users of Appendix C, the envelope trade off option, for new requirements that were added in addendums AL, BC, and BN. AL required skylights and lighting controls in certain occupancies. BC required skylights and lighting controls in unconditioned semi-heated spaces. BN dealt with orientation specific SHGC requirements.	0 (alternative compliance path).
104	dl	Normative Appendix C. Methodology for Building Envelope Trade-Off Option in Subsection 5.6.	Gives instruction to the users of Appendix C on how to model the base envelope design and the proposed envelope design on how to comply with the cool roof provisions of Section 5.	0 (alternative compliance path).
105	dn	Normative Appendix G. Performance Rating Method.	This addendum adds system types 9 and 10 for heated only storage spaces and associated changes.	0 (performance rating method).
106	do	4. Administration and Enforcement; 9. Lighting.	Establishes the goals and requirements of the lighting system including controls and ensures that owners are provided all the information necessary to best use and maintain lighting systems.	0 (documentation only).
107	dp	12. Normative References	Updates the references in 90.1 to reflect the current edition of the cited standard. Substantive changes in the referenced documents did not affect the requirements in 90.1 or change the stringency of the requirements of 90.1.	0 (updates references).
108	dq	Normative Appendix C. Methodology for Building Envelope Trade-Off Option in Subsection 5.6.	Modifies the calculations found in Appendix C in order to reflect modifications to the modeling assumptions.	0 (alternative compliance path).

TABLE 1—RESULTS OF ADDENDUM-BY-ADDENDUM ANALYSIS—Continued

No.	Addendum to Standard 90.1–2007	Section affected	Description of changes	Impact on energy efficiency and reason
109	dr	9. Lighting	Original purpose of 9.4.4 was to limit the use of inefficient lighting sources for high wattage applications when there was not a comprehensive table of lighting power density limits. With such a table now in place, section 9.4.4 is no longer necessary	0 (editorial only).

Table 2 is an overall summary of the addenda in terms of their impact in the qualitative analysis. Overall, the sum of the major positive and minor positive addenda (56) greatly overwhelms the number of minor negative addenda (6), leading to the conclusion that the overall impact of the addenda on the standard is positive.

TABLE 2—OVERALL SUMMARY OF ADDENDA IMPACT IN QUALITATIVE ANALYSIS

Major negative	Minor negative	Neutral	Minor positive	Major positive	Total
None	6	47	37	19	109

The 6 negative impacts on energy efficiency include:

1. Addendum b—allows larger than minimum ventilation rates if required by other codes.
2. Addendum c—allows an exception to dehumidification for controls for vivariums.
3. Addendum p—increases allowable pressure drop in laboratory exhaust systems.
4. Addendum aw—adds an additional lighting allowance for nightlights in hotel/motel bathrooms.
5. Addendum cc—allows higher flow rates in 8'' piping.
6. Addendum dc—eliminates tandem wiring requirement.

None of these negative impacts are judged to be significant. Addendum b simply acknowledges that Standard 90.1 does not address ventilation rates that are required in other codes. Addendum c simply adds vivariums (spaces used for plant or animal growth) to the list of spaces that may have more stringent humidity requirements than normal spaces. Addendum p increases allowable pressure drop in laboratory exhaust systems and addresses some noted shortcomings in the previous version of Standard 90.1 with regard to fume hoods. Addendum aw acknowledges the common practice of the use of bathroom lights as ''nightlights'' in hotel/motel guest rooms. Addendum cc corrects a calculation error in the previous version of Standard 90.1. Addendum dc eliminates a tandem wiring requirement for ballasts that is no longer used with the widespread use of electronic ballasts.

The 19 major positive impacts on energy efficiency include:

1. Addendum d—requires daylighting controls under skylights and commissioning of daylighting controls.
2. Addendum e—requires increased use of heat recovery.
3. Addendum f—requires cool roofs in hot climates.
4. Addendum i—lower illuminance requirements in certain exterior zones.
5. Addendum m—updates chiller efficiency requirements.
6. Addendum n—extends VAV fan control requirements.
7. Addendum x—adds occupancy sensor requirements for many specific applications.
8. Addendum ab—adds daylighting control requirements for side-lighted spaces.
9. Addendum al—requires skylights and daylighting in some building types.
10. Addendum ap—reduces ventilation energy.
11. Addendum av—expansion of new lighting power densities to more retrofits.
12. Addendum bh—requires supply air temperature reset for non-peak conditions.
13. Addendum bu—adds efficiency requirements for data centers.
14. Addendum by—required lower lighting power densities.
15. Addendum cb—expands automatic damper requirements.
16. Addendum cd—requires control of exterior lighting.
17. Addendum cs—minimizes exceptions to switched receptacle requirement.
18. Addendum cy—expands use of economizers.
19. Addendum dd—requires daylighting controls in more spaces.

Many of these ''major positive'' addenda are self descriptive. The high-level themes of the major positive addenda tend to be as follows:

• Better lighting, daylighting, and controls (d, i, x, ab, al, av, by, cd, cs, and dd).
• Better mechanical systems and application to more systems (e, m, n, ap, bh, bu, cb, and cy).
• Better building envelope (f).

There are an additional 37 addenda that have minor positive impacts. See the complete qualitative analysis for additional detail.

B. Quantitative Analysis

1. Discussion of Whole Building Energy Analysis

The quantitative comparison of Standard 90.1–2010 was carried out using whole-building energy simulations of buildings built to both Standard 90.1–2007 and Standard 90.1–2010. DOE simulated 16 representative building types in 15 U.S. climate locations, each climate location selected to be representative of one of the 15 U.S climate zones used in the definition of building energy code criteria in Standard 90.1–2007 and Standard 90.1–2010. The simulations were developed using specific building prototypes based on the DOE commercial reference building models developed for DOE's

Net-Zero Energy Commercial Building Initiative. (These reference building prototypes were formerly known as Benchmark building models.)

For each building prototype simulated in each climate the energy use intensities (EUI) by fuel type and by end-use were extracted. These EUIs by fuel type for each building were then weighted to national average EUI figures using weighting factors based on the relative square footage of construction represented by that prototype in each of the 15 climate regions. These weighting factors were based on commercial building construction starts data for a five year period from 2003 to 2007. The source of data was the McGraw-Hill Construction Projects Starts Database (MHC). The MHC database captures over 90% of new commercial construction in any given year and the collection process is independently monitored to ensure the coverage of most of the commercial construction in the U.S. The data is used by other Federal agencies such as the U.S. Census Bureau, the Federal Reserve and the U.S. Department of Health and Human Services (HHS) for characterizing building construction in the U.S. For the purpose of developing construction weighting factors, the strength of this data lies in the number of samples, the characterization of each sample in terms of building end-use and size and number of stories, the frequency of data collection, and the detailed location data. In addition, the MHC database can be used to identify multifamily residential buildings that would be covered under ASHRAE Standard 90.1.

DOE's prototypes reflect the use of two fuel types, electricity and natural gas. Using the weighting factors, DOE was able to establish an estimate of the relative reduction in building energy use, as determined by a calculated reduction in weighted average site EUI for each building prototype. Site energy refers to the energy consumed at the building site. In a corresponding fashion, DOE was also able to calculate a reduction in terms of weighted average primary EUI and in terms of weighted average energy cost intensity (ECI) in $/sq. ft. of building floorspace. Primary energy as used here refers to the energy required to generate and deliver energy to the site. To estimate primary energy, all electrical energy use intensities were first converted to primary energy using a factor of 10,918 Btus primary energy per kWh (based on the 2010 estimated values reported in Table 2 of the EIA 2010 Annual Energy Outlook, release date December 2009, available at *http://www.eia.doe.gov/oiaf/archive/aeo10/aeoref_tab.html*).

The conversion factor of 10,918 was calculated from Table 2 by summing the commercial electricity value of 4.62 quads with the electricity losses value of 10.17 quads and then dividing that sum by the commercial value. ((4.62 + 10.17)/4.62 = 3.2) This yields an electricity ratio of 3.2 for converting how much primary (source) electricity is required per unit of site required electricity. This ratio of 3.2 is then multiplied by 3,412 Btu per kWh, producing a value of 10,918 Btus primary energy per kWh of site energy. Natural Gas EUIs in the prototypes were converted to primary energy using a factor of 1.090 Btus primary energy per Btu of site natural gas use (based on the 2010 national energy use estimated shown in Table 2 of the AEO 2010). This natural gas source energy conversion factor was calculated by dividing the natural gas subtotal of 23.15 quads (sum of all natural gas usage, including usage for natural gas field production, leases, plant fuel, and pipeline (compression) supply) by the delivered natural gas total of 21.23 quads (sum of four primary energy sectors (residential, commercial, industrial, and transportation).

a. Calculation of Energy Cost Index

To estimate the reduction in energy cost index, DOE relied on national average commercial building energy prices of $0.1027/kWh of electricity and $10.06 per 1000 cubic feet ($0.9796/therm) of natural gas, based on EIA statistics for 2010 (the last complete year of data available in Table 5.3 Average Retail Price of Electricity to Ultimate Consumers: Total by End-Use Sector for the commercial sector—available from EIA at *http://www.eia.doe.gov/cneaf/electricity/epm/table5_3.html* and for 2009 (the last complete year of data available from the EIA Natural Gas Annual Summary for the commercial sector available at *http://tonto.eia.doe.gov/dnav/ng/ng_pri_sum_dcu_nus_a.htm.*) DOE recognizes that actual fuel costs will vary somewhat by building type within a region, and will in fact vary more across regions. Nevertheless, DOE believes that the use of simple national average figures illustrates whether there will be energy cost savings sufficient for the purposes of the DOE determination.

b. Calculation of Energy Use Intensities

Energy use intensities developed for each representative building type were weighted by total national square footage of each representative building type to provide an estimate of the difference between the national energy use in buildings constructed to the 2007 and 2010 editions of the Standard 90.1. Note that the 16 buildings types used in the preliminary determination reflect approximately 80% of the total square footage of commercial construction including multi-family buildings greater than three stories covered under ASHRAE Standard 90.1.

Note that only differences between new building requirements were considered in this quantitative analysis. Changes to requirements in the 2010 edition that pertain to existing buildings only are addressed in the detailed textual analysis only.

c. Application to Additions and Renovations

Both the 2010 and 2007 editions address additions and renovations to existing buildings. Since DOE has preliminarily found insufficient data to characterize renovations in terms of what energy using features are utilized, DOE has not determined that the results obtained from the whole building prototypes used would reasonably reflect the EUI benefits that would accrue to renovated floor space. For this reason, renovated floor space is not included in the DOE weighting factors. Building additions on the other hand are believed to be substantially equivalent to new construction. For this reason, FW Dodge construction data on additions has been incorporated into the overall weighting factors. Floor space additions reflect approximately 13 percent of new construction floor space based on data captured in the FW Dodge dataset.

d. Ventilation Rate Assumptions

The preliminary quantitative analysis assumed the same base ventilation level for buildings constructed to Standard 90.1–2007 and Standard 90.1–2010. Neither edition of Standard 90.1 specifies ventilation rates for commercial building construction. ASHRAE has a separate ventilation standard for commercial construction, ASHRAE Standard 62.1 *Ventilation for Acceptable Indoor Air Quality.* This standard is cited only in a few exceptions within the mechanical sections of either Standard 90.1–2007 or Standard 90.1–2010, with each edition referencing a different version of Standard 62.1. Standard 90.1–2007 lists Standard 62.1–2004 in its table of references. Standard 90.1–2010 lists Standard 62.1–2007 in its table of references.

Ventilation rates can have significant impact on the energy use of commercial buildings. States and local jurisdictions typically specify the ventilation requirements for buildings within their respective building codes and can set these requirements independent of the energy code requirements. Because of the limited reference to ventilation within either the 2007 or the 2010 edition, the requirements that States certify that their energy codes meet or exceed the 2010 edition of Standard 90.1 would in general not require modification of State ventilation code requirements. However, in many cases, ventilation requirements can be traced back to requirements found in one or another version of Standard 62.1. For the purpose of the quantitative analysis, DOE assumed ventilation rates for the simulation prototypes based on the requirements of Standard 62.1–2004.

2. Results of Whole Building Energy Analysis

The preliminary quantitative analysis of the energy consumption of buildings built to Standard 90.1–2010, as compared with buildings built to Standard 90.1–2007, indicates national primary energy savings of approximately 18.2 percent of commercial building energy consumption based on the weighting factors for the 16 buildings simulated. Site energy savings are estimated to be approximately 18.5 percent. Using national average fuel prices for electricity and natural gas DOE estimated a reduction in energy expenditures of 18.2 percent would result from the use of Standard 90.1–2010 as compared to Standard 90.1–2007. As identified previously, these estimated savings figures do not include energy savings from equipment or appliance standards that would be in place due to Federal requirements regardless of their presence in the Standard 90.1–2010.

Tables 3 and 4 show the aggregated energy use and associated energy savings by building type for the 16 building prototypes analyzed and on an aggregated national basis for the 2007 and 2010 editions, respectively. For each edition of Standard 90.1, the national building floor area weight used to calculate the national impact on building EUI or building ECI is presented. National-average site energy use intensities ranges from over five hundred Btu per square foot annually for the Fast Food prototype to approximately 20 Btu per square foot annually for the Non-refrigerated Warehouse type. Source energy use intensities and building energy cost intensities ($/sf-yr) are also presented. Further details on the preliminary quantitative analysis can be found in the full preliminary quantitative analysis report available at *http://www.energycodes.gov/status/determinations_com.stm.*

TABLE 3—ESTIMATED ENERGY USE INTENSITY BY BUILDING TYPE—2007 EDITION

Building type	Building prototype	Building type floor area weight %	Whole building EUI data for building population		
			Site EUI kBtu/ft²-yr	Source EUI kBtu/ft²-yr	ECI $/ft²-yr
Office	Small Office	5.61	39.1	118.4	$1.11
	Medium Office	6.05	47.7	140.6	1.32
	Large Office	3.33	42.8	123.3	1.16
Retail	Stand-Alone Retail	15.25	65.0	179.5	1.69
	Strip Mall	5.67	68.3	186.0	1.75
Education	Primary School	4.99	63.4	170.2	1.60
	Secondary School	10.36	54.2	149.7	1.41
Healthcare	Outpatient Health Care	4.37	162.0	438.0	4.11
	Hospital	3.45	156.4	374.9	3.51
Lodging	Small Hotel	1.72	70.8	179.4	1.68
	Large Hotel	4.95	157.1	315.8	2.95
Warehouse	Non-Refrigerated Warehouse	16.72	24.2	58.6	0.55
Food Service	Fast-Food Restaurant	0.59	547.7	1068.0	9.98
	Sit-Down Restaurant	0.66	382.4	810.7	7.59
Apartment	Mid-Rise Apartment	7.32	44.2	123.7	1.16
	High-Rise Apartment	8.97	44.2	129.3	1.22
National		100	67.5	174.0	1.63

TABLE 4—ESTIMATED ENERGY USE INTENSITY BY BUILDING TYPE—2010 EDITION

Building type	Building prototype	Building type floor area weight %	Whole building EUI data for building population		
			Site EUI kBtu/ft²-yr	Source EUI kBtu/ft²-yr	ECI $/ft²-yr
Office	Small Office	5.61	32.8	99.0	$0.93
	Medium Office	6.05	37.1	106.3	$1.00
	Large Office	3.33	33.3	96.8	0.91
Retail	Stand-Alone Retail	15.25	48.0	135.1	1.27
	Strip Mall	5.67	56.9	150.9	1.42
Education	Primary School	4.99	48.0	134.8	1.27
	Secondary School	10.36	39.8	114.9	1.08
Healthcare	Outpatient Health Care	4.37	125.4	340.9	3.20
	Hospital	3.45	118.1	299.5	2.81
Lodging	Small Hotel	1.72	66.6	165.7	1.55
	Large Hotel	4.95	139.8	282.5	2.64
Warehouse	Non-Refrigerated Warehouse	16.72	19.2	45.0	0.42
Food Service	Fast-Food Restaurant	0.59	519.9	976.5	9.12
	Sit-Down Restaurant	0.66	330.9	654.1	6.12
Apartment	Mid-Rise Apartment	7.32	41.2	118.3	1.11

TABLE 4—ESTIMATED ENERGY USE INTENSITY BY BUILDING TYPE—2010 EDITION—Continued

Building type	Building prototype	Building type floor area weight %	Whole building EUI data for building population		
			Site EUI kBtu/ft^2-yr	Source EUI kBtu/ft^2-yr	ECI $/ft^2-yr
	High-Rise Apartment	8.97	41.0	123.5	1.16
National		100	55.5	142.4	1.34

Table 5 presents the estimated percent energy savings (based on change in EUI) between the 2007 and 2010 editions. Overall, considering those differences that can be reasonably quantified, the 2010 edition is expected to increase the energy efficiency of commercial buildings. Numbers in Table 5 represent percent energy savings.

TABLE 5—ESTIMATED PERCENT ENERGY SAVINGS WITH 2010 EDITION—BY BUILDING TYPE

Building type	Building prototype	Building type floor area weight %	Percent savings in whole building energy use intensity (%)		
			Site EUI	Source EUI	ECI
Office	Small Office	5.61	16.1	16.4	16.4
	Medium Office	6.05	22.1	24.4	24.4
	Large Office	3.33	22.3	21.5	21.5
Retail	Stand-Alone Retail	15.25	26.1	24.7	24.7
	Strip Mall	5.67	16.8	18.9	18.9
Education	Primary School	4.99	24.2	20.8	20.8
	Secondary School	10.36	26.7	23.3	23.2
Healthcare	Outpatient Health Care	4.37	22.6	22.2	22.2
	Hospital	3.45	24.5	20.1	20.1
Lodging	Small Hotel	1.72	5.9	7.7	7.7
	Large Hotel	4.95	11.0	10.5	10.5
Warehouse	Non-Refrigerated Warehouse	16.72	20.7	23.1	23.1
Food Service	Fast Food Restaurant	0.59	5.1	8.6	8.6
	Sit-Down Restaurant	0.66	13.5	19.3	19.4
Apartment	Mid-Rise Apartment	7.32	6.8	4.4	4.4
	High-Rise Apartment	8.97	7.2	4.5	4.5
National		100	18.5	18.2	18.2

C. Preliminary Determination Statement

DOE's review and evaluation indicates that there are significant differences between the 2007 edition and the 2010 edition. DOE's overall preliminary conclusion is that the 2010 edition will improve the energy efficiency of commercial buildings.

However, DOE identified six changes in textual requirements that taken alone appear to represent a reduction in stringencies and could decrease energy efficiency. The six changes are:

- Addendum b, which allows larger than minimum ventilation rates if required by other codes;
- Addendum c, which allows an exception to dehumidification for controls for vivariums;
- Addendum p, which increases allowable pressure drop in laboratory exhaust systems;
- Addendum aw, which adds an additional lighting allowance for nightlights in hotel/motel bathrooms;
- Addendum cc, which allows higher flow rates in 8″ piping; and
- Addendum dc, which eliminates tandem wiring requirements.

DOE believes that in these cases, the reduction in stringency was not considered a major impact. For the other addenda, DOE preliminarily determined that the remaining addenda either represented no change in stringency, or indicated a positive change in stringency corresponding to improved efficiency. Overall, DOE preliminarily concluded the changes in textual requirements and stringencies are ''positive,'' in the sense that they would improve energy efficiency in commercial construction.

The quantitative analysis preliminarily shows that for the 16 prototype buildings, a weighted average national improvement in new building efficiency of 16.5 percent, when considering source energy, and by 17.1 percent, when considering site energy.

As both the 2007 and 2010 editions cover existing buildings, to the extent that these standards are applied to existing buildings in retrofits or in new construction addition, the 2010 edition should improve the efficiency of the existing building stock.

DOE has, therefore, preliminarily concluded that Standard 90.1–2010 receive an affirmative determination under Section 304(b) of ECPA.

III. Filing Certification Statements With DOE

A. Review and Update

If today's determination is finalized, each State would be required to review and update, as necessary, the provisions of its commercial building energy code to meet or exceed the energy efficiency provisions of the 2010 edition. (42 U.S.C. 6833(b)(2)(B)(i)) This action would be required to be taken not later than two years from the date of the final determination notice, unless an extension is provided.

The DOE recognizes that some States do not have a State commercial building energy code or have a State code that does not apply to all commercial buildings. If local building energy codes regulate commercial building design and construction rather than a State code, the State must review and make all reasonable efforts to update as authorized those local codes to determine whether they meet or exceed the 2010 edition of Standard 90.1. States may base their certifications on reasonable actions by units of general purpose local government. Each such State must still review the information obtained from the local governments and gather any additional data and testimony for its own certification.

Note that the applicability of any State revisions to new or existing buildings would be governed by the State building codes. However, it is our understanding that generally, the revisions would not apply to existing buildings unless they are undergoing a change that requires a building permit.

States should be aware that the DOE considers high-rise (greater than three stories) multi-family residential buildings, hotel, motel, and other transient residential building types of any height as commercial buildings for energy code purposes. Consequently, commercial buildings, for the purposes of certification, would include high-rise (greater than three stories) multi-family residential buildings, hotel, motel, and other transient residential building types of any height.

B. Certification

If today's determination is finalized, Section 304(b) of ECPA, as amended, requires each State to certify to the Secretary of Energy that it has reviewed and updated the provisions of its commercial building energy code regarding energy efficiency to meet or exceed the Standard 90.1–2010 edition. (42 U.S.C. 6833(b)) If today's determination is finalized before the 2 year deadline to file a certification for the 2007 positive determination then a state may file just one certification to address both determinations. The certification must include a demonstration that the provisions of the State's commercial building energy code regarding energy efficiency meet or exceed Standard 90.1–2010. If a State intends to certify that its commercial building energy code already meets or exceeds the requirements of Standard 90.1–2010, the State should provide an explanation of the basis for this certification, *e.g.*, Standard 90.1–2010 is incorporated by reference in the State's building code regulations. The chief executive of the State (*e.g.*, the Governor) or a designated State official, such as the Director of the State energy office, State code commission, utility commission, or equivalent State agency having primary responsibility for commercial building energy codes, would provide the certification to the Secretary. Such a designated State official would also provide the certifications regarding the codes of units of general purpose local government based on information provided by responsible local officials.

DOE does list the States that have filed certifications and those that have or have not adopted new codes on the DOE Energy Efficiency and Renewable Energy Web site at *http://www.energycodes.gov/states/*. Once a State has adopted a new commercial code, DOE typically provides software, training, and support for the new code as long as the new code is based on the national model codes (in this case, ASHRAE Standard 90.1).

Some States develop their own codes that are only loosely related to the national model codes and DOE does not typically provide technical support for those codes. However, DOE does provide grants to these States through grant programs administered by the National Energy Technology Laboratory (NETL). DOE does not prescribe how each State adopts and enforces its energy codes.

C. Request for Extensions To Certify

Section 304(c) of ECPA, requires that the Secretary permit an extension of the deadline for complying with the certification requirements described above, if a State can demonstrate that it has made a good faith effort to comply with such requirements and that it has made significant progress toward meeting its certification obligations. (42 U.S.C. 6833(c)) Such demonstrations could include one or both of the following: (1) A plan for response to the requirements stated in section 304; or (2) a statement that the State has appropriated or requested funds (within State funding procedures) to implement a plan that would respond to the requirements of Section 304 of ECPA. This list is not exhaustive.

IV. Regulatory Analysis

A. Review Under Executive Order 12866

Today's action is a significant regulatory action under section 3(f)(1) of Executive Order 12866, ''Regulatory Planning and Review'' (58 FR 51735; October 4, 1993). Accordingly, today's action was reviewed by the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB).

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires the preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' (67 FR 53461 (Aug. 16, 2002)), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process (68 FR 7990). DOE has made its procedures and policies available on the Office of General Counsel's Web site: *http://www.gc.doe.gov.*

DOE has reviewed today's preliminary determination under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. If today's action on the preliminary determination of improved energy efficiency between the 2007 and 2010 editions of Standard 90.1 is finalized by DOE then it would require States to undertake an analysis of their respective building codes. As such, the only entities directly regulated by this preliminary determination would be States. DOE does not believe that there will be any direct impacts on small entities such as small businesses, small organizations, or small governmental jurisdictions.

On the basis of the foregoing, DOE certifies that this preliminary determination would not have a significant economic impact on a substantial number of small entities. Accordingly, DOE has not prepared a regulatory flexibility analysis for this preliminary determination. DOE's certification and supporting statement of factual basis will be provided to the Chief Counsel for Advocacy of the Small Business Administration pursuant to 5 U.S.C. 605(b).

C. Review Under the National Environmental Policy Act of 1969

DOE has preliminarily determined that today's action is covered under the Categorical Exclusion found in DOE's National Environmental Policy Act regulations at paragraph A.6. of Appendix A to subpart D, 10 CFR part 1021. That Categorical Exclusion applies to actions that are strictly procedural, such as rulemaking establishing the administration of grants. Today's action is required by Title III of ECPA, as amended, which provides that whenever the Standard 90.1–1989, or any successor to that code, is revised, the Secretary must make a determination, not later than 12 months after such revision, whether the revised code would improve energy efficiency in commercial buildings and must publish notice of such determination in the **Federal Register**. (42 U.S.C. 6833(b)(2)(A)) If the Secretary determines that the revision of Standard 90.1–1989 or any successor thereof, improves the level of energy efficiency in commercial buildings then no later than two years after the date of the publication of such affirmative determination, each State is required to certify that it has reviewed and updated the provisions of its commercial building code regarding energy efficiency with respect to the revised or successor code. (42 U.S.C. 6833(b)(2)(B)(i)) If the Secretary makes a determination that the revised standard will not improve energy efficiency in commercial buildings then State commercial codes shall meet or exceed the last revised standard for which the Secretary has made a positive determination. (42 U.S.C. 6833(b)(2)(B)(ii)) Therefore, DOE has preliminarily determined that the Secretary's determination is not a major Federal action that would have direct environmental impacts. Accordingly, DOE has not prepared an environmental assessment or an environmental impact statement.

D. Review Under Executive Order 13132, ''Federalism''

Executive Order 13132, 64 FR 43255 (Aug 4, 1999), imposes certain requirements on agencies formulating and implementing policies or regulations that pre-empt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions.

DOE has reviewed the statutory authority. Congress found that:

(1) Large amounts of fuel and energy are consumed unnecessarily each year in heating, cooling, ventilating, and providing domestic hot water for newly constructed residential and commercial buildings because such buildings lack adequate energy conservation features;

(2) Federal voluntary performance standards for newly constructed buildings can prevent such waste of energy, which the Nation can no longer afford in view of its current and anticipated energy shortage;

(3) The failure to provide adequate energy conservation measures in newly constructed buildings increases long-term operating costs that may affect adversely the repayment of, and security for, loans made, insured, or guaranteed by Federal agencies or made by Federally insured or regulated instrumentalities; and

(4) State and local building codes or similar controls can provide an existing means by which to assure, in coordination with other building requirements and with a minimum of Federal interference in State and local transactions, that newly constructed buildings contain adequate energy conservation features. (42 U.S.C. 6831)

Pursuant to Section 304(b) of ECPA, DOE is statutorily required to determine whether the most recent versions of ASHRAE 90.1 would improve the level of energy efficiency in commercial buildings as compared to the previous version. If DOE makes a positive determination, the statute requires each State to certify that it has reviewed and updated the provisions of its commercial building code regarding energy efficiency with respect to the revised or successor codes. (42 U.S.C. 6833(b)(2)(B)(i))

Executive Order 13132, 64 FR 43255 (August 4, 1999) requires meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications unless ''funds necessary to pay the direct costs incurred by the State and local governments in complying with the regulation are provided by the Federal Government.'' (62 FR 43257) Pursuant to Section 304(e) of ECPA, the DOE Secretary is required to ''provide incentive funding to States to implement the requirements of [Section 304], and to improve and implement State residential and commercial building energy efficiency codes, including increasing and verifying compliance with such codes. In determining whether, and in what amount, to provide incentive funding under this subsection, the Secretary shall consider the actions proposed by the State to implement the requirements of this section, to improve and implement residential and commercial building energy efficiency codes, and to promote building energy efficiency through the use of such codes.'' (42 U.S.C. 6833(e)) Therefore, consultation with States and local officials regarding this preliminary determination was not required.

However, DOE notes that State and local governments were invited to participate in the development Standard 90.1–2010. Standard 90.1–2010, was developed in a national American National Standards Institute consensus process open to the public and in which State and local governments participate along with DOE and other interested parties. It is the product of a series of amendments to the prior addition of the standard. Each addendum is put out for national public review. Anyone may submit comments, and in the process comments were received from State and local governments. Comments on the addendum are received, reviewed and resolved through a consensus process. Members of the standards project committee have included representatives of State and local governments.

DOE annually holds a national building energy codes workshop at which the progress on development of the model energy codes are presented, along with discussion and sharing of problems and successes in adoption, implementation, and enforcement of building energy codes. The predominate attendance of these workshops are State and local officials responsible for building energy codes. They are consistently encouraged and urged to participate in the model building energy code processes, which will be the subject of DOE's next determinations under section 304 of ECPA. Thus, State and local officials have had the opportunity to participate in the development of the standard through the ASHRAE process. Some have done so.

Similarly, the comments of States and local governments about provisions of the developing Standard 90.1–2010 were received in formal comment periods and heard and addressed in ASHRAE committee deliberations open to the public. In addition, concerns and issues about adoption, implementation and enforcement issues were presented and discussed at informal sessions at the Department's annual national workshops on building energy codes. DOE believes that the above process has given State and local jurisdictions extensive opportunity to comment on and express their concerns on Standard 90.1–2010, the subject of this determination.

On issuance of a final determination that Standard 90.1–2010 would improve the energy efficiency of commercial buildings, ECPA requires the States to certify to the Secretary that it has reviewed and updated the provisions of its commercial building code regarding energy efficiency to meet or exceed the requirements of Standard 90.1–2010. DOE notes that ECPA sets forth this requirement for States. (42 U.S.C. 6833(b)(2)(B)(i)) States are given broad freedom to either adopt Standard 90.1–2010 or develop their own code that meets equivalent energy efficiency.

E. Review Under the Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) generally requires Federal agencies to examine closely the impacts of regulatory actions on State, local, and Tribal governments. Subsection 101(5) of Title I of that law defines a Federal intergovernmental mandate to include any regulation that would impose upon State, local, or Tribal governments an enforceable duty, except a condition of Federal assistance or a duty arising from participating in a voluntary Federal program. Title II of that law requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments, in the aggregate, or to the private sector, other than to the extent such actions merely incorporate requirements specifically set forth in a statute. Section 202 of that title requires a Federal agency to perform a detailed assessment of the anticipated costs and benefits of any rule that includes a Federal mandate which may result in costs to State, local, or Tribal governments, or to the private sector, of $100 million or more. Section 204 of that title requires each agency that proposes a rule containing a significant Federal intergovernmental mandate to develop an effective process for obtaining meaningful and timely input from elected officers of State, local, and Tribal governments.

If today's determination is finalized, each State would be required under Section 304 of ECPA to review and update, as necessary, the provisions of its commercial building energy code to meet or exceed the provisions of the 2010 edition of Standard 90.1. (42 U.S.C. 6833(b)(2)(B)(i)) Section 304 of ECPA requires State action in response to a positive determination by DOE. The statutory requirements of ECPA require DOE to provide a determination irrespective of costs. While the processes that States may undertake to update their codes vary widely, as a general rule a State at a minimum would need to:

- Evaluate Standard 90.1–2010 using the background material provided by DOE.
- Compare the existing State commercial building energy code to Standard 90.1–2010 to see if an update is needed.
- Update the State commercial building energy code to meet or exceed Standard 90.1–2010.

DOE evaluated the potential for State activity to exceed $100 million in any one year. The approach looked at the three steps for minimum activity listed in the previous paragraph—evaluate, compare and update. A fourth potential step of providing training on the new code was also considered as some States may consider training on the new code to be an integral part of adopting the new code. For the three steps of minimum activity, DOE estimated the following:

Evaluate Standard 90.1–2010—DOE estimated a minimum of 8 hours of review per State and a maximum review time of 500 hours of review per State (12.5 work weeks). The minimum review time of 8 hours (one day) is the estimated minimum amount of time DOE can see States taking to review Standard 90.1–2010. Reading and reviewing the **Federal Register** notice, the qualitative analysis document and the quantitative analysis document will take the average person several hours. Deciding on whether or not to upgrade to Standard 90.1–2010 may take another couple of hours. The maximum review time of 500 hours (62.5 days, 3 working months) upper limit was estimated as the amount of time that a State that was not familiar with energy codes at all or which has a particularly arduous review process within the State would take to review these documents.

(1) A cost per hour of $100 per hour was assumed based on actual rates proposed in subcontracts associated with compliance studies funded by DOE. The average rate calculated from these subcontracts for 10 types of building officials from 6 states was $93.41, so DOE chose to round this up to $100 per hour.

a. Low estimate—8 hours * 50 states * $100 per hour = $40,000

b. High estimate—500 hours * 50 states * $100 per hour = $2,500,000

(2) Compare Standard 90.1–2010 to existing state code—Assuming the State is familiar with its code and has performed an effective evaluation of Standard 90.1 in the first step, the range of potential costs should be similar to Step 1. (See Step 1 for discussion of 8 hour and 500 hour times and $100 per hour cost estimate).

a. Low estimate—8 hours * 50 states * $100 per hour = $40,000

b. High estimate—500 hours * 50 states * $100 per hour = $2,500,000

(3) Update the State Codes to meet or exceed Standard 90.1–2010—Adopting a new energy code could be as simple as updating an order within the State, or it could be very complex involving hearings, testimony, *etc.* Again, the range of potential costs should be similar to Step 1. (See Step 1 for discussion of origin of 8 hour and 500 hour times and $100 per hour cost estimate).

a. Low estimate—8 hours * 50 states * $100 per hour = $40,000

b. High estimate—500 hours * 50 states * $100 per hour = $2,500,000

The potential range of total costs to States to under these assumptions would be $120,000 to $7.5 million. This range is well below the $100 million threshold in the Unfunded Mandates Act. DOE has also considered potential costs were States to provide training on the new code.

(4) Train Code officials on New Code—Assuming every jurisdiction has at least one person that needs to be trained on energy code. There are roughly 40,000 general purpose local governments, or jurisdictions, in the U.S. The total number of jurisdictions in the U.S. that enforce energy codes is not known with any degree of certainty. The National League of Cities publishes an estimate of the number of local governments in the U.S. at *http://www.nlc.org/about_cities/cities_101/142.aspx.* Their summary indicates the following:

- 19,429 Municipal governments;
- 16,504 Town or Township governments;
- 3,034 County governments;
- 13,506 School districts; and
- 35,052 Special district governments.

DOE believes it is reasonable to assume that all of the municipal governments, town or township governments, and county governments could be required to acquire training on Standard 90.1–2010 in order to enforce this standard as an adopted energy code. In addition, the 50 state governments would be required to acquire training. This number adds up to 19,429 + 16,504 + 3,034 + 50 = 38,667. Another widely mentioned estimate of the total number of code adopting jurisdictions in the U.S. is 44,000. This number is based on the National Conference of States on Building Codes and Standards (NCBCS). See, for example, *http://www.ncsbcs.org/newsite/New%20Releases/RW_Presentation_060602.htm.* Both these estimates are in reasonable agreement and so DOE assumed that there are 40,000 potential jurisdictions that potentially would need training on a new energy code.

Based on training experiences of the Building Energy Codes Program staff, with conducting training sessions for jurisdictional staff regarding Standard 90.1, one full-day (8 hours) of training is normally sufficient . Therefore, DOE has used 8 hours as a low estimate and 16 hours as a high estimate for training hours required if a jurisdiction were to adopt Standard 90.1–2010.

a. Low estimate—8 hours * 40,000 jurisdictions * $100 per hour = $32,000,000

b. High Estimate—16 hours * 40,000 jurisdictions * $100 per hour = $64,000,000

Adding the potential training costs of $32 million to $64 million to the costs for the three steps indicates a potential total costs ranging from $32.12 million to $71.5 million. The high end of this estimate is less than the $100 million threshold in the Unfunded Mandates Act. Accordingly, no further action is required under the Unfunded Mandates Reform Act of 1995.

F. Review Under the Treasury and General Government Appropriations Act of 1999

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

G. Review Under the Treasury and General Government Appropriations Act of 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516, note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed today's action under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

H. Review Under Executive Order 13211

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to the OMB a Statement of Energy Effects for any proposed significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) Is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (3) Is designated by the Administrator of the Office of Information and Regulatory Affairs (OIRA) as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use, should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

Today's action would not have a significant adverse effect on the supply, distribution, or use of energy and is therefore not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

I. Review Under Executive Order 13175

Executive Order 13175. ''Consultation and Coordination with Indian tribal Governments'' (65 FR 67249 (Nov. 9, 2000)), requires DOE to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' ''Policies that have tribal implications'' refers to regulations that have ''substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.'' Today's regulatory action is not a policy that has ''tribal implications'' under Executive Order 13175. DOE has reviewed today's action under Executive Order 13175 and has determined that it is consistent with applicable policies of that Executive Order.

V. Public Participation

The public is invited to submit comments on the preliminary determinations. Comments must be provided by August 19, 2011 using any of the methods described in the **ADDRESSES** section of this notice. If you submit information that you believe to be exempt by law from public disclosure, you should submit one complete copy, as well as one copy from which the information claimed to be exempt by law from public disclosure has been deleted. DOE is responsible for the final determination with regard to disclosure or nondisclosure of the information and for treating it accordingly under the DOE Freedom of Information regulations at 10 CFR 1004.11.

Issued in Washington, DC, on July 13, 2011.

Kathleen Hogan,

Deputy Assistant Secretary for Energy Efficiency, Office of Technology Development, Energy Efficiency and Renewable Energy.

[FR Doc. 2011–18082 Filed 7–19–11; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG11–101–000.
Applicants: Bishop Hill Energy, LLC.
Description: Notice of Self-Certification of Exempt Wholesale Generator Status of Bishop Hill Energy LLC.
Filed Date: 07/13/2011.
Accession Number: 20110713–5056.
Comment Date: 5 p.m. Eastern Time on Wednesday, August 03, 2011.

Docket Numbers: EG11–102–000.
Applicants: Bishop Hill Energy III LLC.
Description: Notice of Self-Certification of Exempt Wholesale Generator Status of Bishop Hill Energy III LLC.
Filed Date: 07/13/2011.
Accession Number: 20110713–5065.
Comment Date: 5 p.m. Eastern Time on Wednesday, August 03, 2011.

Docket Numbers: EG11–103–000.
Applicants: Bishop Hill Energy II LLC.
Description: Notice of Self-Certification of Exempt Wholesale Generator Status of Bishop Hill Energy II LLC.
Filed Date: 07/13/2011.
Accession Number: 20110713–5090.
Comment Date: 5 p.m. Eastern Time on Wednesday, August 03, 2011.

Docket Numbers: EG11–104–000.
Applicants: CSOLAR IV South, LLC.
Description: Notice of Self-Certification of Exempt Wholesale Generator Status of CSOLAR IV South, LLC.
Filed Date: 07/13/2011.
Accession Number: 20110713–5094.
Comment Date: 5 p.m. Eastern Time on Wednesday, August 03, 2011.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–3357–000; ER10–3357–001.
Applicants: Entergy Arkansas, Inc.

Description: Entergy Services, Inc. Response to May 13, 2011 Deficiency Letter.
Filed Date: 07/12/2011.
Accession Number: 20110712–5164.
Comment Date: 5 p.m. Eastern Time on Tuesday, August 02, 2011.

Docket Numbers: ER11–2206–001.
Applicants: Alta Wind V, LLC.
Description: Alta Wind V, LLC, Notice of Non-Material Change in Status.
Filed Date: 07/13/2011.
Accession Number: 20110713–5091.
Comment Date: 5 p.m. Eastern Time on Wednesday, August 03, 2011.

Docket Numbers: ER11–3727–001.
Applicants: El Segundo Energy Center LLC.
Description: El Segundo Energy Center LLC submits tariff filing per 35.17(b): Supplement to Application for Market-Based Rate Authority to be effective 8/5/2011.
Filed Date: 07/12/2011.
Accession Number: 20110712–5153.
Comment Date: 5 p.m. Eastern Time on Tuesday, August 02, 2011.

Docket Numbers: ER11–3753–001.
Applicants: People's Power & Gas, LLC.
Description: People's Power & Gas, LLC submits tariff filing per 35: Compliance Filing to be effective 7/13/2011.
Filed Date: 07/13/2011.
Accession Number: 20110713–5003.
Comment Date: 5 p.m. Eastern Time on Wednesday, August 03, 2011.

Docket Numbers: ER11–4037–000.
Applicants: Interstate Gas Supply, Inc.
Description: Interstate Gas Supply, Inc. submits tariff filing per 35.12: Market Based Rate to be effective 7/13/2011.
Filed Date: 07/12/2011.
Accession Number: 20110712–5126.
Comment Date: 5 p.m. Eastern Time on Tuesday, August 02, 2011.

Docket Numbers: ER11–4038–000.
Applicants: Southern California Edison Company.
Description: Southern California Edison Company submits tariff filing per 35.13(a)(2)(iii: SGIA WDT SERV AG SCE–GBU 2782 W. Edison Porterville, CA Roof Top Solor Project to be effective 7/14/2011.
Filed Date: 07/13/2011.
Accession Number: 20110713–5000.
Comment Date: 5 p.m. Eastern Time on Wednesday, August 03, 2011.

Docket Numbers: ER11–4039–000.
Applicants: PJM Interconnection, LLC.
Description: PJM Interconnection, LLC submits tariff filing per 35.13(a)(2)(iii: Queue Position No. W2–102—Original Service Agreement No. 2965 to be effective 6/16/2011.
Filed Date: 07/13/2011.
Accession Number: 20110713–5057.
Comment Date: 5 p.m. Eastern Time on Wednesday, August 03, 2011.

Docket Numbers: ER11–4040–000.
Applicants: PJM Interconnection, LLC.
Description: PJM Interconnection, LLC submits tariff filing per 35.13(a)(2)(iii: Revisions to the PJM OATT, OA & RAA to correct technical and ministerial errors to be effective 7/14/2011.
Filed Date: 07/13/2011.
Accession Number: 20110713–5067.
Comment Date: 5 p.m. Eastern Time on Wednesday, August 03, 2011.

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.

As it relates to any qualifying facility filings, the notices of self-certification [or self-recertification] listed above, do not institute a proceeding regarding qualifying facility status. A notice of self-certification [or self-recertification] simply provides notification that the entity making the filing has determined the facility named in the notice meets the applicable criteria to be a qualifying facility. Intervention and/or protest do not lie in dockets that are qualifying facility self-certifications or self-recertifications. Any person seeking to challenge such qualifying facility status may do so by filing a motion pursuant to 18 CFR 292.207(d)(iii). Intervention and protests may be filed in response to notices of qualifying facility dockets other than self-certifications and self-recertifications.

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.

Dated: July 13, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–18217 Filed 7–19–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

National Nuclear Security Administration

Record of Decision for the Continued Operation of the Y–12 National Security Complex

AGENCY: Department of Energy, National Nuclear Security Administration.

ACTION: Record of decision.

SUMMARY: The National Nuclear Security Administration (NNSA) of the U.S. Department of Energy (DOE) is issuing this Record of Decision (ROD) for the Y–12 National Security Complex (Y–12) in Oak Ridge, Tennessee based on information and analyses contained in the *Final Site-Wide Environmental Impact Statement for the Y–12 National Security Complex,* DOE/EIS–0387 (Y–12 Final SWEIS, Y–12 SWEIS or 2011 Y–12 SWEIS) issued on March 4, 2011; comments on the Draft and Final Y–12 SWEIS; and other factors, including costs, security considerations and the missions of NNSA. The 2011 Y–12 SWEIS analyzes the potential environmental impacts for ongoing and reasonably foreseeable future operations

and activities at Y–12, including alternatives for changes to site infrastructure and levels of operation. Five alternatives are analyzed in this Y–12 SWEIS: (1) No Action Alternative (maintain the status quo); (2) Uranium Processing Facility (UPF) Alternative; (3) Upgrade-in-Place Alternative; (4) Capability-sized UPF Alternative; and (5) No Net Production/Capability-sized UPF Alternative. Both the Draft and the Y–12 Final SWEISs identified the Capability-sized UPF Alternative (Alternative 4) as NNSA's preferred alternative. NNSA has decided to select Alternative 4, to continue operation of Y–12, and to construct and operate one new facility—a Capability-sized UPF. A separate decision may be made at a later date regarding whether to construct and operate a Complex Command Center (CCC).

FOR FURTHER INFORMATION CONTACT: For further information on the 2011 Y–12 SWEIS or this ROD, or to receive a copy of this SWEIS or ROD, contact: Ms. Pam Gorman, Y–12 SWEIS Document Manager, U.S. Department of Energy, National Nuclear Security Administration, Y–12 Site Office, P.O. Box 2050, Oak Ridge, TN 37831, (865) 576–9903. For information on the DOE National Environmental Policy Act (NEPA) process, *contact:* Ms. Carol M. Borgstrom, Director, Office of NEPA Policy and Compliance (GC–54), U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586–4600, or leave a message at (800) 472–2756. Additional information regarding DOE NEPA activities and access to many DOE NEPA documents, including the 2011 Y–12 SWEIS, are available on the Internet through the DOE NEPA Web site at: *http://nepa.energy.gov.*

SUPPLEMENTARY INFORMATION:

Background

Y–12 is one of three primary installations on the DOE Oak Ridge Reservation (ORR) in Oak Ridge, Tennessee. The other installations are the Oak Ridge National Laboratory and the East Tennessee Technology Park (formerly the Oak Ridge K–25 Site). As one of the NNSA production facilities, Y–12 is the primary site for enriched uranium processing and storage, and one of the manufacturing facilities for maintaining the U.S. nuclear weapons stockpile. Y–12 is unique in that it is the only source within the NNSA nuclear security enterprise for certain mission critical nuclear weapons components. Y–12 also dismantles weapons components, safely and securely stores and manages special nuclear material (SNM), supplies SNM for use in naval and research reactors, and dispositions surplus materials. Y–12 nuclear nonproliferation programs play a critical role in securing our nation and the world and combating the spread of weapons of mass destruction by removing, securing, and dispositioning SNM, and down-blending weapons-grade materials to non-weapons forms suitable for use in commercial reactors. Y–12 also conducts nondefense-related activities including: environmental monitoring, remediation, and decontamination and decommissioning activities of the DOE Environmental Management Program; managing waste materials from past and current operations; supporting the production of medical isotopes; and developing highly specialized technologies to support the capabilities of the U.S. industrial base.

NNSA prepared the 2011 Y–12 SWEIS and this ROD pursuant to the regulations of the Council on Environmental Quality (CEQ) for implementing NEPA (40 CFR parts 1500–1508) and DOE's NEPA Implementing Procedures (10 CFR part 1021).

The process for preparing the 2011 Y–12 SWEIS began on November 28, 2005, when NNSA published a Notice of Intent (NOI) in the **Federal Register** (70 FR 71270), announcing its intent to prepare this Y–12 SWEIS. NNSA distributed the Draft Y–12 SWEIS in October 2009. The public comment period for the Draft Y–12 SWEIS began on October 30, 2009, with publication of the Environmental Protection Agency's Notice of Availability in the **Federal Register** (74 FR 56189). That notice invited public comment on the Draft Y–12 SWEIS through January 4, 2010. During the comment period, two public hearings were held in Oak Ridge, Tennessee, on November 17 and 18, 2009. At the first hearing, NNSA announced an extension of the comment period until January 29, 2010. That announcement was formalized with a notice in the **Federal Register** on December 28, 2009 (74 FR 68599). Following issuance of the Draft SWEIS, NNSA determined that a Haul Road was needed to support UPF construction. The Final SWEIS also includes information and analysis of a Haul Road extension corridor for the UPF, including a detailed Wetlands Assessment that was prepared in accordance with 10 CFR part 1022. This Assessment is contained in Appendix G of the Final SWEIS. Comments received on the Haul Road and Wetlands Assessment were addressed in the Final SWEIS.

Alternatives Considered

The No Action Alternative (Alternative 1) for the 2011 Y–12 SWEIS is the continued implementation of the 2002 ROD (67 FR 11296), which was based on the Final SWEIS for the Y–12 National Security Complex (DOE/EIS–0309), and modified by subsequent NEPA decisions. Four action alternatives are considered in this SWEIS in addition to the No Action Alternative: UPF Alternative (Alternative 2); Upgrade-in-Place Alternative (Alternative 3); Capability-sized UPF Alternative (Alternative 4); and No Net Production/Capability-sized UPF Alternative (Alternative 5). The four action alternatives differ in that: Alternative 2 involves a new, fully modernized manufacturing facility (the UPF) optimized for safety, security and efficiency; Alternative 3 involves upgrading the existing facilities to attain the highest level of safety, security, and efficiency possible without constructing new production facilities; and both Alternatives 4 and 5 involve constructing a UPF that would be approximately 10 percent smaller than the UPF assessed for Alternative 2. Alternatives 4 and 5 would also result in reductions in the production capability level at Y–12 to support the requirements of a smaller stockpile. Alternative 4 analyzes a production capability level equivalent to approximately 80 secondaries and cases per year and Alternative 5 analyzes a production capability level equivalent to approximately 10 secondaries and cases per year. The construction and operation of a CCC, which would provide a new Emergency Services Complex for Y–12 is analyzed for Alternatives 2–5.

Preferred Alternative

As discussed in Section 3.6 of the Y–12 Final SWEIS, NNSA identified the Capability-sized UPF Alternative (Alternative 4) as its preferred alternative in both the Draft and the Final Y–12 SWEIS.

Environmentally Preferable Alternative

Considering the many environmental facets of the alternatives analyzed in the Y–12 Final SWEIS, and looking out over the long term, NNSA believes that the No Net Production/Capability-sized UPF Alternative (Alternative 5) would be the environmentally preferable alternative. Replacing older, inefficient facilities with new facilities that incorporate modern safety, security and efficiency standards, would improve Y–12's ability to protect human health and the environment. Modernizing and replacing older facilities with more energy efficient and environmentally-protective facilities would minimize environmental impacts compared to the No Action and Upgrade in Place Alternatives. Under Alternative 5, NNSA would minimize the use of electricity and water, improve health and safety for workers and the public, streamline operations through consolidation, and reduce the resource consumption ''footprint'' of Y–12. Operating at a reduced production level would minimize the volume of all classes of waste generated at Y–12. NNSA notes that the Capability-sized UPF Alternative (Alternative 4) would result in environmental benefits of a similar nature as those associated with Alternative 5, but to a slightly reduced extent due to the higher level of operations associated with Alternative 4.

Environmental Impacts of Alternatives

NNSA analyzed the potential impacts of each alternative on: Land use; visual resources; site infrastructure; traffic and transportation; geology and soils; air quality and noise; greenhouse gases; water resources; wetlands; ecological resources; threatened and endangered species; cultural resources; socioeconomics; environmental justice; human health and safety; waste management; facility accidents; and intentional destructive acts. NNSA also evaluated the potential impacts of each alternative as to irreversible and irretrievable commitments of resources, and the relationship between short-term uses of the environment and the maintenance and enhancement of long-term productivity. In addition, NNSA evaluated the impact of potential accidents at Y–12 on workers and surrounding populations. These analyses and results are described in the Summary and chapters 4 and 5 of the SWEIS. In a classified appendix, NNSA evaluated the potential impacts of intentional destructive acts that might occur at Y–12.

Comments on the Final Site-Wide Environmental Impact Statement

NNSA distributed more than 500 copies of the Y–12 Final SWEIS to Congressional members and committees, the State of Tennessee, local governments, other Federal agencies, non-governmental organizations, and individuals. Additionally, the Y–12 Final SWEIS is, available electronically via the Internet at *http://nepa.energy.gov.*

Following publication of the Y–12 Final SWEIS in March 2011, and prior to issuing this ROD, NNSA received three comment documents related to the Y–12 Final SWEIS. Two of the three documents were submitted by the Oak Ridge Environmental Peace Alliance (OREPA) on April 1, 2011 and April 4, 2011, and the third was submitted on April 4, 2011 by the following organizations: Southwest Research and Information Center, Tri-Valley CAREs, Friends of the Earth, Nuclear Watch of New Mexico, Fernald Residents for Environmental Safety and Health, Nuclear Age Peace Foundation, JustPeace, Cumberland Countians for Peace and Justice, Network for Environmental and Economic Responsibility, and Nukewatch. The Appendix to this ROD identifies the comments contained in these three documents and provides NNSA's responses. NNSA has concluded that none of the comments received necessitate further NEPA analysis.

Decision

NNSA has decided to select the Capability-sized UPF Alternative (Alternative 4). Under this Alternative, NNSA will continue to operate Y–12 to meet the stockpile stewardship mission critical activities assigned to the site. NNSA will also construct and operate a Capability-sized UPF at Y–12 adjacent to the Highly Enriched Uranium Materials Facility (HEUMF) and consolidate its enriched uranium operations. This new facility is described in Section 1.4.4 of the Y–12 Final SWEIS. NNSA will reduce the production capability level of facilities that support NNSA's stockpile stewardship mission to a level that equates to approximately 80 secondaries and cases per year (compared to a capability level that equates to 125 secondaries and cases per year for Alternatives 1, 2, and 3 and a capability level that equates to 10 secondaries and cases per year for Alternative 5). This alternative also includes continuing operations related to other NNSA National Security Programs, such as Nonproliferation, Global Threat Reduction Initiatives, and support to Naval Reactors. Under this alternative, activities conducted at Y–12 under non-NNSA Programs such as the Complementary Work/Work for Others Program, Environmental Management Programs, Non-defense Research and Development Program and Complementary Work/Technology Program would also continue. These programs, their missions and their major activities are described in Chapter 2 of the Final Y–12 SWEIS. Additionally, NNSA has decided, for the time being, to defer making a decision regarding the construction and operation of the CCC. At an appropriate time, a separate decision will be made regarding whether to construct and operate a CCC.

Basis for Decision

NNSA's decisions are based on its mission responsibilities and its need to sustain Y–12's ability to operate in a manner that allows it to fulfill its existing responsibilities in an environmentally sound, timely, and fiscally prudent manner. National security policies require NNSA to maintain the nation's nuclear weapons stockpile as well as its core technical competencies and capabilities. Y–12's operations support a wide range of scientific and technological capabilities for NNSA's national security missions, including nonproliferation.

The benefits of implementing the Capability-sized UPF Alternative include reliable, long-term, consolidated enriched uranium processing capability for the nuclear security enterprise with modern technologies and facilities; improved security posture for SNM; reduced accident risks; improved health and safety for workers and the public; improved operational efficiency; and reductions in the cost of operating and maintaining key site facilities. The UPF will replace multiple aging facilities with a modern facility that will be synergistic with the new HEUMF to provide a robust SNM capability and improve responsiveness, flexibility, and efficiency of operations.

Significant improvements in operation and maintenance costs and operational efficiency can be expected from a new Capability-sized UPF. These improvements include plans for installing new, reliable equipment which is expected to, greatly reduce the need for major corrective maintenance (*e.g.,* less than half of the existing casting furnaces are normally available because of reliability problems). In addition, security improvements will be an integral part of the new facility, reducing the number of personnel required to protect material. It is also expected that the inventory cycle can be greatly reduced because of more effective means of real-time inventory controls. A more efficient facility layout is expected to decrease material handling steps and reduce intra-plant transfers.

With the consolidation of SNM operations, incorporation of integral security systems, and the 90 percent reduction of the protected area, the security posture will be greatly improved under the Capability-sized UPF Alternative. The use of engineered controls to reduce reliance on administrative controls and personal protection equipment to protect workers will improve worker health and safety. In addition, use of new technologies and processes may eliminate the need for some hazardous materials, reduce emissions, and minimize wastes. Cost savings and cost avoidances are expected to include the following:

- Savings from consolidation related to right-sizing of facilities/footprint, more efficient operations, and simplification of SNM movement;
- Operating and maintenance cost reductions of approximately 33 percent from current operations;
- Reducing the footprint of the Perimeter Intrusion Detection and Assessment System (PIDAS) protected area by 90 percent (from 150 acres to about 15 acres), which will allow better concentration of the protective force over a smaller area; and
- Reducing the number of workers required to access the protected area, which will improve the productivity of workers assigned to non-SNM activities that are currently located in the protected area. By reducing the size of the PIDAS, it is forecast that approximately 600 fewer employees will have to enter the PIDAS. An improvement in efficiency of up to 20 percent in non-SNM operations, including environmental clean-up projects, could be realized by avoiding the access requirements and restrictions of the PIDAS. Projects that support non-SNM operations will be less expensive because of improved productivity.

Mitigation Measures for the Capability-sized UPF Alternative (Alternative 4)

As described in the 2011 Y–12 SWEIS, Y–12 operates in compliance with environmental laws, regulations, and policies within a framework of contractual requirements. Many of these contractual requirements mandate controls and actions intended to protect human health and the environment as well as limit and mitigate potential adverse environmental effects. Examples include the Environment, Safety, and Health Manual, Integrated Safety Management System, emergency plans, pollution prevention and waste minimization programs. NNSA and Y–12 will continue to impose contractual requirements for actions necessary to comply with these or similar controls.

Mitigation measures are included in the UPF project design and are integral components of the project to be implemented during the construction project with all necessary funding provided by the project. Mitigation measures specific to the UPF project include the wetlands and stream mitigations described in Section 4.3 of Appendix G. Other mitigation measures are identified in the Y–12 Final SWEIS (Chapter 5) and NNSA will impose all mitigation commitments associated with the Capability-sized UPF Alternative by including these measures in all appropriate contractual documents and providing oversight to ensure that the commitments are met. Monitoring of project activities will occur through NNSA oversight which ensures fulfillment of imposed requirements so that potential conditions adverse to quality, security, safety health, and environment are promptly identified and actions are taken to correct the conditions and prevent recurrence.

Thomas P. D'Agostino,

Administrator, National Nuclear Security Administration.

Appendix to the Y–12 SWEIS ROD

Following publication of the *Final Site-Wide Environmental Impact Statement for the Y–12 National Security Complex,* DOE/EIS–0387 (Y–12 Final SWEIS or 2011 Y–12 SWEIS) in March 2011, and prior to issuing of this Record of Decision (ROD), the National Nuclear Security Administration (NNSA) received three comment documents related to the Y–12 Final SWEIS. These comments were received outside of the public comment period established by NNSA for consideration of the SWEIS. However, NNSA endeavors to consider all public comments where reasonably practicable, even when not obligated to do so by the requirements of NEPA and the DOE and CEQ regulations.

As discussed below, the comments raised in the three documents were largely similar to, and in many cases identical to comments that were submitted on the Draft Y–12 SWEIS, and to which NNSA responded in the Y–12 Final SWEIS. Listed below is a summary of the major comments contained in these three documents, along with NNSA's response to these comments.

Comment 1. The 2011 Y–12 SWEIS is not a site-wide EIS and focused almost exclusively on two proposed DOE actions—construction of a new Uranium Processing Facility (UPF) and the construction of a Complex Command Center (CCC).

Response. The 2011 Y–12 SWEIS provides a comprehensive analysis of the current environmental situation at Y–12, and of ongoing and reasonably foreseeable future operations and activities at existing and proposed facilities. The SWEIS includes an analysis of all proposed actions and reasonable alternatives ripe for analysis and decisionmaking. The SWEIS was prepared by NNSA in accordance with the requirements of the National Environmental Policy Act (NEPA) and the U.S. Department of Energy (DOE) and the Council on Environmental Quality (CEQ) NEPA regulations. In preparing the 2011 Y–12 SWEIS, NNSA used current and well-documented, well-known scientific models and data to analyze potential environmental impacts. Consequently, NNSA disagrees that the 2011 Y–12 SWEIS is not a site-wide EIS.

In addition to analyzing all current, ongoing and reasonably foreseeable operations and activities at Y–12 that support NNSA's stockpile stewardship and nonproliferation missions, the 2011 Y–12 SWEIS includes an analysis of constructing and operating a UPF at Y–12 in accordance with NNSA's decision to pursue such a facility in the ROD (73 FR 77644) for the *Complex Transformation Supplemental PEIS* (SPEIS) (DOE/EIS–0236–S4). The SWEIS includes an analysis of constructing and operating a CCC at Y–12 because NNSA is considering this facility as a replacement for existing facilities that house equipment and personnel for the plant shift superintendent, fire department, and emergency operations center. Analyzing reasonably foreseeable project-specific actions in a SWEIS, such as the construction and operation of a UPF or CCC, is appropriate. (See comment-response 2.F on page 3–11 of Volume II of the Y–12 Final SWEIS).

Comment 2. Because NNSA's activities are part of the ''nuclear security enterprise,'' NNSA needs to conduct an updated ''nonproliferation assessment'' to reassess whether the activities addressed by the Y–12 Final SWEIS are still consistent with U.S. nonproliferation policy.

Response. As discussed above, the Y–12 Final SWEIS was prepared by NNSA in accordance with the requirements of NEPA and the DOE and CEQ regulations. Notwithstanding the fact that this comment is beyond the scope of NEPA considerations for a site-wide EIS, NNSA believes that its activities, including those considered in the Y–12 Final SWEIS, are fully consistent with current U.S. nuclear weapons policies and treaty obligations, including the 2010 Nuclear Posture Review (NPR), (U.S. Department of Defense, Nuclear Posture Review Report (2011), available at *http://www.defense.gov/npr*).

An extensive discussion of current nonproliferation and national security policies is included in Section 1.5 of the Y–12 Final SWEIS. The NNSA's nonproliferation mission is actively supported at Y–12. Y–12 participates in developing and implementing domestic and international programs and projects aimed at reducing threats, both internal and external, to the United States from the proliferation of nuclear weapons, weapons technologies, and weapons usable materials.

Comment 3. The Y–12 Final SWEIS fails to fully describe and analyze environmental impacts of excavation, soil characterization, transportation or disposal associated with the UPF.

Response. The Y–12 Final SWEIS includes an analysis of the impacts of the UPF construction, including soil disturbance, transportation, and disposal. Soil disturbance and disposal is addressed in Section 5.1.2 and 5.5.2. Transportation of soil is addressed in Section 5.4.1.2. (See comment-response 12.T.13 on page 3–52 of Volume II of the Y–12 Final SWEIS).

Soil characterization information is contained in detail in the referenced *Wetland and Sensitive Species Survey Report for Y–12: Proposed Uranium Processing Facility,* November 2009, which is a reference for the

Wetlands Assessment (Appendix G of the Y–12 Final SWEIS). (See comment-response 12.T.20 on page 3–54 of Volume II of the Y–12 Final SWEIS). Potential impacts related to excavation, soil characterization, transportation and disposal are also considered in the state Aquatic Resource Alteration Permit application. During project execution, characterization of soils excavated and managed for the UPF will be conducted as described in Section 4.0 of the Wetlands Assessment utilizing MARSSIM (Multi-Agency Radiation Survey and Site Investigation Manual) processes. (See comment-response 12.T.23 on page 3–55 of Volume II of the Y–12 Final SWEIS). In planning for the Haul Road Extension Corridor and wetland development, no contaminated soil is anticipated. Walk-over radiological surveys have been done and sampling for site characterization is being performed according to MARSSIM and U.S. Environmental Protection Agency requirements. Historical land use in the region is also known which lends support to NNSA's expectation that no contamination will be encountered on the project. Nevertheless, the potential exists for contaminated soils and possibly other media to be encountered during excavation and other site activities. Prior to commencing ground disturbance, NNSA would survey potentially affected areas to determine the extent and nature of any contaminated media and required remediation in accordance with the procedures established under the site's environmental restoration program and in accordance with appropriate requirements and agreements. As discussed in Section 5.5.2 of the Y–12 Final SWEIS, the potential for additional soil contamination from project activities would be minimized by complying with waste management procedures specified in DOE Order 435.1, Radioactive Waste Management, and DOE Order 450.1A, Environmental Protection Programs.

Comment 4. The Y–12 Final SWEIS provides inadequate analysis of seismic risks and steps taken to ameliorate risks.

Response. Seismology is addressed in Sections 4.5.3 and 5.5.1 of the Y–12 Final SWEIS. As discussed in those sections, Y–12 lies at the boundary between seismic Zones 1 and 2, indicating that minor to moderate damage could typically be expected from an earthquake. Y–12 is traversed by many inactive faults formed during the late Paleozoic Era. There is no evidence of capable faults (surface movement within the past 35,000 years or movement of a recurring nature within the past 500,000 years) in the immediate area of Y–12, as defined by the Nuclear Regulatory Commission's (NRC's) ''Reactor Site Criteria'' (10 CFR part 100). The nearest capable faults are approximately 300 miles west of Y–12 in the New Madrid Fault zone. Based on the seismic history of the area, a moderate seismic risk exists at Y–12. However, this should not negatively impact the construction and operation of facilities at Y–12. All new facilities and building expansions would be designed to withstand the maximum expected earthquake-generated ground acceleration in accordance with DOE Order 420.1B, Facility Safety, and accompanying safety guidelines. (See comment-response 12.E on page 3–33 of Volume II of the Y–12 Final SWEIS.)

The Y–12 Final SWEIS also considers potential impacts that could be caused by earthquakes and other natural phenomena (see Section D.9). Table D.9.3–1 identifies the accidents that were considered for the major operations at Y–12. The accidents analyzed in detail for the Y–12 Final SWEIS bound any impacts that would be associated with earthquakes and other natural phenomena. This is due to the fact that the accidents analyzed in detail in the SWEIS would be expected to result in greater radiological releases than reasonably foreseeable accidents caused by natural phenomena, including seismic activity. (See comment-response 12.M.1 on page 3–39 of Volume II of the Y–12 Final SWEIS.)

Comment 5. NNSA failed to provide adequate public comment opportunity for wetlands proposal announced after close of the Draft SWEIS comment period.

Response. NNSA has never intended to proceed with the proposed action without public comment and compliance with applicable permitting processes and regulations. The need for the Haul Road Extension Corridor and associated potential impacts to wetlands were not identified until after the Draft SWEIS was released for public comment in October 2009. NNSA issued a separate Notice of Proposed Wetlands Action and Wetlands Assessment (Appendix G of the Y–12 Final SWEIS) in June 2010 in compliance with 10 CFR Part 1022, and provided an 18 day public comment period. In addition, Y–12 has fully complied with the process of obtaining permits for the Haul Road Extension Corridor which is intended to help to identify and resolve environmental impact issues and/or concerns that State or Federal agencies may have. The permitting processes also included public comment periods. The public was given a 30 day comment period for each of the permitting processes conducted by the Tennessee Department of Environment and Conservation (TDEC) and the U.S. Army Corps of Engineers (USACE). Full, detailed project plans and design drawings for the proposed Haul Road Extension Corridor were also available through the USACE and TDEC in addition to the abridged summaries provided in their respective public notices. (See comment-response 12.T.2 on page 3–47 of Volume II of the Y–12 Final SWEIS.)

Comment 6. NNSA inappropriately declares the environmental impact of wetlands disruption ''not relevant'' to the SWEIS.

Response. Following the requirements of 10 CFR part 1022, NNSA prepared a Wetlands Assessment (Appendix G of the Y–12 Final SWEIS) and determined that the information in the Wetlands Assessment does not reflect a significant impact or substantial change to the SWEIS and the NEPA process. The Y–12 Final SWEIS includes the potential impacts related to the Haul Road Extension Corridor Project. The Y–12 Final SWEIS analyzes all reasonably foreseeable potential environmental impacts associated with implementation of the alternatives analyzed in the SWEIS. (See comment-response 12.T.9 on page 3–50 of Volume II of the Y–12 Final SWEIS.)

Comment 7. The Y–12 Final SWEIS fails to provide adequate analysis of Alternative 6, proposed by the Oak Ridge Environmental Peace Alliance (OREPA) and supported by broader public, which provides a reasonable, unexamined alternative to those considered in the Y–12 Final SWEIS.

Response. NNSA continues to believe that ''Alternative 6'' is not a reasonable alternative based on its determination that this alternative would not support current and reasonably foreseeable national security requirements.

As discussed in comment-response 9.A on page 3–25 of Volume II of the Y–12 Final SWEIS, NNSA believes that many of the elements of ''Alternative 6,'' proposed by OREPA, are analyzed in the Y–12 Final SWEIS. For example, the Y–12 Final SWEIS includes an alternative (Alternative 3, Upgrade in-Place) that would accomplish all required dismantlements (and any required assembly) in existing facilities that would be upgraded. As such, the SWEIS includes an alternative that recognizes a need for a Stockpile Stewardship mission that can be achieved through an upgrade in-place to existing facilities. While NNSA agrees that consolidating operations and upgrading in-place could render facilities functional for at least another decade, during which the future of U.S. nuclear force needs could become more clear, NNSA notes that the recently completed Nuclear Posture Review specifically concludes that a UPF is a key investment required to sustain a safe, secure, and effective nuclear arsenal.

The SWEIS also includes an alternative that would provide the minimum assembly/disassembly capacity which NNSA believes would meet national security requirements, which ''Alternative 6'' does not satisfy. Under this alternative (Alternative 5—No Net Production/Capability-sized UPF Alternative), NNSA would maintain the capability to conduct surveillance and produce and dismantle secondaries and cases. NNSA would reduce the production capability level to approximately 10 secondaries and cases per year, which would support surveillance operations and a limited Life Extension Program workload; however, this alternative would not support adding new types or increased numbers of secondaries to the stockpile.

In response to public comments, NNSA added a discussion of ''Alternative 6,'' proposed by OREPA, to Section 3.4 of the Y–12 Final SWEIS. The existing analyses of the individual elements of ''Alternative 6'' that are incorporated in the action alternatives provide the decisionmaker with the information required to incorporate any of those elements into decisions for future actions at Y–12.

Comment 8. DOE's Preferred Alternative does not match the ''purpose and need'' as closely as the less-expensive No Net Production Alternative.

Response. Section 3.6 of the SWEIS discusses the rationale for the preferred alternative. (See comment-response 8.A on page 3–24 of Volume II of the Y–12 Final SWEIS.) NNSA decided that Alternative 4 was preferred over other alternatives because it represented the best capacity for meeting current and reasonably foreseeable national security requirements.

Comment 9. The Y–12 Final SWEIS wrongly declares that the demolition/disposal of existing facilities arising from relocation of operations to a new UPF is ''not ripe.''

Response. The Integrated Facility Disposition Program (IFDP) is DOE's program for disposing of legacy materials and facilities at the Oak Ridge National Laboratory (ORNL) and Y–12. The IFDP includes both existing excess facilities (*e.g.,* facilities not required for DOE's needs or the discharge of its responsibilities) and newly identified excess (or soon to be excess) facilities. Under the IFDP, the decontamination and decommissioning (D&D) of approximately 188 facilities at ORNL, 112 facilities at Y–12, and remediation of soil and groundwater contamination would occur over the next 30 to 40 years. The IFDP will be conducted as a remedial action under the *Comprehensive Environmental Response, Compensation, and Liability Act* (CERCLA). Cleanup and D&D activities conducted under CERCLA are reviewed through the CERCLA process, which incorporates NEPA values. The potential impacts of the IFDP are analyzed in the cumulative impacts section of the SWEIS in chapter 6 (See comment-response 12.P on page 3–44 of Volume II of the Y–12 Final SWEIS). Although IFDP D&D activities are expected to commence within the next three to five years, the major IFDP D&D activities would not take place for many years (*e.g.,* most likely any D&D activities associated with the action alternatives in this SWEIS would not take place prior to approximately 2018). These major D&D activities are to be resolved under the provisions of CERCLA and are beyond the planning basis for this SWEIS (See Section 5.16 on page 5–100 of Volume I of the Y–12 Final SWEIS). NNSA believes that the Y–12 Final SWEIS includes an analysis of all reasonable alternatives and all cleanup/waste management actions that are required to be included in a NEPA analysis.

Comment 10. The Tennessee Division of Radiological Health is not listed as a consulting agency. They should be given an opportunity, and time, to comment on the Y–12 Final SWEIS before any ROD is issued.

Response. During the Y–12 SWEIS process, NNSA specifically invited TDEC to be a cooperating agency in the preparation of the SWEIS and also requested that other agencies express their interest in being designated as a cooperating agency in the preparation of the Y–12 SWEIS (see 70 FR 71270, November 28, 2005). The Tennessee Division of Radiological Health is part of TDEC. TDEC comments on the Draft Y–12 SWEIS are contained on page 2–123 of Volume II of the Y–12 Final SWEIS.

Comment 11. Commentors stated that an article in the Knoxville News-Sentinel on March 31, 2011, casts new light on the seismic conditions of current facilities and underscores OREPA's concerns, first raised in 1994 and repeatedly in the succeeding years, about the structural integrity of facilities at Y–12 including building 9212. The Y–12 Final SWEIS does not include a thorough assessment of risks associated with ongoing operations at Y–12 in the ''No Action Alternative,'' and provides an inadequate evaluation in its accident scenarios.

Response. The Y–12 Final SWEIS considers potential impacts that could be caused by earthquakes and other natural phenomena such as wind, rain/snow, tornadoes and lightning (see Section D.9). Criticality is also considered. Table D.9.3–1 identifies the accidents that were considered for the major operations at Y–12. As shown in that table, the SWEIS considered potential impacts from earthquakes and other natural phenomena, including wind, flood, and lightning. The impacts associated with accidents analyzed in detail for the Y–12 Final SWEIS bound any impacts that would be associated with earthquakes and other natural phenomena. This is due to the fact that the accidents analyzed in detail in the SWEIS would be expected to result in greater radiological releases than reasonably foreseeable accidents caused by natural phenomena at Y–12.

With respect to potential accidents associated with existing/old facilities, as discussed in Section 5.14.1.1, the Y–12 Final SWEIS accident analysis process began with a review of all Y–12 facilities, including Building 9212, with emphasis on building hazard classification, radionuclide inventories, including type, quantity, and physical form, and storage and use conditions. For each of these facilities, the next step was to identify the most current documentation describing and quantifying the risks associated with its operation. Current safety documentation was obtained for all of these facilities. From these documents, potential accident scenarios and source terms (release rates and frequencies) associated with those facilities were identified. (See comment-response 12.M.1 on page 3–39 of Volume II of the Y–12 Final SWEIS).

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DEPARTMENT OF ENERGY

Western Area Power Administration

[DOE/EIS–0469]

Notice of Intent To Prepare an Environmental Impact Statement and to Conduct Scoping Meetings; Proposed Wilton IV Wind Energy Center Project, North Dakota

AGENCY: Western Area Power Administration, DOE.

ACTION: Notice.

SUMMARY: NextEra Energy Resources (NextEra) applied to interconnect its proposed 99-megawatt (MW) Wilton IV Wind Energy Center Project (Project) with Western Area Power Administration's (Western) existing Hilken Switching Station in Burleigh County, North Dakota. The proposed Project would consist of up to 62 1.6-MW wind turbine generators and associated infrastructure located across approximately 15,725 acres of land in Burleigh County, about 20 miles north of Bismarck. In addition to constructing and operating the above proposed Project, NextEra has requested to operate its nearby existing Wilton I (also known as Burleigh), Wilton II, and Baldwin Wind Energy Center projects at levels exceeding 50 average annual MW, when wind conditions warrant. Western will prepare an environmental impact statement (EIS) on NextEra's proposal to interconnect their Project and to operate its existing projects above 50 average annual MW in accordance with the National Environmental Protection Act (NEPA), U.S. Department of Energy (DOE) NEPA Implementing Procedures, and the Council on Environmental Quality (CEQ) regulations for implementing NEPA. Portions of NextEra's proposed Project may affect floodplains and wetlands, so this Notice of Intent (NOI) also serves as a notice of proposed floodplain or wetland action in accordance with DOE floodplain and wetland environmental review requirements.

DATES: A public scoping meeting will be held on July 26, 2011, from 5 to 8 p.m. in Wilton, North Dakota. Local notification of this meeting has been made through direct mailings to affected parties and by advertising in local media to ensure at least 15 days of prior notice. The public scoping period starts with the publication of this notice and ends on September 6, 2011. Western will consider all comments on the scope of the EIS received or postmarked by that date. The public is invited to submit comments on the proposed Project at any time during the EIS process.

ADDRESSES: Western will host a public scoping meeting at the Wilton Memorial Hall, 105 Dover Avenue, Wilton, North Dakota, to provide information on the Project and gather comments on the proposal. Oral or written comments may be provided at the public scoping meeting or mailed or e-mailed to Matt Marsh, Upper Great Plains Regional Office, Western Area Power Administration, P.O. Box 35800, Billings, MT 59107–5800, e-mail *MMarsh@wapa.gov,* telephone (800) 358–3415.

FOR FURTHER INFORMATION CONTACT: For additional information on the proposed Project, the EIS process, or to receive a copy of the Draft EIS when it is published, contact Matt Marsh at the addresses above. For general information on the DOE's NEPA review process, contact Carol M. Borgstrom, Director of NEPA Policy and Compliance, GC–54, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585–0119, telephone (202) 586–4600 or (800) 472–2756, facsimile (202) 586–7031.

SUPPLEMENTARY INFORMATION: Western is a Federal power marketing agency within the DOE that markets and delivers Federal wholesale electric power (principally hydroelectric power) to municipalities, rural electric cooperatives, public utilities, irrigation districts, Federal and State agencies, and Native American tribes in 15 western and central states. NextEra's proposed Project would be located within Western's Upper Great Plains Region, which operates in North and South Dakota, most of Montana, and portions of Iowa, Minnesota, and Nebraska. Western will prepare an EIS on NextEra's application to interconnect their proposed Wilton IV Wind Project and their proposal to operate its three existing projects above 50 average annual MW, when feasible, in accordance with NEPA (42 U.S.C. 4321–4347); DOE NEPA Implementing Procedures (10 CFR part 1021), and the CEQ regulations for implementing NEPA (40 CFR Parts 1500–1508).[1] Projects generating more than 50 average annual MW normally require the preparation of an EIS under DOE NEPA regulations.

Western will coordinate with appropriate Federal, State, and local agencies and potentially affected Native American tribes during the preparation of the EIS. While there are no designated cooperating agencies at this time, cooperating agencies could be identified at a later date.

Purpose and Need for Agency Action

Western's need for agency action is precipitated by NextEra's application to interconnect its proposed Wilton IV Wind Project with Western's power transmission system, and its intention of operating the three existing wind energy center projects at a level exceeding 50 average annual MW. Western needs to consider NextEra's interconnection request under Western's Open Access Transmission Service Tariff (Tariff), which provides for interconnection to its transmission system if there is available transmission capacity.

This EIS will address Western's Federal action of interconnecting NextEra's proposed Project with its Hilken Switching Station. As part of its normal interconnection analysis, Western determines if any changes within the substation or any system modifications are needed to accommodate the interconnection. In this case the physical interconnection is already in place and operating at Hilken, and preliminary studies indicate that the power system can accommodate the proposed interconnection without negatively affecting system reliability or power deliveries to existing customers. However, final system studies could still determine that network and/or transmission system upgrades are required. Any such upgrades would be funded by NextEra as a condition of the interconnection.

NextEra's proposal to operate the existing Wilton I, Wilton II, and Baldwin Wind Energy Center projects at levels exceeding 50 average annual MW creates the need for Western to revisit the interconnection agreements prepared for each of these projects. Projects generating over 50 average annual MW normally require the preparation of an EIS under DOE NEPA regulations, and the existing interconnection agreements call for curtailing generation, or completing an EIS prior to generating above that cap. None of the environmental assessments[2] originally prepared for these projects identified potential significant impacts resulting from the construction, operation, and maintenance of the three wind energy projects.

Proposed Action

In compliance with the provisions of the Tariff, and considering the environmental impacts of NextEra's proposed Project as identified by the EIS process, Western will consider NextEra's interconnection request. If approved, any necessary system changes would be made to accomplish the interconnection, and power generated by the proposed Project would use Western's transmission system to reach the market. Western will contact the U.S. Fish and Wildlife Service under section 7 of the Endangered Species Act and the North Dakota State Historic Preservation Office under section 106 of the National Historic Preservation Act. Section 7 and 106 consultations were completed in 2010 on some of the proposed wind turbine locations as part of the Baldwin project, and additional coordination with these agencies will build off of these previous consultations.

Alternatives

Western must respond to NextEra's proposed Project as it is described in their application for interconnection, and make a decision on the interconnection request based on that application. NextEra's interconnection request essentially results in an increase in the amount of power entering Western's transmission system through existing facilities; no physical modifications to Western's facilities or the transmission system are anticipated at this time. Under the no action alternative, Western would not approve the interconnection request, and NextEra would not be able to export the generation from its proposed Project over Western's transmission system.

The current interconnection agreements for the Wilton I, Wilton II, and Baldwin Wind Energy Center projects contain language that prevent these projects from exceeding 50 average annual MW. Western would remove this language under the proposed action. Under the no action alternative, the existing language would remain in force, and NextEra would be unable to operate any of these three projects above the 50 average annual MW cap.

Applicant's Proposed Project

NextEra proposes to construct 62 1.6-MW wind turbine generators in Crofte, Ecklund, Ghylin, Painted Woods, and Rocky Hill townships in Burleigh County, North Dakota, approximately 20 miles north of Bismarck. Each turbine would be up to 426 feet tall from tip of blade to base, and about 260 feet tall from the ground to the hub. The three-bladed rotors would have a diameter of approximately 328 feet, or 100 meters. The proposed Project would also include all-weather access roads to each turbine location, and underground power collection lines linking the turbines to Central Power Electric Cooperative's existing 4.4-mile 230-kilovolt (kV) generation tie-line that terminates at Western's Hilken Switching Station. The Western interconnection point for NextEra's proposed Project would be at the Hilken Switchyard. The Hilken Switching Station is located on Western's Garrison—Bismarck 230-kV transmission line.

NextEra's proposed Project would be an expansion of its three existing wind

[1] On October 4, 1999, DOE's Assistant Secretary for Environmental, Safety and Health delegated to Western's Administrator the authority to approve EISs for integrating transmission facilities with Western's transmission grid.

[2] Burleigh County Wind Energy Center, Burleigh County, North Dakota [Wilton I], DOE/EA–1542, 2006; EA Supplement to DOE/EA–1542 [Wilton II], 2009; Baldwin Wind Energy Center Project, Burleigh County, North Dakota, DOE/EA–1698, 2010.

energy projects in the area. Of the 62 proposed Wilton IV Wind Project wind turbines, 37 are located in a 10,000-acre area within Crofte Township, adjacent to and immediately to the west of NextEra's existing wind energy projects. These 37 wind turbine sites were considered as alternate locations for the Baldwin Project, and were analyzed for potential environmental impacts in the Baldwin environmental assessment. The wind turbines would be arrayed in several strings, generally oriented southwest to northeast, in an area roughly six miles square. Cultural resources and biological resources field surveys were accomplished for these wind turbine locations during the NEPA process for the Baldwin Project, which was completed in 2010. The remaining 25 wind turbines would be located in Ecklund, Ghylin, Painted Woods, and Rocky Hill townships within a 5,725-acre area. These turbine strings would be generally oriented east to west over approximately 4 miles immediately east of NextEra's existing wind energy projects. The potential environmental impacts of these 25 turbines will be analyzed as part of this EIS, and cultural and biological surveys will be conducted on these sites and any other potentially disturbed areas not already included in the Baldwin environmental assessment.

The proposed Project would generate about 99 nameplate MW on the two separate areas totaling approximately 15,725 acres. The proposed wind energy project would be located entirely on private lands; no Federal or State land would be affected.

In addition to constructing and operating the proposed Project as described above, NextEra has requested to operate its nearby existing Wilton I, Wilton II, and Baldwin Wind Energy Center projects at levels exceeding 50 average annual MW, when wind conditions warrant. Projects generating more than 50 average annual MW normally require the preparation of an EIS under DOE NEPA regulations (10 CFR Part 1021). These projects were originally analyzed in environmental assessments based in part on their anticipated output being under 50 average annual MW, and the interconnection agreements include a cap at that generation level unless an EIS is prepared. NextEra now believes that wind conditions may allow operation of the three wind projects above 50 average annual MW, and would like to generate above the cap, if possible. NextEra's proposal to potentially operate above the 50 average annual MW level creates the need for Western to revisit the existing interconnection agreements that include this limitation. No physical modifications to the existing wind generation projects are proposed; the requested interconnection agreement amendments would simply allow for more hours of generation if wind conditions are favorable but still within the stated nameplate capacity.

Western's Federal action is to consider the interconnection request, any resultant impact to the transmission system, and the change in operating parameters for the other three existing projects; however, the EIS will also identify and review the environmental impacts of constructing, operating, maintaining, and decommissioning NextEra's proposed Wilton IV Project. NextEra would be responsible for completing necessary coordination with State and local agencies to permit its proposed Project.

Floodplain or Wetland Involvement

Floodplains and wetlands are common in this part of North Dakota. Since the proposed Project may involve action in floodplains or wetlands, this NOI also serves as a notice of proposed floodplain or wetland action. The EIS will include an assessment of impacts to floodplains and wetlands, and floodplain statement of findings following DOE regulations for compliance with floodplain and wetlands environmental review (10 CFR Part 1022).

Environmental Issues

The location of NextEra's proposed Project is in a relatively sparsely populated portion of southcentral North Dakota. The area is characterized by extensive agriculture and pasture with scattered farmsteads on section line roads. NextEra has secured leases with willing landowners for its wind generation turbines and related facilities. Available overview information and the results of the NEPA analyses on the existing three wind projects indicates this area has a relatively low probability of substantial natural resources conflicts. NextEra's siting process for the wind turbine strings and associated facilities considered sensitive resources, and the proposed Project was designed to avoid these areas. The EIS will review the environmental information collected on the Project area, including that already collected as part of the Baldwin project, and evaluate the level of impact the interconnection and NextEra's proposed Project would have on environmental resources within the approximately 15,725-acre site. Modifications to NextEra's proposed Project may be made to avoid or minimize resource impacts. While no substantive resource conflicts have been identified thus far, the EIS will analyze the potential impacts on the full range of potentially affected environmental resources. Wind farm projects are generally known to have visual and noise effects, and may affect birds and bats.

Public Participation

Interested parties are invited to participate in the scoping process to help define the scope of the EIS, significant resources, and issues to be analyzed in depth, and to eliminate from detailed study issues that are not pertinent. The scoping process will involve all interested agencies (Federal, State, county, and local), Native American tribes, public interest groups, businesses, affected landowners, and individual members of the public.

Western has previously consulted with potentially affected or interested tribes to jointly evaluate and address the potential effects on cultural resources, traditional cultural properties, or other resources important to the tribes in the proposed Project area. Western will contact previously identified interested tribes and inform them that NextEra now intends to expand its wind energy projects in this area. Any nation-to-nation consultations will be conducted in accordance with Executive Order 13175, Consultation and Coordination with Indian Tribal Governments (65 FR 67249), the President's memorandum of April 29, 1994, Government-to-Government Relations with Native American Tribal Governments (59 FR 22951), DOE-specific guidance on tribal interactions, and applicable natural and cultural resources laws and regulations.

A public scoping meeting will be held as described under **DATES** and **ADDRESSES** above. The meeting will be informal, and attendees will be able to speak directly with Western and NextEra representatives about the proposed Project. The public is encouraged to provide information and comments on issues it believes Western should address in the EIS. Comments may be broad in nature or restricted to specific areas of concern. After gathering comments on the scope of the EIS, Western will address those issues raised in the EIS. Comments on Western's proposed action and NextEra's proposed Project will be accepted at any time during the EIS process, and may be directed to Western as described under **ADDRESSES** above.

Western's EIS process will include this NOI and public scoping meetings; consultation and coordination with appropriate Federal, State, county, and local agencies and tribal governments; involvement with affected landowners; distribution of and public review and comment on the Draft EIS; a formal public hearing or hearings on the Draft EIS; distribution of a published Final EIS; and publication of Western's Record of Decision in the **Federal Register.**

Dated: July 7, 2011.

Timothy J. Meeks,

Administrator.

[FR Doc. 2011–17997 Filed 7–19–11; 8:45 am]

BILLING CODE 6450–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2011–0566; FRL–8881–3]

Certain New Chemicals; Receipt and Status Information

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: Section 5 of the Toxic Substances Control Act (TSCA) requires any person who intends to manufacture (defined by statute to include import) a new chemical (i.e., a chemical not on the TSCA Chemical Substances Inventory (TSCA Inventory)) to notify EPA and comply with the statutory provisions pertaining to the manufacture of new chemicals. Under TSCA sections 5(d)(2) and 5(d)(3), EPA is required to publish in the **Federal Register** a notice of receipt of a premanufacture notice (PMN) or an application for a test marketing exemption (TME), and to publish in the **Federal Register** periodic status reports on the new chemicals under review and the receipt of notices of commencement (NOC) to manufacture those chemicals. This document, which covers the period from May 23, 2011 to June 5, 2011, and provides the required notice and status report, consists of the PMNs and TMEs, both pending or expired, and the NOC to manufacture a new chemical that the Agency has received under TSCA section 5 during this time period.

DATES: Comments identified by the specific PMN number or TME number, must be received on or before August 19, 2011.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPPT–2011–0566, and the specific PMN number or TME number for the chemical related to your comment, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Document Control Office (7407M), Office of Pollution Prevention and Toxics (OPPT), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Hand Delivery:* OPPT Document Control Office (DCO), EPA East Bldg., Rm. 6428, 1201 Constitution Ave., NW., Washington, DC. The DCO is open from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the DCO is (202) 564–8930. Such deliveries are only accepted during the DCO's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: EPA's policy is that all comments received will be included in the 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 regulations.gov or e-mail. The 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 regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the docket index available at *http://www.regulations.gov.* 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 electronically at *http://www.regulations.gov,* or, if only available in hard copy, at the OPPT Docket. The OPPT Docket is located in the EPA Docket Center (EPA/DC) at Rm. 3334, EPA West Bldg., 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room hours of operation are 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number of the EPA/DC Public Reading Room is (202) 566–1744, and the telephone number for the OPPT Docket is (202) 566–0280. Docket visitors are required to show photographic identification, pass through a metal detector, and sign the EPA visitor log. All visitor bags are processed through an X-ray machine and subject to search. Visitors will be provided an EPA/DC badge that must be visible at all times in the building and returned upon departure.

FOR FURTHER INFORMATION CONTACT: *For technical information contact:* Bernice Mudd, Information Management Division (7407M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (202) 564–8951; fax number: (202) 564–8955; e-mail address: *mudd.bernice@epa.gov.*

For general information contact: The TSCA–Hotline, ABVI–Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554–1404; e-mail address: *TSCA-Hotline@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general. As such, the Agency has not attempted to describe the specific entities that this action may apply to. Although others may be affected, this action applies directly to the submitter of the PMNs addressed in this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one

complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. Why is EPA Taking this Action?

EPA classifies a chemical substance as either an ''existing'' chemical or a ''new'' chemical. Any chemical substance that is not on EPA's TSCA Inventory is classified as a ''new chemical,'' while those that are on the TSCA Inventory are classified as an ''existing chemical.'' For more information about the TSCA Inventory go to: *http://www.epa.gov/opptintr/newchems/pubs/inventory.htm.* Anyone who plans to manufacture or import a new chemical substance for a non-exempt commercial purpose is required by TSCA section 5 to provide EPA with a PMN, before initiating the activity. Section 5(h)(1) of TSCA authorizes EPA to allow persons, upon application, to manufacture (includes import) or process a new chemical substance, or a chemical substance subject to a significant new use rule (SNUR) issued under TSCA section 5(a), for ''test marketing'' purposes, which is referred to as a test marketing exemption, or TME. For more information about the requirements applicable to a new chemical go to: *http://ww.epa.gov/opt/newchems.*

Under TSCA sections 5(d)(2) and 5(d)(3), EPA is required to publish in the **Federal Register** a notice of receipt of a PMN or an application for a TME and to publish in the **Federal Register** periodic status reports on the new chemicals under review and the receipt of NOCs to manufacture those chemicals. This status report, which covers the period from May 23, 2011 to June 5, 2011, consists of the PMNs pending or expired, and the NOCs to manufacture a new chemical that the Agency has received under TSCA section 5 during this time period.

III. Receipt and Status Reports

In Table I. of this unit, EPA provides the following information (to the extent that such information is not claimed as CBI) on the PMNs received by EPA during this period: The EPA case number assigned to the PMN, the date the PMN was received by EPA, the projected end date for EPA's review of the PMN, the submitting manufacturer/importer, the potential uses identified by the manufacturer/importer in the PMN, and the chemical identity.

TABLE I—36 PMNS RECEIVED FROM MAY 23, 2011 TO JUNE 5, 2011

Case No.	Received date	Projected notice end date	Manufacturer/ importer	Use	Chemical
P–11–0386	5/20/2011	8/17/2011	Emery Oleochemicals LLC.	(S) Wetting agent	(S) Nonanoic acid, ammonium salt *.
P–11–0390	5/23/2011	8/20/2011	CBI	(G) Additive, open, non-dispersive use.	(G) 2-propenoic acid, 2-methyl, alkyl ester, polymer with aralkyl 2-methyl-2-propenoate, polyethyleneglycole 2-methyl-2-propenoate, 2-(dimethylamino)ethyl 2-methyl-2-propenoate, [(1-methoxy-2-methyl-1-propen-1-yl)oxy]trimethylsilane-initiated, glycidyl tolyl ether-quaternized, benzoates (salts).
P–11–0391	5/20/2011	8/17/2011	CBI	(G) Additive, open, non-dispersive use.	(G) Polyether phosphate.
P–11–0392	5/23/2011	8/20/2011	CBI	(G) Solvent, foam and refrigerant use.	(G) Chlorofluoroalkene.
P–11–0393	5/24/2011	8/21/2011	CBI	(S) Resin for coatings for wood floors.	(G) Waterborne aliphatic polyurethane.
P–11–0394	5/25/2011	8/22/2011	CBI	(G) Resin for ultra violet free radical curable adhesives.	(S) Amines, c36-alkylenedi-, polymers with 5,5'-oxybis[1,3-isobenzofurandione], reaction products with maleic anhydride.
P–11–0395	5/25/2011	8/22/2011	CBI	(G) Synthetic leather	(G) Elastomer polyurethane.
P–11–0396	5/25/2011	8/22/2011	CBI	(G) Dispersing agent for use in paper applications.	(G) Acrylate copolymer.
P–11–0397	5/25/2011	8/22/2011	CBI	(G) Dispersing agent for use in paper applications.	(G) Acrylate copolymer.
P–11–0398	5/26/2011	8/23/2011	Huntsman Corporation.	(S) Hard surface cleansers.	(S) Poly(oxy-1,2-ethanediyl), .alpha.-(1-oxooctyl)-.omega.-methoxy-.
P–11–0399	5/26/2011	8/23/2011	Huntsman Corporation.	(S) Hard surface cleansers.	(S) Poly(oxy-1,2-ethanediyl), .alpha.-(1-oxodecyl)-.omega.-methoxy-.
P–11–0400	5/26/2011	8/23/2011	Huntsman Corporation.	(S) Hard surface cleansers.	(S) Poly(oxy-1,2-ethanediyl), .alpha.-(1-oxotetradecyl)-.omega.-methoxy-.

TABLE I—36 PMNS RECEIVED FROM MAY 23, 2011 TO JUNE 5, 2011—Continued

Case No.	Received date	Projected notice end date	Manufacturer/ importer	Use	Chemical
P–11–0401	5/26/2011	8/23/2011	Huntsman Corporation.	(S) Cross-linking agent for adhesive system.	(S) Poly[oxy(methyl-1,2-ethanediyl)], .alpha.-hydro-.omega.-(2-aminomethylethoxy)-, ether with 2,2-bis(hydroxymethyl)-1,3-propanediol (4:1).
P–11–0402	5/26/2011	8/23/2011	CBI	(G) Coatings and adhesives.	(G) Urethane acrylate.
P–11–0403	5/26/2011	8/23/2011	CBI	(G) Base oil for lubricant	(G) Fatty acid esters.
P–11–0404	5/26/2011	8/23/2011	Matteson-Ridolfi Incorporated.	(G) Polymeric flow and foam control additive for industrial coatings.	(G) Alkyl polyester—acrylic copolymer.
P–11–0405	5/27/2011	8/24/2011	CBI	(G) Additive, open, non-dispersive use.	(G) Poly(oxy-1,2-ethanediyl),,'-[alkenyl-1-ylimino]di-2, 1-ethanediyl]bis[-hydroxy-, N-[2-alkyloxy-, N-[2-alkyloxy)-1-(hydroxymethyl)ethyl] derivates, benzoates (salts).
P–11–0406	5/27/2011	8/24/2011	CBI	(G) Additive, open, non-dispersive use.	(G) Reaction product of ethoxylated alcohol and maleic anhydride.
P–11–0408	5/27/2011	8/24/2011	CBI	(G) An additive for resins	(G) Polycarbodiimide modified diisocyanate.
P–11–0409	5/27/2011	8/24/2011	CBI	(G) An additive for resins	(G) Multifunctional polycarbodiimide.
P–11–0410	5/27/2011	8/24/2011	CBI	(G) Resin for molding	(G) Methacrylic resin containing cyclic structure unit.
P–11–0415	5/31/2011	8/28/2011	Huntsman	(S) Polymer for odor control treatment for polyester fabrics.	(G) Hydrogenated tallow alkyl amine polymer with substituted siloxanes and substituted glycol ether salt.
P–11–0416	6/1/2011	8/29/2011	CBI	(G) An open, non-dispersive use.	(G) Modified rosin.
P–11–0417	6/1/2011	8/29/2011	CBI	(G) Plastic additive	(G) Phosphorous acid alkyl ester.
P–11–0418	6/1/2011	8/29/2011	CBI	(G) Additive, open, non-dispersive use.	(G) Polyether phosphate compound with polyacrylate.
P–11–0419	6/2/2011	8/30/2011	CBI	(G) Defoamer in industrial chemical processing operation.	(S) Octadecanoic acid, manufacture of, by-products from, distant lights.
P–11–0420	6/2/2011	8/30/2011	CBI	(G) Defoamer in industrial chemical processing operation.	(S) Isooctadecanoic acid, manufacture of, by-products from, distant lights.
P–11–0421	6/2/2011	8/30/2011	CBI	(G) Defoamer in industrial chemical processing operation.	(S) Octadecanoic acid, manufacture of, by-products from, distant residues.
P–11–0422	6/2/2011	8/30/2011	CBI	(G) Defoamer in industrial chemical processing operation.	(S) Isooctadecanoic acid, manufacture of, by-products from, distant residues.
P–11–0423	6/2/2011	8/30/2011	Dow Chemical Company.	(S) Component of formulation to make microelectronic parts and displays.	(G) Acrylate copolymer.
P–11–0425	6/3/2011	8/31/2011	CBI	(G) Packaging material	(G) Poly (3-hydroxybutyrate-co-3-hydroxyhexanoate).
P–11–0426	6/3/2011	8/31/2011	CBI	(G) Packaging material	(G) Poly (3-hydroxybutyrate-co-3-hydroxyhexanoate).
P–11–0427	6/3/2011	8/31/2011	CBI	(G) Packaging material	(G) Poly (3-hydroxybutyrate-co-3-hydroxyhexanoate).
P–11–0428	6/3/2011	8/31/2011	CBI	(G) Packaging material	(G) Poly (3-hydroxybutyrate-co-3-hydroxyhexanoate).
P–11–0429	6/3/2011	8/31/2011	CBI	(G) Packaging material	(G) Poly (3-hydroxybutyrate-co-3-hydroxyhexanoate).
P–11–0430	6/3/2011	8/31/2011	CBI	(G) Packaging material	(G) Poly (3-hydroxybutyrate-co-3-hydroxyhexanoate)

In Table II. of this unit, EPA provides the following information (to the extent that such information is not claimed as CBI) on the NOCs received by EPA during this period: The EPA case number assigned to the NOC, the date the NOC was received by EPA, the projected end date for EPA's review of the NOC, and chemical identity.

TABLE II—8 NOCS RECEIVED FROM MAY 23, 2011 TO JUNE 5, 2011

Case No.	Received date	Commencement notice end date	Chemical
P–03–0550	5/26/2011	5/10/2011	(G) Amine functional epoxy curing agent.

TABLE II—8 NOCS RECEIVED FROM MAY 23, 2011 TO JUNE 5, 2011—Continued

Case No.	Received date	Commencement notice end date	Chemical
P–06–0824	6/1/2011	5/23/2011	(G) 2-propenoic acid, polymer with cyanoalkene, alkenoic acid alkyl ester, alkylalkenamide, methylolmethacrylamide, and an alkenyl benzene.
P–09–0547	5/26/2011	5/20/2011	(G) Formaldehyde, reaction products with aromatic amine and alkenyl anhydride.
P–10–0072	5/20/2011	4/8/2011	(G) Substituted oxidized piperidinyl derivative.
P–10–0523	5/26/2011	5/16/2011	(G) Fluorochemical acrylate copolymer.
P–10–0592	5/23/2011	5/20/2011	(G) Fatty acids, polymer with substituted carbopolycycle, substuted alkylamines, substituted alkyleneoxide and glycidyl alkanoate, substituted alkanoic acid (salts).
P–11–0122	6/3/2011	5/27/2011	(G) Polyalkylene glycol methyl-2-propenoate, polymer with alkyl-substituted 2-propenoate.
P–11–0158	5/24/2011	5/18/2011	(G) Tertiary ammonium compound.

If you are interested in information that is not included in these tables, you may contact EPA as described in Unit II. to access additional non-CBI information that may be available.

List of Subjects

Environmental protection, Chemicals, Hazardous substances, Imports, Notice of commencement, Premanufacturer, Reporting and recordkeeping requirements, Test marketing exemptions.

Dated: July 11, 2011.

Chandler Sirmons,

Acting Director, Information Management Division, Office of Pollution Prevention and Toxics.

[FR Doc. 2011–18104 Filed 7–19–11; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL ACCOUNTING STANDARDS ADVISORY BOARD

Notice of Release of the Exposure Draft of Technical Bulletin 2011–2, Extended Deferral of the Effective Date of Technical Bulletin 2006–1

AGENCY: Federal Accounting Standards Advisory Board.

ACTION: Notice.

Board Action: Pursuant to 31 U.S.C. 3511(d), the Federal Advisory Committee Act (Pub. L. 92–463), as amended, and the FASAB Rules of Procedure, as amended in October, 2010, notice is hereby given that the Federal Accounting Standards Advisory Board (FASAB) has released the *Exposure Draft of Technical Bulletin 2011–2, Extended* Deferral of the Effective Date of Technical Bulletin 2006–1, Recognition and Measurement of Asbestos-Related Cleanup Costs.

The Exposure Draft is available on the FASAB home page *http://www.fasab.gov/board-activities/documents-for-comment/exposure-drafts-and-documents-for-comment/.* Copies can be obtained by contacting FASAB at (202) 512–7350. Respondents are encouraged to comment on any part of the exposure draft. Written comments on the Exposure Draft are requested by August 3, 2011. Comments on the Exposure Drafts should be sent to: Wendy M. Payne, Executive Director, Federal Accounting Standards Advisory Board, 441 G Street, NW., Suite 6814, Mail Stop 6K17V, Washington, DC 20548.

FOR FURTHER INFORMATION CONTACT: Wendy Payne, Executive Director, at (202) 512–7350.

Authority: Federal Advisory Committee Act, Pub. L. 92–463.

Dated: July 14, 2011.

Charles Jackson,

Federal Register Liaison Officer.

[FR Doc. 2011–18226 Filed 7–19–11; 8:45 am]

BILLING CODE 1610–02–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Agency Information Collection Activities: Proposed Collection Renewals; Comment Request

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice and request for comment.

SUMMARY: The FDIC, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on renewal of an existing information collection, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35). Currently, the FDIC is soliciting comments on renewal of the information collection described below.

DATES: Comments must be submitted on or before September 19, 2011.

ADDRESSES: Interested parties are invited to submit written comments to the FDIC by any of the following methods:

- *http://www.FDIC.gov/regulations/laws/federal/notices.html.*
- *E-mail: comments@fdic.gov* Include the name of the collection in the subject line of the message.
- *Mail:* Gary A. Kuiper (202.898.3877), Counsel, Room F–1086, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.
- *Hand Delivery:* Comments may be hand-delivered to the guard station at the rear of the 17th Street Building (located on F Street), on business days between 7 a.m. and 5 p.m.

All comments should refer to the relevant OMB control number. A copy of the comments may also be submitted to the OMB desk officer for the FDIC: Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Gary A. Kuiper, at the FDIC address above.

SUPPLEMENTARY INFORMATION:

Proposal to Renew the Following Currently Approved Collection of Information

Title: Prompt Corrective Action.

OMB Number: 3064–0115.

Frequency of Response: On occasion.

Affected Public: All insured depository institutions.

Estimated Number of Respondents: 19.

Estimated Time per Response: 4 hours.

Total Annual Burden: 76 hours.

General Description of Collection: The Prompt Corrective Action provisions in Section 38 of the Federal Deposit Insurance Act (12 U.S.C. 1831o) *permits and, in some cases requires, the FDIC and other federal banking agencies to take certain supervisory actions when FDIC-insured institutions fall within one of five capital categories. They also restrict or prohibit certain activities and require the submission of a capital restoration plan when an insured institution becomes undercapitalized.*

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, 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 information collection on respondents, including through the use of automated collection techniques or other forms of information technology. All comments will become a matter of public record.

Dated at Washington, DC, this 15th day of July 2011.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2011–18246 Filed 7–19–11; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL MEDIATION AND CONCILIATION SERVICE

Labor-Management Relations Information Collection Requests

AGENCY: Federal Mediation and Conciliation Service.

ACTION: Submission for OMB Review: Request for Comments.

SUMMARY: The Federal Mediation and Conciliation Service (FMCS) hereby announces the submission of the following public information collection requests (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13). The information collection requests are FMCS forms: Arbitrator's Report and Fee Statement (Agency Form R–19), Arbitrator's Personal Data Questionnaire (Agency Form R–22), and Request for Arbitration Services (Agency Form R–43). These information collection requests were assigned the OMB control numbers 3076–0001, 3076–0002, and 3076–0003. These information collections will be used to collect information to determine applicant suitability for the arbitration roster, to monitor the work of arbitrators, and to collect information that facilitates the processing of arbitration requests.

The OMB is particularly interested in comments that:

(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) Evaluates the accuracy of the agency's estimates of the burden of the proposed collection of information;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collections of information on those who are to respond, including the use of appropriate automated, electronic collection technologies or other forms of information technology.

Burden: FMCS receives approximately 150 responses per year to the Arbitrator's Personal Data Questionnaire (OMB No. 3076–001); 3,000 responses per year to the Arbitrator's Report and Fee Statement (OMB No. 3076–0003); and 16,000 responses per year to the Request for Arbitration Panel form (OMB No. 3076–0002).

Affected Entities: Individuals who apply for admission to the FMCS Roster of Arbitrators; arbitrators who render decisions under FMCS arbitration policies and procedures; and employers, labor unions, and their representatives who request arbitration services.

DATES: Comments must be submitted on or before August 19, 2011.

ADDRESSES: Submit written comments to: *E-mail: oira_submissions@omb.eop.gov.* Please include the FMCS form numbers, the information collection title, and the OMB control number in the subject line of the message. Comments may also be sent to fax number 202–395–5806 to the attention of Desk Officer for FMCS.

SUPPLEMENTARY INFORMATION: For additional information, see the related 60-day notice published in the **Federal Register** at Vol. 76 No. 93 on May 13, 2011.

Dated: July 15, 2011.

Jeannette Walters-Marquez,

Attorney Advisor.

[FR Doc. 2011–18306 Filed 7–19–11; 8:45 am]

BILLING CODE 6732–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than August 4, 2011.

A. Federal Reserve Bank of Kansas City (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *Jeffrey N. Bradley, Morrison, Colorado;* to retain control of Evergreen Bancorporation, and thereby indirectly retain control of Evergreen National Bank, both in Evergreen, Colorado

Board of Governors of the Federal Reserve System, July 15, 2011.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2011–18282 Filed 7–19–11; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than August 15, 2011.

A. Federal Reserve Bank of New York (Ivan Hurwitz, Vice President) 33 Liberty Street, New York, New York 10045–0001:

1. *FNBNY Bancorp, Inc. and Modern Capital Holdings LLC,* both in New York, New York; to become bank holding companies by acquiring 100 percent of the voting shares of Madison National Bancorp, Inc., and Madison National Bank, both in Hauppauge, New York.

In connection with this application, Modern Capital Holdings LLC, New York, New York, also has applied to acquire 24.9 percent of the voting shares of The Upstate National Bank, Lisbon, New York.

Board of Governors of the Federal Reserve System, July 15, 2011.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2011–18283 Filed 7–19–11; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Service Administration

Advisory Committee on Interdisciplinary, Community-Based Linkages; Notice of Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), notice is hereby given of the following meeting:

Name: Advisory Committee on Interdisciplinary, Community-Based Linkages (ACICBL).

Dates and Times: October 4, 2011, 11 a.m. to 3 p.m., E.D.T.

Place: Webinar Format.

Status: The meeting will be open to the public.

Purpose: The members of the ACICBL will begin the planning required to develop the legislatively mandated 12th Annual Report to the Secretary of Health and Human Services and the Congress. The meeting objectives are to: (1) Focus on a relevant topic that will enhance the mission of the Title VII training programs; (2) develop an outline that will inform the development of the 12th Annual Report; (3) review the urgent issues related to the training programs; and (4) identify resources that will address gaps and further strengthen the outcomes from these efforts.

Agenda: The ACICBL agenda includes an opportunity for each member to offer ideas for the upcoming report, along with identifying consultants in specific areas who could provide expert testimony. The staff writer provided by the Health Resources and Services Administration (HRSA), Bureau of Health Professions, will offer a strategy for outlining the upcoming report. The agenda will be available 2 days prior to the meeting on the HRSA Web site (*http://www.hrsa.gov/advisorycommittees/bhpradvisory/acicbl/acicbl.html*). Agenda items are subject to change as priorities dictate.

Supplementary Information: Requests to make oral comments or provide written comments to the ACICBL should be sent to Dr. Joan Weiss, Designated Federal Official at the contact information below. Written comments can be provided before and after the meeting. Individuals who plan to participate on the webinar should register at least one day prior to the meeting using the following webinar information: *https://hrsa.connectsolutions.com/e94041221/event/registration.html.* The conference call-in number is 1–888–391–9505, using the participant pass code ACICBL.

For Further Information Contact: Anyone requesting information regarding the ACICBL should contact Dr. Joan Weiss, Designated Federal Official within the Bureau of Health Professions, Health Resources and Services Administration, in one of three ways: (1) Send a request to the following address: Dr. Joan Weiss, Designated Federal Official, Bureau of Health Professions, Health Resources and Services Administration, Parklawn Building, Room 9–36, 5600 Fishers Lane, Rockville, Maryland 20857; (2) call (301) 443–6950; or (3) send an e-mail to *jweiss@hrsa.gov.* In the absence of Dr. Weiss, CAPT Norma J. Hatot, Senior Nurse Consultant, can be contacted via telephone at (301) 443–2681 or by e-mail at *nhatot@hrsa.gov.*

Dated: July 14, 2011.

Reva Harris,

Acting Director, Division of Policy and Information Coordination.

[FR Doc. 2011–18254 Filed 7–19–11; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–D–0500]

Guidance for Industry and Food and Drug Administration Staff; Class II Special Controls Guidance Document: Focused Ultrasound Stimulator System for Aesthetic Use; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of the guidance entitled, ''Class II Special Controls Guidance Document: Focused Ultrasound Stimulator System for Aesthetic Use.'' This guidance document describes a means by which focused ultrasound stimulator systems for aesthetic use may comply with the requirement of special controls for class II devices. This guidance document is being immediately implemented as the special control for focused ultrasound stimulator systems for aesthetic use, but it remains subject to comment in accordance with the Agency's good guidance practices.

DATES: Submit either electronic or written comments on this guidance at any time. General comments on Agency guidance are welcome at any time.

ADDRESSES: Submit written requests for single copies of the guidance document entitled ''Class II Special Controls Guidance Document: Focused Ultrasound Stimulator System for Aesthetic Use'' to the Division of Small Manufacturers, International, and Consumer Assistance, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, rm. 4613, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your request, or fax your request to 301–847–8149. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance.

Submit electronic comments on the guidance to *http://www.regulations.gov*. Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Identify comments with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Richard Felten, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, rm. 1436, Silver Spring, MD 20993–0002, 301–796–6392.

SUPPLEMENTARY INFORMATION:

I. Background

This guidance document will serve as the special control for focused ultrasound stimulator systems for aesthetic use. Section 513(f)(2) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 360c(f)(2)) provides that any person who submits a premarket notification under section 510(k) of the FD&C Act (21 U.S.C. 360(k)) for a device that has not previously been classified may, within 30 days after receiving an order classifying the device in class III under section 513(f)(1) of the FD&C Act, request FDA to classify the device under the criteria set forth in section 513(a)(1) of the FD&C Act. FDA shall, within 60 days of receiving such a request, classify the device by written order. This classification shall be the initial classification of the device. Within 30 days after the issuance of an order classifying the device, FDA must publish a notice in the **Federal Register** announcing such classification. Because of the timeframes established by section 513(f)(2) of the FD&C Act, FDA has determined, under 21 CFR 10.115(g)(2), that it is not feasible to allow for public participation before issuing this guidance as a final guidance document. Thus, FDA is issuing this guidance document as a level 1 guidance document that is immediately in effect. FDA will consider any comments that are received in response to this notice to determine whether to amend the guidance document.

Elsewhere in this issue of the **Federal Register**, FDA is publishing a final rule classifying focused ultrasound stimulator systems for aesthetic use into class II (special controls) under section 513(f)(2) of the FD&C Act.

II. Significance of Guidance

FDA believes that adherence to the recommendations described in this guidance document, in addition to the general controls, will provide reasonable assurance of the safety and effectiveness of focused ultrasound stimulator system for aesthetic use classified under 878.4590 (21 CFR Part 878). In order to be classified as a class II device under 878.4590, an ultrasound stimulator for aesthetic use must comply with the requirements of special controls; a manufacturer must address the issues requiring special controls as identified in the guidance, either by following the recommendations in the guidance document or by some other means that provides equivalent assurances of safety and effectiveness.

III. Electronic Access

Persons interested in obtaining a copy of the guidance may do so by using the Internet. A search capability for all CDRH guidance documents is available at *http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/default.htm*. Guidance documents are also available at *http://www.regulations.gov.* To receive ''Class II Special Controls Guidance Document: Focused Ultrasound Stimulator System for Aesthetic Use,'' you may either send an e-mail request to *dsmica@fda.hhs.gov* to receive an electronic copy of the document or send a fax request to 301–847–8149 to receive a hard copy. Please use the document number 1701 to identify the guidance you are requesting

IV. Paperwork Reduction Act of 1995

This guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in 21 CFR Part 807, subpart E, have been approved under OMB control number 0910–0120; the collections of information in 21 CFR Part 812 have been approved under OMB control number 0910–0078; the collections of information in 21 CFR 56.115 have been approved under OMB control number 0910–0130; the collections of information in 21 CFR 50.23 have been approved under OMB control number 0910–0586; the collections of information in 21 CFR Part 58 have been approved under OMB control number 0910–0119; and the collections of information in 21 CFR Part 801 have been approved under OMB control number 0910–0485.

V. 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.

Dated: July 15, 2011.

Nancy K. Stade,

Deputy Director for Policy, Center for Devices and Radiological Health.

[FR Doc. 2011–18280 Filed 7–19–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; 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 materials, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Neurological Disorders and Stroke Special Emphasis Panel, Stem Cells.

Date: July 27, 2011.

Time: 9 a.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852, (Telephone Conference Call).

Contact Person: Raul A. Saavedra, PhD, Scientific Review Officer, Scientific Review Branch, Division of Extramural Research, NINDS/NIH/DHHS/Neuroscience Center, 6001 Executive Blvd., Suite 3208, MSC 9529, Bethesda, MD 20892–9529, 301–496–9223, *saavedrr@ninds.nih.gov*.

This notice is being published less than 15 days prior to the meeting due to timing limitations imposed by the review and funding cycle.

Name of Committee: National Institute of Neurological Disorders and Stroke Special Emphasis Panel, Rare Diseases.

Date: August 2, 2011.

Time: 9 a.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852, (Telephone Conference Call).

Contact Person: Raul A. Saavedra, PhD, Scientific Review Officer, Scientific Review Branch, Division of Extramural Research, NINDS/NIH/DHHS/Neuroscience Center, 6001 Executive Blvd., Suite 3208, MSC 9529, Bethesda, MD 20892–9529, 301–496–9223, *saavedrr@ninds.nih.gov*.

This notice is being published less than 15 days prior to the meeting due to timing limitations imposed by the review and funding cycle.

Name of Committee: National Institute of Neurological Disorders and Stroke Special Emphasis Panel, Epilepsy Genetic Centers Without Walls.

Date: August 5, 2011.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Amalfi Hotel, 20 West Kinzie Street, Chicago, IL 60654.

Contact Person: William C. Benzing, PhD, Scientific Review Officer, Scientific Review Branch, Division of Extramural Research, NINDS/NIH/DHHS/Neuroscience Center, 6001 Executive Blvd., Suite 3208, MSC 9529, Bethesda, MD 20892–9529, 301–496–0660, *Benzingw@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS)

Dated: July 13, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–18286 Filed 7–19–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health & Human Development; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Child Health and Human Development Special Emphasis Panel, The Development of Infant Behavioral Affect Specificity to Discrete Emotions.

Date: July 25, 2011.

Time: 11:30 a.m. to 12:20 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6100 Executive Boulevard, Rockville, MD 20852, (Telephone Conference Call).

Contact Person: Carla T. Walls, PhD, Scientific Review Officer, Division of Scientific Review, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, 6100 Executive Blvd., Room 5B01, Bethesda, MD 20892, (301) 435–6898, *wallsc@mail.nih.gov*.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos.93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: July 14, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–18299 Filed 7–19–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health & Human Development; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Child Health and Human Development Special Emphasis Panel, Children in Rural Poverty.

Date: August 9, 2011.

Time: 9 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Renaissance Mayflower Hotel, 1127 Connecticut Avenue, NW., Washington, DC 20036.

Contact Person: Marita R. Hopmann, PhD, Scientific Review Officer, Division of Scientific Review, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, 6100 Executive Blvd., Room 5B01, Bethesda, MD 20892, 301–435–6911, *hopmannm@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: July 14, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–18297 Filed 7–19–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health & Human Development; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Child Health and Human Development, Special Emphasis Panel, FES Controller for Upper Limb Movement.

Date: August 9, 2011.

Time: 1 to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6100 Executive Boulevard, Rockville, MD 20852, (Telephone Conference Call).

Contact Person: Sathasiva B. Kandasamy, PhD, Scientific Review Officer, Division of Scientific Review, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, 6100 Executive Blvd., Room 5B01, Bethesda, MD 20892, 301–435–6680, *skandasa@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: July 14, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–18288 Filed 7–19–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of General Medical Sciences Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of General Medical Sciences Special Emphasis Panel, Review of Program Project (P01) Applications.

Date: August 4, 2011.

Time: 1 to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Natcher Building, 45 Center Drive, Room 3AN12, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Lisa Dunbar, PhD, Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, Room 3AN12, Bethesda, MD 20892, 301–594–2849, *dunbarl@mail.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.375, Minority Biomedical Research Support; 93.821, Cell Biology and Biophysics Research; 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.862, Genetics and Developmental Biology Research; 93.88, Minority Access to Research Careers; 93.96, Special Minority Initiatives, National Institutes of Health, HHS)

Dated: July 14, 2011.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–18291 Filed 7–19–11; 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 Conflict: Biological Chemistry and Macromolecular Biophysics.

Date: August 9–10, 2011.

Time: 8:30 a.m. to 12 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Mike Radtke, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4176, MSC 7806, Bethesda, MD 20892, 301–435–1728, *radtkem@csr.nih.gov.*

Name of Committee: Bioengineering Sciences & Technologies Integrated Review Group, Biomaterials and Biointerfaces Study Section.

Date: August 31–September 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: Ping Fan, MD, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5154, MSC 7840, Bethesda, MD 20892, 301–408–9971, *fanp@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: July 13, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–18289 Filed 7–19–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: Form I–765, Extension of a Currently Approved Information Collection; Comment Request

ACTION: 30-Day Notice of Information Collection Under Review: Form I–756, Application for Employment Authorization; OMB Control No. 1615–0040.

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection was previously published in the **Federal Register** on April 19, 2011, at 76 FR 21912 allowing for a 60-day public comment period. USCIS did not receive any comments for this information collection.

The purpose of this notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted until August 19, 2011. This process is conducted in accordance with 5 CFR 1320.10.

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), and to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), USCIS Desk Officer. Comments may be submitted to: USCIS, Chief, Regulatory Products Division, Clearance Officer, 20 Massachusetts Avenue, Suite 5012, Washington, DC 20529. Comments may also be submitted to DHS via facsimile to 202–272–8352 or via e-mail at *uscisfrcomment@dhs.gov,* and to the OMB USCIS Desk Officer via facsimile at 202–395–5806 or via e-mail at *oira_submission@omb.eop.gov.*

When submitting comments by e-mail please make sure to add OMB Control Number 1615–0040. Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the 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 a currently approved information collection.

(2) *Title of the Form/Collection:* Application for Employment Authorization.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security*

sponsoring the collection: Form I–765. U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals and households. The information collected on this form is used by the USCIS to determine eligibility for the issuance of the employment document.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 1,885,296 responses at 3 hours and 25 minutes (3.42 hours) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 6,447,712 annual burden hours.

If you have additional comments, suggestions, or need a copy of the proposed information collection instrument with instructions, or additional information, please visit: *http://www.regulations.gov/search/index.jsp*.

If additional information is required contact: USCIS, Regulatory Products Division, 20 Massachusetts Avenue, Suite 5012, Washington, DC 20529–2020, telephone (202) 272–8377.

Dated: July 14, 2011.

Sunday Aigbe,

Chief, Regulatory Products Division, Office of the Executive Secretariat, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2011–18271 Filed 7–19–11; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: Form AR–11, Extension of an Existing Information Collection; Comment Request

ACTION: 30-Day Notice of Information Collection under Review: Form AR–11, Alien's Change of Address Card; OMB Control No. 1615–0007.

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection was previously published in the **Federal Register** on May 10, 2011, at 76 FR 27077 allowing for a 60-day public comment period. USCIS did not receive any comments for this information collection.

The purpose of this notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted until August 19, 2011. This process is conducted in accordance with 5 CFR 1320.10.

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), and to the Office of Management and Budget (OMB) USCIS Desk Officer. Comments may be submitted to: 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 *uscisfrcomment@dhs.gov*, and to the OMB USCIS Desk Officer via facsimile at 202–395–5806 or via e-mail at *oira_submission@omb.eop.gov.*

When submitting comments by e-mail please make sure to add OMB Control Number 1615–0007 in the subject box. Written comments and suggestions from the public and affected agencies 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 a currently approved information collection.

(2) *Title of the Form/Collection:* Alien's Change of Address Card.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring this collection:* Form AR–11. U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or Households. This form is used by aliens to submit their change of address to the USCIS within 10 days from the date of change.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 720,000 responses at .083 hours (5 minutes) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 59,760 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, Office of the Executive Secretariat, 20 Massachusetts Avenue, NW., Washington, DC 20529–2020; Telephone 202–272–8377.

Dated: July 13, 2011.

Sunday Aigbe,

Chief, Regulatory Products Division, Office of the Executive Secretariat, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2011–18273 Filed 7–19–11; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5540–D–01]

Delegation of Authority for the Office of Public Affairs

AGENCY: Office of the Secretary, HUD.

ACTION: Notice of Delegation of Authority.

SUMMARY: In this notice, the Secretary of HUD delegates authority to the General Deputy Assistant Secretary for Public Affairs with respect to developing policy and procedures for external and internal communications for HUD. This notice also supersedes all prior delegations of authority from the Secretary to the Assistant Secretary for Public Affairs.

DATES: *Effective Date:* June 29, 2011.

FOR FURTHER INFORMATION CONTACT: Neill Coleman, General Deputy Assistant Secretary, Office of Public Affairs, Department of Housing and Urban Development, 451 7th Street, SW., Room 10130, Washington, DC 20410–6000, telephone number 202–708–0980. (This is not a toll-free number.) Persons with hearing- or speech-impairments may access this number through TTY by calling the toll-free Federal Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

Section A. Authority

The Secretary hereby delegates to the General Deputy Assistant Secretary for Public Affairs authority and responsibility for conveying the Department's mission through internal and external outreach to include local, regional, and national level media. The Office of Public Affairs is responsible for ensuring that information provided to the news media by HUD is current, complete, and accurate. It also has responsibility for ensuring that all applicable laws, regulations, and policies involving the release of information to the public are followed. In carrying out these responsibilities, the General Deputy Assistant Secretary for Public Affairs shall, among other duties:

1. Direct and coordinate all media outreach for the Department regarding the Department's mission.

2. Use a variety of mediums and media outlets to communicate the Department's initiatives and goals to stakeholders, homeowners, renters, and those individuals living in or in need of subsidized housing.

3. Provide Americans with information about housing policies and programs through coordinating press conferences; drafting press releases; and utilizing the Internet and social media, including departmental blogs, Facebook, Twitter, Flikr, and You Tube, in addition to community outreach and other methods of communication.

4. Reviewing or drafting all official speeches and statements made by HUD officials and employees before such statements are released to the public.

Section B. Authority Excepted

The authority delegated in this document does not include the authority to sue or be sued or to issue or waive regulations.

Section C. Authority to Redelegate

The General Deputy Assistant Secretary for Public Affairs is authorized to redelegate to employees of HUD any of the authority delegated under Section A.

Section D. Authority Superseded

This delegation supersedes all prior delegations of authority from the Secretary to the Assistant Secretary for Public Affairs.

Authority: Section 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

Dated: June 29, 2011.

Shaun Donovan,

Secretary.

[FR Doc. 2011–18159 Filed 7–19–11; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5540–D–02]

Order of Succession for the Office of Public Affairs

AGENCY: Office of Public Affairs, HUD.

ACTION: Notice of order of succession.

SUMMARY: In this notice, the General Deputy Assistant Secretary designates the Order of Succession for the Office of Public Affairs. This Order of Succession supersedes all prior orders of succession for the Office of Public Affairs.

DATES: *Effective Date:* June 29, 2011.

FOR FURTHER INFORMATION CONTACT: Neill Coleman, General Deputy Assistant Secretary, Office of Public Affairs, Department of Housing and Urban Development, 451 7th Street, SW., Room 10130, Washington, DC 20410–6000, telephone number 202–708–0980. (This is not a toll-free number.) Persons with hearing- or speech-impairments may access this number through TTY by calling the toll-free Federal Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: The General Deputy Assistant Secretary is issuing this Order of Succession of officials authorized to perform the functions and duties of the Office of Public Affairs when, by reason of absence, disability, or vacancy in office, the General Deputy Assistant Secretary for Public Affairs is not available to exercise the powers or perform the duties of the office. This Order of Succession is subject to the provisions of the Federal Vacancies Reform Act of 1998 (5 U.S.C. 3345–3349d), and supersedes all prior Orders of Succession for the Office of Public Affairs.

Accordingly, the General Deputy Assistant Secretary designates the following Order of Succession:

Section A. Order of Succession

Subject to the provisions of the Federal Vacancies Reform Act of 1998, during any period when, by reason of absence, disability, or vacancy in office, the Assistant Secretary for Public Affairs is not available to exercise the powers or perform the duties of the office of the Assistant Secretary, the following officials within the Office of Public Affairs are hereby designated to exercise the powers and perform the duties of the Office:

(1) Press Secretary;

(2) Deputy Assistant Secretary for Public Affairs; and

(3) Supervisory Public Affairs Specialist.

These officials shall perform the functions and duties of the office in the order specified herein, and no official shall serve unless all the other officials, whose position titles precede his/hers in this order, are unable to act by reason of absence, disability, or vacancy in office.

Section B. Authority Superseded

This Order of Succession supersedes all prior orders of succession for the Office of the Assistant Secretary for Public Affairs.

Authority: Section 7(d), Department of Housing and Urban Development Act, 42 U.S.C. 3535(d).

Dated: June 29, 2011.

Neill Coleman,

General Deputy Assistant Secretary.

[FR Doc. 2011–18160 Filed 7–19–11; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R9–R–2011–N152; 93261–12630000–9X]

Proposed Information Collection; Hunting and Fishing Application Forms and Activity Reports for National Wildlife Refuges

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice; request for comments.

SUMMARY: We (U.S. Fish and Wildlife Service) will ask the Office of Management and Budget (OMB) to renew approval for the information collection (IC) described below. As required by the Paperwork Reduction Act of 1995 and as part of our continuing efforts to reduce paperwork and respondent burden, we invite the general public and other Federal agencies to take this opportunity to comment on this IC. This IC is scheduled to expire on January 31, 2012. 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.

DATES: To ensure that we are able to consider your comments on this IC, we must receive them by September 19, 2011.

ADDRESSES: Send your comments on the IC to the Service Information Collection Clearance Officer, Fish and Wildlife Service, MS 2042–PDM, 4401 North Fairfax Drive, Arlington, VA 22203 (mail); or *INFOCOL@fws.gov* (e-mail). Please include ''1018–0140'' in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this IC, contact Hope Grey at *INFOCOL@fws.gov* (e-mail) or 703–358–2482 (telephone).

SUPPLEMENTARY INFORMATION:

I. Abstract

The National Wildlife Refuge System Administration Act of 1966 (16 U.S.C. 668dd–668ee), as amended (Administration Act), and the Refuge Recreation Act of 1962 (16 U.S.C. 460k–460k–4) (Recreation Act) govern the administration and uses of national wildlife refuges and wetland management districts. The Administration Act consolidated all the different refuge areas into a single Refuge System. It also authorizes us to permit public uses, including hunting and fishing, on lands of the Refuge System when we find that the activity is compatible and appropriate with the purpose for which the refuge was established. The Recreation Act allows the use of refuges for public recreation when the use is not inconsistent or does not interfere with the primary purpose(s) of the refuge.

There are 408 national wildlife refuges where we administer hunting and/or fishing programs. We only collect user information at about 20 percent of these refuges. Information that we plan to collect will help us:

- Administer and monitor hunting and fishing programs on refuges.
- Distribute hunting and fishing permits in a fair and equitable manner to eligible participants.

We use nine application and report forms associated with hunting and fishing on refuges. We may not allow all opportunities on all refuges; therefore, we developed different forms to simplify the process and avoid confusion for applicants. The currently approved forms are available online at *http://www.fws.gov/forms/*. Not all refuges will use each form and some refuges may collect the identical information in a nonform format.

We use the following application forms when we assign areas, dates, and/or types of hunts via a drawing because of limited resources, high demand, or when a permit is needed to hunt. We issue application forms for specific periods, usually seasonally or annually.

- FWS Form 3–2354 (Quota Deer Hunt Application).
- FWS Form 3–2355 (Waterfowl Lottery Application).
- FWS Form 3–2356 (Big/Upland Game Hunt Application).
- FWS Form 3–2357 (Migratory Bird Hunt Application).
- FWS Form 3–2358 (Fishing/Shrimping/Crabbing Application).

We collect information on:

- Applicant (name, address, phone number) so that we can notify applicants of their selection.
- User preferences (dates, areas, method) so that we can distribute users equitably.
- Whether or not the applicant is applying for a special opportunity for disabled or youth hunters.
- Age of youth hunter(s) so that we can establish eligibility.

We ask users to report on their success after their experience so that we can evaluate hunting/fishing quality and resource impacts. We use the following activity reports, which we distribute during appropriate seasons, as determined by State or Federal regulations.

- FWS Form 3–2359 (Big Game Harvest Report).
- FWS Form 3–2360 (Fishing Report).
- FWS Form 3–2361 (Migratory Bird Hunt Report).
- FWS Form 3–2362 (Upland/Small Game/Furbearer Report).

We collect information on:

- Names of users so we can differentiate between responses.
- City and State of residence so that we can better understand if users are local or traveling.
- Dates, time, and number in party so we can identify use trends and allocate staff and resources.
- Details of success by species so that we can evaluate quality of experience and resource impacts.

II. Data

OMB Control Number: 1018–0140.

Title: Hunting and Fishing Application Forms and Activity Reports for National Wildlife Refuges, 50 CFR parts 25, 26, 27, 30, 31, and 32.

Service Form Number(s): FWS Forms 3–2354, 3–2355, 3–2356, 3–2357, 3–2358, 3–2359, 3–2360, 3–2361, 3–2362.

Type of Request: Extension of a currently approved collection.

Description of Respondents: Individuals and households.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: On occasion (for applications, usually once per year at the beginning of the hunting season; for activity reports, once at the conclusion of the hunting/fishing experience).

Nonhour Cost Burden: We estimate the annual nonhour cost burden to be $60,000 for hunting application fees at some refuges.

Activity	Number of respondents	Number of responses	Completion time per response (utes)	Total annual burden hours
FWS Form 3–2354	180,000	180,000	30	90,000
FWS Form 3–2355	93,000	93,000	30	46,500
FWS Form 3–2356	2,600	2,600	30	1,300
FWS Form 3–2357	5,200	5,200	30	2,600
FWS Form 3–2358	2,600	2,600	30	1,300
FWS Form 3–2359	88,000	88,000	15	22,000
FWS Form 3–2360	412,000	412,000	15	103,000
FWS Form 3–2361	31,000	31,000	15	7,750
FWS Form 3–2362	26,000	26,000	15	6,500
	840,400	840,400	....	280,950

III. Comments

We 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 imize the burden of the collection of information on respondents.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this IC. 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.

Dated: July 14, 2011.

Tina A. Campbell,

Chief, Division of Policy and Directives Management, U.S. Fish and Wildlife Service.

[FR Doc. 2011–18252 Filed 7–19–11; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R2–R–2011–N114; 1261–0000–29154–4A]

Hunt Fee at Caddo Lake National Wildlife Refuge, TX

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of Intent to Implement a Hunt Fee.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce our intent to implement a hunt fee at Caddo Lake National Wildlife Refuge (Refuge), located in Texas, as authorized by Federal Lands Recreation Enhancement Act (REA). The Refuge's proposed fee is $12.50 for lottery deer and feral hog hunt. Under REA provisions, the Refuge will identify and post the specific fee.

DATES: Submit your comments on this action by August 19, 2011. Unless we publish a notice in the **Federal Register** withdrawing this action, we will implement the hunt fee on January 16, 2012 at the Refuge.

ADDRESSES: Submit your comments by one of the following methods:

• *By U.S. mail to:* U.S. Fish and Wildlife Service, Attn: Visitor Services, 500 Gold Ave., SW., Room 4504, Albuquerque, NM 87102.

• *By fax to:* (505) 248–6621.

• *By e-mail to: Ken_Garrahan@fws.gov.*

FOR FURTHER INFORMATION CONTACT: Ken Garrahan, at (505) 248–6635.

SUPPLEMENTARY INFORMATION: The Texas Parks and Wildlife Department (TPWD) is the regulatory agency for wildlife in Texas. To monitor deer population dynamics throughout the state, TPWD has identified 33 unique Resource Management Units (RMUs) having similar soils, vegetation types and land use practices. TPWD collects, compiles, and analyzes deer population data from identified RMUs and associated ecoregions throughout the state and adjusts deer hunting regulations accordingly.

Caddo Lake NWR is within RMU 16 where deer densities increased from 8.7 to 15.1 deer per 1,000 acres and recruitment decreased almost 50 percent from 2005 to 2008. The Refuge has worked in cooperation with TPWD biologists and staff to monitor the deer herd on Caddo Lake NWR.

In 2008 and 2009, Refuge and TPWD staff conducted spotlight surveys, browse surveys, forest understory evaluations and review of historic and ongoing Army deer hunt data (prior to 2004, the land was under the jurisdiction of the United States Army, Department of Defense). The data indicate that the Refuge deer herd is at/near carrying capacity (K) levels, or that it exceeds K levels in certain areas of the Refuge. During this 2-year period, deer density on the refuge has increased from 34.3 to 58.9 deer per 1,000 acres. Estimated doe per buck ratio also increased from 2:1 to 3:1, while recruitment remained low, at near 0.15 fawns per doe. Accordingly, the proposed limited deer hunt will reduce the number of deer to obtain a more healthy and sustainable population on the Refuge.

Feral hogs are an extremely invasive exotic species that is not considered a game species by the State of Texas. Texas is home to an estimated 2 million feral hogs. This is due in part to intentional releases, suitable habitat, disease eradication, limited natural predators, and high reproductive potential. There are very few inhibiting factors to curtail this population growth. The hunting of feral hogs has become a popular sport in the State, and the public interest would best be served by allowing this activity on the refuge. The damaging effects of feral hogs were present prior to the establishment of the refuge, and their numbers and damaging effects on the habitat and native wildlife species will continue to increase without a control mechanism. If a control mechanism (*i.e.* hunting or trapping) is not established and implemented, feral hogs will degrade the refuge habitat and have a negative impact on native wildlife species.

We announce our intent to implement a $12.50 hunt fee for a lottery deer and feral hog hunt at the Refuge under 16 U.S.C. 6802(g) of the REA. The Refuge plans to use collected fees to defray costs associated with a hunting program on the Refuge. Fees garnered through this program will be used to offset expenses in operating the hunt, including providing refuge hunt permits/brochures, boundary line/hunt area signage, maintenance of overtime by law enforcement officers, employee salaries dedicated to the administration of the hunts, and for expansion and improvement of parking areas, and improved accessibility for mobility impaired hunters. It is our policy to only allow activities that are appropriate and compatible with the Refuge's purposes.

Public Availability of Comments

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.

Authorities and Requirements of the REA

In December 2004, the REA became law (16 U.S.C. 6801–6814). The REA provides authority through December 2014 for the Secretaries of the Departments of the Interior and Agriculture to establish, modify, charge, and collect recreation fees for use at some Federal recreation lands and waters, and contains specific provisions addressing public involvement in the establishment of recreation fees. The REA also directed the Secretaries of the Departments of the Interior and Agriculture to publish advance notice in the **Federal Register** whenever bureaus establish new recreation fee areas under their respective jurisdictions.

Should public comments provide substantive reasons why we should not implement a hunt fee at the Refuge, we may reevaluate our plan and publish a subsequent notice in the **Federal Register** withdrawing this action. Otherwise, we will implement a hunt fee at the Caddo Lake Refuge on the date specified in the **DATES** section of this document, and the Refuge will post fee amounts and expenditures onsite.

Authority: 16 U.S.C. 6801–6814.

Dated: April 27, 2011.

Joy E. Nicholopoulos,

Acting Regional Director, Region 2.

[FR Doc. 2011–18199 Filed 7–19–11; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[F–14920–A; F–14920–A2; LLAK965000–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 the Bureau of Land Management (BLM) will issue an appealable decision approving the surface and subsurface estates in certain lands for conveyance pursuant to the Alaska Native Claims Settlement Act to Arviq Incorporated. The subsurface estate in a portion of these lands will be conveyed to Calista Corporation when the surface estate is conveyed to Arviq Incorporated. The remaining lands lie within Togiak National Wildlife Refuge, established on January 23, 1969. The subsurface estate in the refuge lands will be reserved to the United States at the time of conveyance. The lands are in the vicinity of Platinum, Alaska, and are located in:

Lands *Within* The Cape Newenham National Wildlife Refuge (Public Land Order 4583), Now Known as the Togiak National Wildlife Refuge

Seward Meridian, Alaska

T. 14 S., R. 74 W.,
Sec. 15.
Containing 640 acres.

T. 14 S., R. 74 W.,
Sec. 22.
Containing 640 acres.

T. 15 S., R. 74 W.,
Sec. 5.
Containing 640 acres.
Aggregating 1,920 acres.

Lands *Outside* The Cape Newenham National Wildlife Refuge (Public Land Order 4583), Now Known as the Togiak National Wildlife Refuge

Lots 7a and 7b, U.S. Survey No. 9548, Alaska.
Containing 26.04 acres.

Seward Meridian, Alaska

T. 14 S., R. 74 W.,
Secs. 16, 21, and 29.
Containing 1,919.86 acres.

T. 13 S., R. 76 W.,
Sec. 2.
Containing 10.92 acres.

T. 14 S., R. 74 W.,
Sec. 32.
Containing 640 acres.
Aggregating 2,596.82 acres.
Total Aggregating 4,516.82 acres.

Notice of the decision will also be published four times in the *Tundra Drums*.

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 August 19, 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.

3. Notices of appeal transmitted by electronic means, such as facsimile or e-mail, will not be accepted as timely filed.

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 BLM by phone at 907–271–5960 or by e-mail at *ak.blm.conveyance@blm.gov*. Persons who use a Telecommunications Device for the Deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the BLM during normal business hours. In addition, the FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the BLM. The BLM will reply during normal business hours.

Charmain McMillan,

Land Law Examiner, Land Transfer Adjudication II Branch.

[FR Doc. 2011–18164 Filed 7–19–11; 8:45 am]

BILLING CODE 4310–JA–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[AA–6682–B, AA–6682–D, AA–6682–E, AA–6682–G, AA–6682–H, AA–6682–I, AA–6682–A2; LLAK965000–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 the Bureau of Land Management (BLM) will issue an appealable decision to Alaska Peninsula Corporation, Successor in Interest to Newhalen Native Corporation. The decision approves the surface estate in the lands described below for conveyance pursuant to the Alaska Native Claims Settlement Act. The subsurface estate in these lands will be conveyed to Bristol Bay Native Corporation when the surface estate is conveyed to Alaska Peninsula Corporation, Successor in Interest to Newhalen Native Corporation. The lands are in the vicinity of Newhalen, Alaska, and are located in:

Seward Meridian, Alaska

T. 4 S., R. 34 W.,
Secs. 31, 32, and 33;
Sec. 34, lots 1 and 2;
Secs. 35 and 36.
Containing 3,839.16 acres.

T. 5 S., R. 34 W.,
Secs. 4, 5, and 6.
Containing 1,881.44 acres.

T. 5 S., R. 35 W.,
Sec. 10;
Sec. 16;
Secs. 19, 20, and 21.
Containing 3,166.36 acres.
Aggregating 8,886.96 acres.

Notice of the decision will also be published four times in the *Bristol Bay Times*.

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 August 19, 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.

3. Notices of appeal transmitted by electronic means, such as facsimile or e-mail, will not be accepted as timely filed.

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 BLM by phone at 907–271–5960 or by e-mail at *ak.blm.conveyance@blm.gov.* Persons who use a Telecommunications Device for the Deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the BLM during normal business hours. In addition, the FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the BLM. The BLM will reply during normal business hours.

Jason Robinson,

Land Law Examiner, Land Transfer Adjudication II Branch.

[FR Doc. 2011–18272 Filed 7–19–11; 8:45 am]

BILLING CODE 4310–JA–P

DEPARTMENT OF THE INTERIOR

Bureau Of Land Management

[LLOR957000–L19100000–BJ0000–LRCS43700800: HAG11–0283]

Filing of Plats of Survey: Oregon/Washington

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The plats of survey of the following described lands are scheduled to be officially filed in the Bureau of Land Management Oregon/Washington State Office, Portland, Oregon, 30 days from the date of this publication.

Willamette Meridian

Oregon

T. 29 S., R. 3 W., accepted July 11, 2011.
T. 9 S., R. 3 E., accepted July 11, 2011.
T. 3 S., R. 6 W., accepted July 11, 2011.
T. 22 S., R. 4 W., accepted July 11, 2011.
T. 18 S., R. 1 E., accepted July 11, 2011.
T. 37 S., R. 2 E., accepted July 11, 2011.

Washington

T. 39 N., R. 7 E., accepted July 11, 2011.

ADDRESSES: A copy of the plats may be obtained from the Land Office at the Bureau of Land Management, Oregon/Washington State Office, 333 SW., 1st Avenue, Portland, Oregon 97204, upon required payment. A person or party who wishes to protest against a survey must file a notice that they wish to protest (at the above address) with the Oregon/Washington State Director, Bureau of Land Management, Portland, Oregon.

FOR FURTHER INFORMATION CONTACT: Kyle Hensley, (503) 808–6124, Branch of Geographic Sciences, Bureau of Land Management, 333 SW., 1st Avenue, Portland, Oregon 97204. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: 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.

Fred O'Ferrall,

Chief, Branch of Land, Mineral, and Energy Resources.

[FR Doc. 2011–18245 Filed 7–19–11; 8:45 am]

BILLING CODE 4310–33–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[OR–065784, LLOPRP0600 L51010000.ER0000 LVRWH09H0600; HAG 10–0338]

Notice of Availability of the Record of Decision for the West Butte Wind Power Right-of-Way, Crook and Deschutes Counties, OR

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of availability.

SUMMARY: The Bureau of Land Management (BLM) announces the availability of the Record of Decision (ROD) for the project located in the Prineville District. The Secretary of the Interior approved the ROD on July 14, 2011, which constitutes the final decision of the Department of the Interior.

ADDRESSES: Copies of the ROD are available upon request from the District Manager, Prineville District Office, Bureau of Land Management, 3050 NE., 3rd Street, Prineville, Oregon 97754 or via the following Web site: *http://www.blm.gov/or/districts/prineville/plans/wbw_power_row/.*

FOR FURTHER INFORMATION CONTACT: Steve Storo, BLM West Butte Wind Power Right-of-Way Project Lead: telephone (541) 416–6885; address 3050 NE., 3rd Street, Prineville, Oregon 97754; e-mail: *sstoro@blm.gov.*

SUPPLEMENTARY INFORMATION: The applicant, West Butte Wind Power, LLC, filed right-of-way (ROW) application OR–065784 to construct 4.5 miles of road and an adjacent power transmission line on public land to support the construction of up to 52 wind turbines and ancillary facilities on adjacent private land. The portion of the project on public lands is the ''Proposed Action.'' Actions occurring on private land are called ''connected actions.'' The project is 25 air miles southeast of Bend, Oregon, located on the north side of US Highway 20.

The BLM has selected the preferred alternative. The BLM preferred alternative would result in the granting of a 4.5 mile ROW for construction and operation of an access road and transmission line across lands administered by the BLM. Consideration of this alternative includes an analysis of the connected action of West Butte Wind Power constructing and operating a wind farm and associated facilities (*e.g.,* access road, transmission line, substation, and an operations and maintenance building) on privately held lands.

The Notice of Availability of the Final Environmental Impact Statement (EIS) was published in the **Federal Register** on October 1, 2010 (75 FR 60804). Publication of the Notice of Availability for the Final EIS initiated a 30-day review period on the Final EIS. The BLM received seven letters during this period that ended on November 1, 2010, and three more letters shortly after period ended. The BLM analyzed these letters to determine if they contained substantive comments that were not already addressed in the responses to public comments received on the Draft

EIS or that addressed a need for changes between the Draft and Final EIS. No significant new information was presented in the letters that would require reissuance of the Draft or Final EIS . The U.S. Fish and Wildlife Service confirmed that an Avian and Bat Protection Plan (ABPP) has been developed for the project and that the project applicant has cooperated with the Service to address golden eagle issues within the ABPP.

Because this decision is approved by the Secretary of the Interior, it is not subject to administrative appeal (43 CFR 4.410(a)(3)).

Authority: 40 CFR 1506.6 and 1506.10.

Mike Pool,

Deputy Director, Operations, Bureau of Land Management.

[FR Doc. 2011–18275 Filed 7–19–11; 8:45 am]

BILLING CODE 4310–33–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NRNHL–0611–7822; 2280–665]

National Register of Historic Places; Notification of Pending Nominations and Related Actions

Nominations for the following properties being considered for listing or related actions in the National Register were received by the National Park Service before June 25, 2011. Pursuant to section 60.13 of 36 CFR part 60, written comments are being accepted concerning the significance of the nominated properties under the National Register criteria for evaluation. Comments may be forwarded by United States Postal Service, to the National Register of Historic Places, National Park Service, 1849 C St., NW., MS 2280, Washington, DC 20240; by all other carriers, National Register of Historic Places, National Park Service, 1201 Eye St., NW., 8th floor, Washington DC 20005; or by fax, 202–371–6447. Written or faxed comments should be submitted by August 4, 2011. 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.

J. Paul Loether,

Chief, National Register of Historic Places, National Historic Landmarks Program.

CALIFORNIA

Los Angeles County

Bristol—Cypress Historic District (Late 19th and Early 20th Century Development and Architecture in Pasadena MPS), 438–516 Cypress Ave., Pasadena, 11000489.

Cosby, James Fielding, House (Late 19th and Early 20th Century Development and Architecture in Pasadena MPS), 510 Locke Haven St., Pasadena, 11000490.

Denham, Mary E., House (Late 19th and Early 20th Century Development and Architecture in Pasadena MPS), 297 S. Orange Grove Blvd., Pasadena, 11000491.

Hartwell, John S., House (Late 19th and Early 20th Century Development and Architecture in Pasadena MPS), 423 Lincoln Ave., Pasadena, 11000492.

Hillmont (Late 19th and Early 20th Century Development and Architecture in Pasadena MPS), 1375 E. Mountain St., Pasadena, 11000493.

Hood, Mrs. J.H., House (Late 19th and Early 20th Century Development and Architecture in Pasadena MPS), 494 Ellis St., Pasadena, 11000494.

House at 1360 Lida Street (Late 19th and Early 20th Century Development and Architecture in Pasadena MPS), 1360 Lida St., Pasadena, 11000495.

Jarvis, Benjamin, House (Late 19th and Early 20th Century Development and Architecture in Pasadena MPS), 531 N. Raymond Ave., Pasadena, 11000496.

Lacey, Friend, House (Late 19th and Early 20th Century Development and Architecture in Pasadena MPS), 679 E. Villa St., Pasadena, 11000497.

New Fair Oaks Historic District (Late 19th and Early 20th Century Development and Architecture in Pasadena MPS), 480–512 Lincoln Ave. & 57–103 W. Villa St., Pasadena, 11000498.

Post, George B., House (Late 19th and Early 20th Century Development and Architecture in Pasadena MPS), 360 S. Grand Ave., Pasadena, 11000499.

Raymond—Summit Historic District (Late 19th and Early 20th Century Development and Architecture in Pasadena MPS), Roughly bounded by N. Raymond Ave., E. Villa St., Summit Ave. & E. Maple St., Pasadena, 11000500.

San Francisco County

San Francisco Public Library North Beach Branch, 2000 Mason St., San Francisco, 11000502.

FLORIDA

Lee County

Lindsley, Halstead and Emily, House 1300 W. 13th St., Boca Grande, 11000501.

IOWA

Greene County

Jefferson Square Commercial Historic District, Courthouse Sq. and fronting blocks of N. Wilson, N. Chestnut, E. Lincoln, E. State & 115 S. Wilson Sts., Jefferson, 11000503.

KANSAS

Leavenworth County

Sumner Elementary School (Public Schools of Kansas MPS), 1501 5th Ave., Leavenworth, 11000504.

Lyon County

Cross, Col. H.C. and Susan, House 526 Union St., Emporia, 11000505.

Reno County

Hoke Building (Commercial and Industrial Resources of Hutchinson MPS), 25 E. 1st Ave., Hutchinson, 11000506.

Russell County

Dorrance State Bank, 512 Main St., Dorrance, 11000507.

NORTH CAROLINA

Durham County

Carr, John C. and Binford, House 3400 Westover Rd., Durham, 11000508.

Forsyth County

Chatham Manufacturing Company—Western Electric Company, 750 & 800 Chatham Rd., Winston-Salem, 11000509.

Mecklenburg County

Pineville Commercial Historic District 310–333 Main & 105–109 Dover Sts., Pineville, 11000510.

Pineville Mill Village Historic District Roughly bounded by Dover, Price & Hill Sts., Lakeview Dr. & Eden Ct., Pineville, 11000511.

RHODE ISLAND

Washington County

Baker, David S., Estate, 51 & 67 Prospect Ave., North Kingstown, 11000512.

TEXAS

Bexar County

Brackinridge Park, Roughly bounded by Hildebrand Ave., Broadway & Ave. B, Josephine St., US 281, River Rd., Alpine Dr., N. St. Mary's St. & the San Antonio Zoo. San Antonio, 11000513.

Tarrant County

Butler Place Historic District Roughly bounded by Luella St., I.M. Terrell Way Cir. N., 19th St. & I–35W, Fort Worth, 11000514.

Williamson County

Hutto Commercial Historic District 101–205 East St., 202 Farley St. & 204 US 79., Hutto, 11000515.

VERMONT

Orleans County

White, Ai J., Duplex, 343 Main St., Newport, 11000517.

Windham County

Broad Brook House 475 Coolidge Hwy., Guilford, 11000516.

WISCONSIN

Racine County

Yorkville #4 School, 17640 Old Yorkville Rd., Yorkville, 11000518.

[FR Doc. 2011–18228 Filed 7–19–11; 8:45 am]

BILLING CODE 4312–51–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–1189 (Preliminary)]

Large Power Transformers From Korea; Institution of Antidumping Duty Investigation and Scheduling of a Preliminary Phase Investigation

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice of the institution of an investigation and commencement of preliminary phase antidumping investigation No. 731–TA–1189 (Preliminary) under section 733(a) of the Tariff Act of 1930 (19 U.S.C. 1673b(a)) (the Act) to determine whether there is a reasonable indication that an industry in the United States is materially injured or threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports from Korea of large power transformers, provided for in subheading 8504.23.00 of the Harmonized Tariff Schedule of the United States, that are alleged to be sold in the United States at less than fair value. Unless the Department of Commerce extends the time for initiation pursuant to section 732(c)(1)(B) of the Act (19 U.S.C. 1673a(c)(1)(B)), the Commission must reach a preliminary determination in antidumping investigations in 45 days, or in this case by August 29, 2011. The Commission's views are due at Commerce within five business days thereafter, or by September 6, 2011.

For further information concerning the conduct of this investigation and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A and B (19 CFR part 207).

DATES: *Effective Date:* July 14, 2011.

FOR FURTHER INFORMATION CONTACT: Edward Petronzio (202–205–3176), Office of Investigations, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its Internet server (*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.*

SUPPLEMENTARY INFORMATION:

Background.—This investigation is being instituted in response to a petition filed on July 14, 2011 by ABB Inc., Cary, NC; Delta Star Inc., Lynchburg, VA; and Pennsylvania Transformer Technology Inc., Cannonsburg, PA.

Participation in the investigation and public service list.—Persons (other than petitioners) wishing to participate in the investigation as parties must file an entry of appearance with the Secretary to the Commission, as provided in sections 201.11 and 207.10 of the Commission's rules, not later than seven days after publication of this notice in the **Federal Register**. Industrial users and (if the merchandise under investigation is sold at the retail level) representative consumer organizations have the right to appear as parties in Commission antidumping investigations. The Secretary will prepare a public service list containing the names and addresses of all persons, or their representatives, who are parties to this investigation upon the expiration of the period for filing entries of appearance.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and BPI service list.—Pursuant to section 207.7(a) of the Commission's rules, the Secretary will make BPI gathered in this investigation available to authorized applicants representing interested parties (as defined in 19 U.S.C. 1677(9)) who are parties to the investigation under the APO issued in the investigation, provided that the application is made not later than seven days after the publication of this notice in the **Federal Register**. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Conference.—The Commission's Director of Investigations has scheduled a conference in connection with this investigation for 9:30 a.m. on August 4, 2011, at the U.S. International Trade Commission Building, 500 E Street, SW., Washington, DC. Requests to appear at the conference should be filed with the Office of the Secretary (*William.bishop@usitc.gov* and *Sharon.bellamy@usitc.gov*) on or before August 2, 2011. Parties in support of the imposition of antidumping duties in this investigation and parties in opposition to the imposition of such duties will each be collectively allocated one hour within which to make an oral presentation at the conference. A nonparty who has testimony that may aid the Commission's deliberations may request permission to present a short statement at the conference.

Written submissions.—As provided in sections 201.8 and 207.15 of the Commission's rules, any person may submit to the Commission on or before August 9, 2011, a written brief containing information and arguments pertinent to the subject matter of the investigation. Parties may file written testimony in connection with their presentation at the conference no later than three days before the conference. If briefs or written testimony contain BPI, they must conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's rules do not authorize filing of submissions with the Secretary by facsimile or electronic means, except to the extent permitted by section 201.8 of the Commission's rules, as amended, 67 FR 68036 (November 8, 2002). Even where electronic filing of a document is permitted, certain documents must also be filed in paper form, as specified in II (C) of the Commission's Handbook on Electronic Filing Procedures, 67 FR 68168, 68173 (November 8, 2002).

In accordance with sections 201.16(c) and 207.3 of the rules, each document filed by a party to the investigation must be served on all other parties to the investigation (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Authority: This investigation is being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.12 of the Commission's rules.

By order of the Commission.

Issued: July 14, 2011.

James R. Holbein,

Secretary to the Commission.

[FR Doc. 2011–18157 Filed 7–19–11; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–1089 (Review)]

Certain Orange Juice From Brazil; Scheduling of a Full Five-Year Review Concerning the Antidumping Duty Order on Certain Orange Juice From Brazil

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice of the scheduling of a full review pursuant to section 751(c)(5) of the Tariff Act of 1930 (19 U.S.C. 1675(c)(5)) (the Act) to determine whether revocation of the antidumping duty order on certain orange juice from Brazil would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time. The Commission has determined to exercise its authority to extend the review period by up to 90 days pursuant to 19 U.S.C. 1675(c)(5)(B). For further information concerning the conduct of this review and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR Part 201), and part 207, subparts A, D, E, and F (19 CFR Part 207).

DATES: *Effective Date:* July 14, 2011.

FOR FURTHER INFORMATION CONTACT: Amy Sherman (202–205–3289), Office of Investigations, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*http://www.usitc.gov*). The public record for this review may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*.

SUPPLEMENTARY INFORMATION:

Background.—On May 9, 2011, the Commission determined that responses to its notice of institution of the subject five-year review were such that a full review pursuant to section 751(c)(5) of the Act should proceed (76 FR 30197, May 24, 2011). A record of the Commissioners' votes, the Commission's statement on adequacy, and any individual Commissioner's statements are available from the Office of the Secretary and at the Commission's Web site.

Participation in the review and public service list.—Persons, including industrial users of the subject merchandise and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in this review as parties must file an entry of appearance with the Secretary to the Commission, as provided in section 201.11 of the Commission's rules, by 45 days after publication of this notice. A party that filed a notice of appearance following publication of the Commission's notice of institution of the review need not file an additional notice of appearance. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the review.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and BPI service list.—Pursuant to section 207.7(a) of the Commission's rules, the Secretary will make BPI gathered in this review available to authorized applicants under the APO issued in the review, provided that the application is made by 45 days after publication of this notice. Authorized applicants must represent interested parties, as defined by 19 U.S.C. 1677(9), who are parties to the review. A party granted access to BPI following publication of the Commission's notice of institution of the review need not reapply for such access. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Staff report.—The prehearing staff report in the review will be placed in the nonpublic record on January 4, 2012, and a public version will be issued thereafter, pursuant to section 207.64 of the Commission's rules.

Hearing.—The Commission will hold a hearing in connection with the review beginning at 9:30 a.m. on January 24, 2012, at the U.S. International Trade Commission Building. Requests to appear at the hearing should be filed in writing with the Secretary to the Commission on or before January 17, 2012. A nonparty who has testimony that may aid the Commission's deliberations may request permission to present a short statement at the hearing. All parties and nonparties desiring to appear at the hearing and make oral presentations should attend a prehearing conference to be held at 9:30 a.m. on January 20, 2012, at the U.S. International Trade Commission Building. Oral testimony and written materials to be submitted at the public hearing are governed by sections 201.6(b)(2), 201.13(f), 207.24, and 207.66 of the Commission's rules. Parties must submit any request to present a portion of their hearing testimony *in camera* no later than 7 business days prior to the date of the hearing.

Written submissions.—Each party to the review may submit a prehearing brief to the Commission. Prehearing briefs must conform with the provisions of section 207.65 of the Commission's rules; the deadline for filing is January 13, 2012. Parties may also file written testimony in connection with their presentation at the hearing, as provided in section 207.24 of the Commission's rules, and posthearing briefs, which must conform with the provisions of section 207.67 of the Commission's rules. The deadline for filing posthearing briefs is February 2, 2012; witness testimony must be filed no later than three days before the hearing. In addition, any person who has not entered an appearance as a party to the review may submit a written statement of information pertinent to the subject of the review on or before February 2, 2012. On March 1, 2012, the Commission will make available to parties all information on which they have not had an opportunity to comment. Parties may submit final comments on this information on or before March 5, 2012, but such final comments must not contain new factual information and must otherwise comply with section 207.68 of the Commission's rules. All written submissions must conform with the provisions of section 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's rules do not authorize filing of submissions with the Secretary by facsimile or electronic means, except to the extent permitted by section 201.8 of the Commission's rules, as amended, 67 FR 68036 (November 8, 2002). Even where electronic filing of a document is permitted, certain documents must also be filed in paper form, as specified in II(C) of the Commission's Handbook on Electronic Filing Procedures, 67 FR 68168, 68173 (November 8, 2002).

Additional written submissions to the Commission, including requests pursuant to section 201.12 of the Commission's rules, shall not be accepted unless good cause is shown for accepting such submissions, or unless the submission is pursuant to a specific request by a Commissioner or Commission staff.

In accordance with sections 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the review must be served on all other parties to the review (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Authority: This review is being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.62 of the Commission's rules.

Issued: July 14, 2011.

By order of the Commission.

James R. Holbein,

Secretary to the Commission.

[FR Doc. 2011–18201 Filed 7–19–11; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Inv. No. 337–TA–791]

In the Matter of: Certain Electric Fireplaces, Components Thereof, Manuals for Same, Certain Processes for Manufacturing or Relating to Same and Certain Products Containing Same; Notice of Institution of Investigation

Institution of investigation pursuant to 19 U.S.C. 1337.

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on June 17, 2011, under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, on behalf of Twin-Star International, Inc. of Delray Beach, California and TS Investment Holding Corp. of Miami, Florida. Supplements to the complaint were filed on July 1, 2011 and July 8, 2011. 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 electric fireplaces, components thereof, manuals for same, certain processes for manufacturing or relating to same and certain products containing same by reason of infringement of U.S. Copyright Registration No. TX0007350474; U.S. Copyright Registration No. TX0007350476; U.S. Copyright Registration No. VA0001772660; and U.S. Copyright Registration No. VA0001772661, misappropriation of trade secrets, and unfair competition. The complaint further alleges that there exists in the United States an industry as required by subsection (a)(1)(A) 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: The Office of Unfair Import Investigations, U.S. International Trade Commission, telephone (202) 205–2560.

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 (2011).

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on July 14, 2011, *Ordered That*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine:

(a) 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 electric fireplaces, components thereof, manuals for same, certain processes for manufacturing or relating to same and certain products containing same by reason of infringement of U.S. Copyright Registration Nos. TX0007350474; TX0007350476; VA0001772660; and VA0001772661, and whether an industry in the United States exists as required by subsection (a)(2) of section 337; and

(b) Whether there is a violation of subsection (a)(1)(A) 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 electric fireplaces, components thereof, manuals for same, certain processes for manufacturing or relating to same and certain products containing same by reason of misappropriation of trade secrets or unfair competition, the threat or effect of which is to destroy or substantially injure an industry in the United States;

(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:

Twin-Star International, Inc., 1690 South Congress Avenue, Suite 210, Delray Beach, FL 33445.

TS Investment Holding Corp., c/o Trivest Partners, L.P., 2665 South Bayshore Drive, 8th Floor, Miami, FL 33133.

(b) The respondents are the following entities alleged to be in violation of section 337, and are the parties upon which the complaint is to be served:

Shenzhen Reliap Industrial Co., No. 3 Chuangye Road, The Third Industrial Zone, Shiyan Town, Baoan District, Shenzhen, China.

Yue Qiu Sheng (a.k.a. Jason Yue), Room #507, Building 3, Bang Dao Yuang, Bu Ji Town, Shenzhen City, China 518112.

(c) The 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 respondents 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 a 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.

Issued: July 14, 2011.

By order of the Commission.

James R. Holbein,

Secretary to the Commission.

[FR Doc. 2011–18216 Filed 7–19–11; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Clean Air Act

Notice is hereby given that on July 13, 2011, a proposed Consent Decree (''Decree'') in *United States* v. *Alltex Uniform Rental Service, Inc. and G&K Services, Co.,* Civil Action No. 11–CV–342, was lodged with the United States District Court for the District of New Hampshire.

The Decree resolves claims of the United States against Alltex Uniform Rental Service, Inc. and G&K Services, Co. under the Clean Air Act, 42 U.S.C. 7401–7671q, for injunctive relief and recovery of civil penalties in connection with the defendants' installation and operation of additional industrial laundry equipment in their laundry facility located in Manchester, New Hampshire. The Decree requires the defendants to pay $65,000 in civil penalties; to purchase and retire 75 tons of emission reduction credits; and to institute injunctive relief in the form of production limits and restrictions while seeking permits to install and operate additional equipment to reduce air emissions; and to perform a supplemental environmental project (''SEP'') with a value of at least $220,000. Pursuant to the SEP, the defendants agree to help fund and encourage the replacement of pre-1988 wood stoves with cleaner burning parts and/or stoves.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the Decree. Comments should be addressed to the Assistant Attorney General, Environmental and Natural Resources Division, and either e-mailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *Alltex Uniform Service, Inc., et al.,* 11–CV–342 (D. NH.), D.J. Ref. 90–5–2–1–10075.

The Decree may be examined at U.S. EPA Region I, 5 Post Office Square, Boston, MA 02109. During the public comment period, the Decree, may also be examined on the following Department of Justice Web site, *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A copy of the Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $23.25 (25 cents per page reproduction cost) payable to the U.S. Treasury or, if by e-mail or fax, forward a check in that amount to the Consent Decree Library at the stated address.

Ronald G. Gluck,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2011–18208 Filed 7–19–11; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993; Open Mobile Alliance

Notice is hereby given that, on June 2, 2011, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Open Mobile Alliance (''OMA'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, AuthenTec, Inc., Melbourne, FL; BROADCOM GPS SPAIN SL, Irvine, CA; DAO Lab Ltd., Shatin, N.T, Hong Kong; Dimark Software, Inc., Cupertino, CA; Prim'Vision, Villeneuve-Loubet, France; SeeRoo Information Co., Ltd., Songpa-gu, Seoul, REPUBLIC OF KOREA; Spectracore Technologies, San Diego, CA; UltiMobile, LLC., Orlando, FL; Z–Think, LLC., Alpharetta, GA, have been added as parties to this venture. Also, 7 Layers Inc., Irvine, CA; 724 Solutions, Inc., Toronto, Ontario, CANADA; Amobee, Herzlia, Israel; Aplix Corporation, Tokyo, Japan; Arista Enterprises LLC, Fairbanks, AK; Beijing Leadtone Wireless Ltd., Chaoyang District, Beijing, People's Republic of China; Bercut, Saint-Petersburg, Russian Federation; British Telecommunications PLC, London, United Kingdom; Cable Television Laboratories, Inc., Louisville, CO; CarrierIQ, Inc., Mountain View, CA; CDMA Development Group, Inc., Costa Mesa, CA; Colibria AS, Lysaker, NORWAY; Comviva Technologies Ltd., Gurgaon, Hayana, India; Core Mobility, Mountain View, CA; Discretix Technologies Ltd., Kfar Netter, ISRAEL; EMCC Software Ltd., Manchester, United Kingdom; Enensys Technologies, Rennes, FRANCE; esmertec AG, Dubendorf, Switzerland; Eurofins Product Service GmbH, Reichenwalde, Germany; Expway, Paris, France; FEELingk Co. Ltd., Seoul, Republic of Korea; fg microtec GmbH, Munich, Germany; InfoComm Development Authority of Singapore (IDA), Mapletree Business City, Singapore; I–ON Communications Co., Ltd., Gangnam-gu, Seoul, Republic of Korea; Jataayu Software Pvt Ltd., Bangalore, India; mCarbon Tech Innovation PVT. LTD., Noida, Uttar Pradesh, India; Mctel, Hector Otto, Monaco; Mobile Security Software, Madrid, Spain; Mobilethink A/S, Arhus, Denmark; Motricity, Inc., Bellevue, WA; Neutral Tandem, Chicago, IL; NII Holdings, Inc., Reston, VA; Novarra, Itasca, IL; NOW Wireless Ltd., Croydon, United Kingdom; Oracle USA, Inc., Redwood Shores, CA; Perlego Systems, Inc., Gig Harbor, WA; SafeNet, Inc., Amsterdam, Netherlands; SCA Technica, Inc., Nashua, NH; SEVEN, Helsinki, Finland; SFR, Paris, France; Sintesio, Foundation, Bled, SLOVENIA; Siodata Technologies, Hai Dian District, Beijing, People's Republic of China; SIRF Technologies, San Jose, CA; Smarttrust, Stockholm, Sweden; Solvix Technology Co., Ltd, Gangnam-gu, Seoul, Republic of Korea; STMicroelectronics, Geneva, Switzerland; Tecnomen Lifetree, Espoo, Finland; Telcoware Co., Ltd., Seocho-Gu, Seoul, Republic of Korea; Telespree Communications, San Francisco, CA; Tridea Works, LLC, Reston, VA; Ubiquity Software Corporation, Cardiff, United Kingdom; University of New Hampshire InterOperability Laboratory, Durham, NH; V4X SAS, Bordeaux Pessac, FRANCE; Vobile, Inc., Santa Clara, CA; Winit Inc., Daejeon, Republic of Korea; Wisegram Inc., Seoul, Republic of Korea; and Xiam Technologies Ltd., Dublin, Ireland, have withdrawn as parties to this venture.

The following members have changed their names: KTF to KT Corp., Seoul, Republic of Korea; Sun Microsystems to Oracle America, Inc., Palo Alto, CA; Fraunhofer ITS to Fraunhofer Gesellschaft e.V., Erlagen, Germany; and Global Locate Spain S.L. (a Broadcom Company) to Broadcom GPS Spain SL, Irvine, CA.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and OMA intends to file additional written notifications disclosing all changes in membership.

On March 18, 1998, OMA filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on December 31, 1998 (63 FR 72333).

The last notification was filed with the Department on January 13, 2010. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on March 10, 2010 (75 FR 11197).

Patricia A. Brink,

Director of Civil Enforcement, Antitrust Division.

[FR Doc. 2011–18023 Filed 7–19–11; 8:45 am]

BILLING CODE;M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Advanced Media Workflow Association, Inc.

Notice is hereby given that, on June 23, 2011, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Advanced Media Workflow Association, Inc. has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, A&E Television Networks, New York, NY; CBC, Montreal, Quebec, Canada; Channel 4 TV, London, United Kingdom; Dalet, Levallois Perret, France; JVC Kenwood Holdings, Inc., Kanagawa, Japan; MOG Solutions, Maia, Portugal; National Film Board of Canada, Montreal, Quebec, Canada; OpenCube Technologies, Ramonville Saint-Agne, France; Telestream, Inc., Nevada City, CA; Francois Abbe (individual member), Montpellier Cedex, France; Gary Olson (individual member), New York, NY; Duane Solem (individual member), Atlanta, GA; and Andreas Georg Strascheit (individual member), Dortmund, Germany, have been added as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and Advanced Media Workflow Association, Inc. intends to file additional written notifications disclosing all changes in membership.

On March 28, 2000, Advanced Media Workflow Association, Inc. filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on June 29, 2000 (65 FR 40127).

The last notification was filed with the Department on March 21, 2011. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on April 28, 2011 (76 FR 23839).

Patricia A. Brink,

Director of Civil Enforcement, Antitrust Division.

[FR Doc. 2011–18026 Filed 7–19–11; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993; Network Centric Operations Industry Consortium, Inc.

Notice is hereby given that, on June 9, 2011, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Network Centric Operations Industry Consortium, Inc. (''NCOIC'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Wakelight Technologies, Inc., Honolulu, HI; LinQuest Corporation, Los Angeles, CA; and Computer Sciences Corporation, Rockville, MD, have withdrawn as parties to this venture. In addition, MilSOFT ICT-Iletisim Teknolojileri A.S., Ankara, Turkey is still an active member and has not withdrawn as a party to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and NCOIC intends to file additional written notifications disclosing all changes in membership.

On November 19, 2004, NCOIC filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on February 2, 2005 (70 FR 5486).

The last notification was filed with the Department on March 16, 2011. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on April 15, 2011 (76 FR 21405).

Patricia A. Brink,

Director of Civil Enforcement, Antitrust Division.

[FR Doc. 2011–18022 Filed 7–19–11; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Cooperative Research Group on Diesel Aftertreatment Accelerated Aging Cycles—Heavy-Duty

Notice is hereby given that, on June 23, 2011, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Southwest Research Institute—Cooperative Research Group on Diesel Aftertreatment Accelerated Aging Cycles—Heavy-Duty (''DAAAC–HD'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its nature, objectives, and membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, the period of performance has been extended to February 29, 2012. Additionally, Navistar, Melrose Park, IL, has withdrawn as a party to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and DAAAC–HD intends to file additional written notifications disclosing all changes in membership.

On February 2, 2009, DAAAC–HD filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on February 26, 2009 (74 FR 8813).

The last notification was filed with the Department on May 12, 2010. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on June 4, 2010 (75 FR 31816).

Patricia A. Brink,

Director of Civil Enforcement, Antitrust Division.

[FR Doc. 2011–18027 Filed 7–19–11; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993; DVD Copy Control Association

Notice is hereby given that, on June 23, 2011, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), DVD Copy Control Association (''DVD CCA'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Guangzhou Changjia Electronic Co., Ltd., Guangzhou City, Guangdong, People's Republic of China, and Wistron Corporation, Taipei Hsien, TAIWAN, have been added as parties to this venture.

Also, BeyondWiz Co., Ltd., Seongnam, Republic of Korea; CE Digital (Zhenjiang) Co., Ltd., Zhenjiang, Jiangsu, People's Republic of China; Digital Networks North America, Inc., Cupertino, CA; Enseo, Inc., Richardson, TX; and Ever Best Industrial (H.K.) Limited, Kowloon, Hong Kong-China, have withdrawn as parties to this venture.

In addition, Kenmec Mechanical Engineering Co., Ltd. has changed its name to Kentec, Inc., Taipei, Taiwan.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and DVD CCA intends to file additional written notifications disclosing all changes in membership.

On April 11, 2001, DVD CCA filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on August 3, 2001 (66 FR 40727).

The last notification was filed with the Department on March 9, 2011. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on April 11, 2011 (76 FR 20010).

Patricia A. Brink,

Director of Civil Enforcement, Antitrust Division.

[FR Doc. 2011–18025 Filed 7–19–11; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Marine Well Containment Venture

Notice is hereby given that, on June 7, 2011, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Marine Well Containment Venture (''MWCV'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Apache Deepwater LLC, Houston, TX; Anadarko Offshore Well Containment Company LLC, The Woodlands, TX; BHP Billiton Petroleum (Deepwater) Inc., Houston, TX; Statoil Gulf of Mexico Response Company LLC, Houston, TX, and Hess Offshore Response Company LLC, Houston, TX, have been added as parties to this venture.

No other changes have been made in either the membership or planned activity of the venture. The composition of members in this venture may change, and MWCV intends to file additional written notifications disclosing all changes in membership.

On August 18, 2010, MWCV filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on October 12, 2010 (75 FR 62570).

The last notification was filed with the Department on March 4, 2011. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on May 11, 2011 (76 FR 27351).

Patricia A. Brink,

Director of Civil Enforcement, Antitrust Division.

[FR Doc. 2011–18024 Filed 7–19–11; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–75,227; TA–W–75,227A]

Dana Structural Manufacturing, LLC, Structures Division, Longview, TX; Leased Workers From Manpower Working On-Site at Dana Structural Manufacturing, LLC Structures Division, Longview, TX; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (''Act''), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on February 18, 2011, applicable to workers of Dana Structural Manufacturing, LLC, Structures Division, including on-site leased workers from Manpower, Longview, Texas. The notice was published in the **Federal Register** on March 10, 2011 (76 FR 13230).

At the request of the State Agency, the Department reviewed the certification for workers of the subject firm. The workers are engaged in the production of component parts for the automotive industry.

The review shows that on December 10, 2008, a certification of eligibility to apply for adjustment assistance was issued for all workers of Dana Holding Corporation, Structural Solutions Group, including on-site workers from Career Personnel, Longview, Texas, separated from employment on or after October 29, 2007 through December 10, 2010 (TA–W–64,310). The notice was published in the **Federal Register** on December 30, 2008 (73 FR 79915).

In order to avoid an overlap in worker group coverage concerning the workers from Dana Structural, the Department is amending the February 10, 2010 impact date established for TA–W–75,227, to read December 11, 2010. Since the earlier certification did not include on-site leased workers from Manpower, those workers will be covered under TA–W–75,227A with the impact date being one full year before the petition date. There were no leased workers from Career Personnel on-site at the subject firm during the relevant period.

The amended notice applicable to TA–W–75,227 is hereby issued as follows:

All workers of Dana Structural Manufacturing, LLC, Structures Division, Longview, Texas, (TA–W–75,227) who became totally or partially separated from employment on or after December 11, 2010, through February 18, 2013, and all workers in the group threatened with total or partial separation from employment on date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended; and all leased workers from Manpower working on-site at Dana Structural Manufacturing, LLC, Structures Division, Longview, Texas, (TA–W–75,227A) who became totally or partially separated from employment on or after February 10, 2010, through February 18, 2013, and all workers in the group threatened with total or partial separation from employment on date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended and

Signed in Washington, DC, this 11th day of July 2011.

Michael W. Jaffe,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2011–18234 Filed 7–19–11; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–73,164]

General Motors Corporation, Renaissance Center, including On-Site Leased Workers From Accretive Solutions, Detroit, Inc., Acro Service Corporation, Aerotek, Inc., Ajilon Consulting, Altair Engineering, Inc., Aquent LLC, Global Technology Associates, LTD, JDM Systems Consultants, Inc., Kelly Service, Inc., Populus Group, TEK Systems, Compuware Corporation, and Nexus Business Solutions, Detroit, MI; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (''Act''), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on April 23, 2010, applicable to workers of General Motors Corporation, Renaissance Center, including on-site leased workers from Accretive Solutions, Detroit, Inc., Acro Service Corporation, Aerotek, Inc., Ajilon Consulting, Altair Engineering, Inc., Aquent LLC, Global Technology Associates, Ltd., JDM Systems Consultants, Inc., Kelly Service, Inc., Populus Group, TEK Systems, Detroit, Michigan. The notice was published in the **Federal Register** on May 20, 2010 (75 FR 28299). The notice was amended on August 31, 2010 to include on-site leased workers from Compuware Corporation. The notice was published in the **Federal Register** on September 13, 2010 (75 FR 55613–55614).

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. The workers support production of automobiles.

New information shows that workers leased from Nexus Business Solutions were employed on-site at the Detroit, Michigan location of General Motors Corporation, Renaissance Center. The Department has determined that on-site workers from Nexus Business Solutions were sufficiently under the control of the subject firm to be covered by this certification.

Based on these findings, the Department is amending this certification to include workers from Nexus Business Solutions working on-site at the Detroit, Michigan location of General Motors Corporation, Renaissance Center.

The amended notice applicable to TA–W–73,164 is hereby issued as follows:

All workers of General Motors Corporation, Renaissance Center, including on-site leased workers from Accretive Solutions, Detroit, Inc., Acro Service Corporation, Aerotek, Inc., Ajilon Consulting, Altair Engineering, Inc., Aquent LLC, Global Technology Associates, Ltd., JDM Systems Consultants, Inc., Kelly Service, Inc., Populus Group, TEK Systems, Compuware Corporation, and Nexus Business Solutions, Detroit, Michigan, who became totally or partially separated from employment on or after December 18, 2008 through April 23, 2012, and all workers in the group threatened with total or partial separation from employment on date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed at Washington, DC, this 7th day of July 2011.

Del Min Amy Chen,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2011–18237 Filed 7–19–11; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration Investigations Regarding Certifications of Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

Petitions have been filed with the Secretary of Labor under Section 221(a) of the Trade Act of 1974 (''the Act'') and are identified in the Appendix to this notice. Upon receipt of these petitions, the Director of the Office of Trade Adjustment Assistance, Employment and Training Administration, has instituted investigations pursuant to Section 221(a) of the Act.

The purpose of each of the investigations is to determine whether the workers are eligible to apply for adjustment assistance under Title II, Chapter 2, of the Act. The investigations will further relate, as appropriate, to the determination of the date on which total or partial separations began or threatened to begin and the subdivision of the firm involved.

The petitioners or any other persons showing a substantial interest in the subject matter of the investigations may request a public hearing, provided such request is filed in writing with the Director, Office of Trade Adjustment Assistance, at the address shown below, not later than August 1, 2011.

Interested persons are invited to submit written comments regarding the subject matter of the investigations to the Director, Office of Trade adjustment Assistance, at the address shown below, not later than August 1, 2011.

The petitions filed in this case are available for inspection at the Office of the Director, Office of Trade Adjustment Assistance, Employment and Training Administration, U.S. Department of Labor, Room N–5428, 200 Constitution Avenue, NW., Washington, DC 20210.

Signed at Washington, DC, this 1st day of July 2011.

Michael W. Jaffe,

Certifying Officer, Office of Trade Adjustment Assistance.

APPENDIX

[13 TAA petitions instituted between 6/27/11 and 7/1/11]

TA–W	Subject firm (petitioners)	Location	Date of institution	Date of petition
80253	Adecco Employment Services (State/One-Stop)	Windsor, CO	06/27/11	06/22/11
80254	Rheem Manufacturing Corporation (State/One-Stop)	Fort Smith, AR	06/27/11	06/24/11
80255	Technicolor Home Entertainment Services (Company)	Camarillo, CA	06/28/11	06/27/11
80256	The News & Observer Publishing Company (Company)	Raleigh, NC	06/28/11	06/27/11
80257	Liz Claiborne Distribution Center (State/One-Stop)	Westchester, OH	06/28/11	06/27/11
80258	Avery Dennison (Company)	Greensboro, NC	06/29/11	06/29/11
80259	Welded Tube of Canada, Inc (Company)	Delta, OH	06/29/11	06/15/11
80260	Unimin Corporation (Company)	Aurora, IN	06/29/11	06/27/11
80261	Fritch Mill (State/One-Stop)	Snohomish, WA	06/29/11	06/22/11
80262	Cooper Lighting, LLC (Company)	Americus, GA	06/29/11	06/28/11
80263	Alabama Wholesale Socks (Company)	Sylvania, AL	06/29/11	06/27/11
80264	Keithley Instruments (Company)	Solon, OH	06/30/11	06/30/11
80265	MWH (Workers)	Fort Myers, FL	07/01/11	06/23/11

[FR Doc. 2011–18235 Filed 7–19–11; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (19 U.S.C. 2273), the Department of Labor herein presents summaries of determinations regarding eligibility to apply for trade adjustment assistance for workers (TA–W) number and alternative trade adjustment assistance (ATAA) by (TA–W) number issued during the period of June 27, 2011 through July 1, 2011.

In order for an affirmative determination to be made for workers of a primary firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(a) of the Act must be met.

I. Section (a)(2)(A) all of the following must be satisfied:

A. A significant number or proportion of the workers in such workers' firm, or an appropriate subdivision of the firm, have become totally or partially separated, or are threatened to become totally or partially separated;

B. The sales or production, or both, of such firm or subdivision have decreased absolutely; and

C. Increased imports of articles like or directly competitive with articles produced by such firm or subdivision have contributed importantly to such workers' separation or threat of separation and to the decline in sales or production of such firm or subdivision; or

II. Section (a)(2)(B) both of the following must be satisfied:

A. A significant number or proportion of the workers in such workers' firm, or an appropriate subdivision of the firm, have become totally or partially separated, or are threatened to become totally or partially separated;

B. There has been a shift in production by such workers' firm or subdivision to a foreign country of articles like or directly competitive with articles which are produced by such firm or subdivision; and

C. One of the following must be satisfied:

1. The country to which the workers' firm has shifted production of the articles is a party to a free trade agreement with the United States;

2. The country to which the workers' firm has shifted production of the articles to a beneficiary country under the Andean Trade Preference Act, African Growth and Opportunity Act, or the Caribbean Basin Economic Recovery Act; or

3. There has been or is likely to be an increase in imports of articles that are like or directly competitive with articles which are or were produced by such firm or subdivision.

Also, in order for an affirmative determination to be made for secondarily affected workers of a firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(b) of the Act must be met.

(1) Significant number or proportion of the workers in the workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) The workers' firm (or subdivision) is a supplier or downstream producer to a firm (or subdivision) that employed a group of workers who received a certification of eligibility to apply for trade adjustment assistance benefits and such supply or production is related to the article that was the basis for such certification; and

(3) Either—

(A) The workers' firm is a supplier and the component parts it supplied for the firm (or subdivision) described in paragraph (2) accounted for at least 20 percent of the production or sales of the workers' firm; or

(B) A loss or business by the workers' firm with the firm (or subdivision) described in paragraph (2) contributed importantly to the workers' separation or threat of separation.

In order for the Division of Trade Adjustment Assistance to issue a certification of eligibility to apply for Alternative Trade Adjustment Assistance (ATAA) for older workers, the group eligibility requirements of Section 246(a)(3)(A)(ii) of the Trade Act must be met.

1. Whether a significant number of workers in the workers' firm are 50 years of age or older.

2. Whether the workers in the workers' firm possess skills that are not easily transferable.

3. The competitive conditions within the workers' industry (*i.e.,* conditions within the industry are adverse).

Affirmative Determinations for Worker Adjustment Assistance

The following certifications have been issued. The date following the company name and location of each determination references the impact date for all workers of such determination.

The following certifications have been issued. The requirements of Section

222(a)(2)(A) (increased imports) of the Trade Act have been met.

None.

The following certifications have been issued. The requirements of Section 222(a)(2)(B) (shift in production) of the Trade Act have been met.

None.

The following certifications have been issued. The requirements of Section 222(b) (supplier to a firm whose workers are certified eligible to apply for TAA) of the Trade Act have been met.

None.

The following certifications have been issued. The requirements of Section 222(b) (downstream producer for a firm whose workers are certified eligible to apply for TAA based on increased imports from or a shift in production to Mexico or Canada) of the Trade Act have been met.

None.

Affirmative Determinations for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

The following certifications have been issued. The date following the company name and location of each determination references the impact date for all workers of such determination.

The following certifications have been issued. The requirements of Section 222(a)(2)(A) (increased imports) and Section 246(a)(3)(A)(ii) of the Trade Act have been met.

TA–W–80,178; Chelsea House, Inc., Gastonia, NC: May 12, 2010.
TA–W–80,183; Century Furniture, LLC, Hickory, NC: November 19, 2010.
TA–W–80,211; Ringo B.D., Inc., Passaic, NJ: June 1, 2010.

The following certifications have been issued. The requirements of Section 222(a)(2)(B) (shift in production) and Section 246(a)(3)(A)(ii) of the Trade Act have been met.

TA–W–80,064; Wayne Trademark Printing & Packaging, High Point, NC: March 22, 2010.
TA–W–80,155; Apogee Medical, LLC, Youngsville, NC: May 4, 2010.
TA–W–80,229; Neff Motivation, Inc., Greenville, OH: June 13, 2010.
TA–W–80,236; Unimin Corporation, Green Mountain, NC: June 15, 2010.

The following certifications have been issued. The requirements of Section 222(b) (supplier to a firm whose workers are certified eligible to apply for TAA) and Section 246(a)(3)(A)(ii) of the Trade Act have been met.

TA–W–80,234; American Phoenix, Inc., Trenton, TN: June 10, 2010.

The following certifications have been issued. The requirements of Section 222(b) (downstream producer for a firm whose workers are certified eligible to apply for TAA based on increased imports from or a shift in production to Mexico or Canada) and Section 246(a)(3)(A)(ii) of the Trade Act have been met.

None.

Negative Determinations for Alternative Trade Adjustment Assistance

In the following cases, it has been determined that the requirements of 246(a)(3)(A)(ii) have not been met for the reasons specified.

The Department has determined that criterion (1) of Section 246 has not been met. The firm does not have a significant number of workers 50 years of age or older.

None.

The Department has determined that criterion (2) of Section 246 has not been met. Workers at the firm possess skills that are easily transferable.

None.

The Department has determined that criterion (3) of Section 246 has not been met. Competition conditions within the workers' industry are not adverse.

None.

Negative Determinations for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In the following cases, the investigation revealed that the eligibility criteria for worker adjustment assistance have not been met for the reasons specified.

Because the workers of the firm are not eligible to apply for TAA, the workers cannot be certified eligible for ATAA.

The investigation revealed that criteria (a)(2)(A)(I.A.) and (a)(2)(B)(II.A.) (employment decline) have not been met.

None.

The investigation revealed that criteria (a)(2)(A)(I.B.) (Sales or production, or both, did not decline) and (a)(2)(B)(II.B.) (shift in production to a foreign country) have not been met.

None.

The investigation revealed that criteria (a)(2)(A)(I.C.) (increased imports) and (a)(2)(B)(II.B.) (shift in production to a foreign country) have not been met.

None.

The workers' firm does not produce an article as required for certification under Section 222 of the Trade Act of 1974.

TA–W–80,063; Stream International, Inc., Richardson, TX.
TA–W–80,102; JPMorgan Chase & Co., Fort Worth, TX.
TA–W–80,147; Travelers Insurance, Syracuse, NY.
TA–W–80,166; Computer Sciences Corp., El Segundo, CA.
TA–W–80,184; Merchants Bank of California, N.A., Carson, CA.
TA–W–80,197; EMH Amherst Hospital, Amherst, OH.

The investigation revealed that criteria of Section 222(b)(2) has not been met. The workers' firm (or subdivision) is not a supplier to or a downstream producer for a firm whose workers were certified eligible to apply for TAA.

None.

Determinations Terminating Investigations of Petitions for Worker Adjustment Assistance

After notice of the petitions was published in the **Federal Register** and on the Department's Web site, as required by Section 221 of the Act (19 U.S.C. 2271), the Department initiated investigations of these petitions.

The following determinations terminating investigations were issued in cases where these petitions were not filed in accordance with the requirements of 29 CFR 90.11. Every petition filed by workers must be signed by at least three individuals of the petitioning worker group. Petitioners separated more than one year prior to the date of the petition cannot be covered under a certification of a petition under Section 223(b), and therefore, may not be part of a petitioning worker group. For one or more of these reasons, these petitions were deemed invalid.

TA–W–80,207; Tecumseh Products Corp., Ann Arbor, MI.

The following determinations terminating investigations were issued because the petitioning groups of workers are covered by active certifications. Consequently, further investigation in these cases would serve no purpose since the petitioning group of workers cannot be covered by more than one certification at a time.

TA–W–80,241; CompuCredit Holdings Corporation, Atlanta, GA.

I hereby certify that the aforementioned determinations were issued during the period of June 27, 2011 through July 1, 2011. Copies of these determinations may be requested under the Freedom of Information Act. Requests may be submitted by fax, courier services, or mail to FOIA Disclosure Officer, Office of Trade Adjustment Assistance (ETA), U.S.

Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210 or *tofoiarequest@dol.gov.* These determinations also are available on the Department's Web site at *http://www.doleta.gov/tradeact* under the searchable listing of determinations.

Date: July 7, 2011.

Michael W. Jaffe,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2011–18236 Filed 7–19–11; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–75,067; TA–W–75,076A]

JLG Industries, Inc., Access Segment, a Subsidiary of Oshkosh Corporation, Including On-Site Leased Workers From Aerotek, McConnellsburg, PA; JLG Industries, Inc., Access Division, a Subsidiary of Oshkosh Corporation, Hagerstown, MD; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (''Act''), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on March 9, 2011, applicable to workers and former workers of JLG Industries, Inc., Access Segment, a subsidiary of Oshkosh Corporation, including on-site leased workers of Aerotek, McConnellsburg, Pennsylvania (JLG-McConnellsburg). The workers produce access equipment. The Department's Notice was published in the **Federal Register** on March 23, 2011 (76 FR 16449).

At the request of a worker separated from the Hagerstown, Maryland facility, the Department reviewed the certification for workers of JLG-McConnellsburg.

New information supplied by the workers and confirmed by JLG Industries, Inc. revealed that the Hagerstown, Maryland facility operated in conjunction with JLG-McConnellsburg in the production of access equipment and supplied design engineering, global procurement supply chain, safety, and reliability services used in the production of equipment at JLG-McConnellsburg.

Based on these findings, the Department is amending this certification to properly reflect these matters.

The amended notice applicable to TA–W–75,067 is hereby issued as follows:

All workers of JLG Industries, Inc., Access Segment, a subsidiary of Oshkosh Corporation, including on-site leased workers from Aerotek, McConnellsburg, Pennsylvania (TA–W–75,067) and JLG Industries, Inc., Access Division, a subsidiary of Oshkosh Corporation, Hagerstown, Maryland (TA–W–75,067A), who became totally or partially separated from employment on or after January 3, 2011, through March 9, 2013, and all workers in the group threatened with total or partial separation from employment on March 9, 2011 through March 9, 2013, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed at Washington, DC, this 11th day of July 2011.

Del Min Amy Chen,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2011–18239 Filed 7–19–11; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–74,935]

Husqvarna Turf Care, a Subsidiary of Husqvarna A.B., Beatrice, NE; Notice of Negative Determination on Reconsideration

On May 3, 2011, the Department of Labor issued an Affirmative Determination Regarding Application for Reconsideration for the workers and former workers of Husqvarna Turf Care, a subsidiary of Husqvarna A.B., Beatrice, Nebraska (subject firm). The Department's Notice was published in the **Federal Register** on May 20, 2011 (76 FR 29273). The workers are engaged in activities related to the production of zero turn mowers for commercial users and home owners.

Pursuant to 29 CFR 90.18(c), reconsideration may be granted under the following circumstances:

(1) If it appears on the basis of facts not previously considered that the determination complained of was erroneous;

(2) If it appears that the determination complained of was based on a mistake in the determination of facts not previously considered; or

(3) If in the opinion of the Certifying Officer, a mis-interpretation of facts or of the law justified reconsideration of the decision.

The initial investigation resulted was based on the findings that Criterion III has not been met because the worker separations are not attributable to increased imports or a shift in production to a foreign country. Rather, the investigation established that the worker separations were attributable to a shift in production to an affiliated facility within the United States, and that the shift is attributable to business considerations unrelated to increased imports.

With regard to the affiliated facility (TA–W–74,418) identified in the petition, the investigation confirmed that the shift by the workers' firm of computer-aided design (CAD) services to a foreign country was unrelated to the shift in production in this case.

With respect to Section 222(c) of the Act, the investigation revealed that Criterion (2) has not been met because the firm is not a Supplier or Downstream Producer to a firm that employed a worker group eligible to apply for Trade Adjustment Assistance.

In the request for reconsideration, the petitioner stated that ''it has been the intent of Husqvarna to gradually but progressively move these jobs to another country or countries * * * It has been rumored that he (a line leader) has been given the ultimatum to increase his production or they would move this line to Germany. In addition to this, it was rumored that they had built a new building in Germany * * * and that our PZ line was already running in Germany before our plant had closed.''

In an attachment to the request, another worker stated that ''we have reports that some of our jobs have already been moved to foreign soil and that more will be in the future.''

A careful review of the administrative record and additional information obtained by the Department during the reconsideration investigation confirmed that the worker separations are not attributable to increased imports or a shift in production to a foreign country. Rather, the investigation established that the worker separations were attributable to a shift in production to an affiliated facility within the United States, and that all production was moved to Orangeburg, South Carolina. Further, the firm addressed the above-mentioned petitioner allegations, in addition to confirming that separations were attributable to a shift in production to an affiliated facility within the United States, and that all production was moved to Orangeburg, South Carolina.

Conclusion

After reconsideration, I affirm the original notice of negative determination of eligibility to apply for worker adjustment assistance for workers and former workers of

Husqvarna Turf Care, a subsidiary of Husqvarna A.B., Beatrice, Nebraska.

Signed in Washington, DC, on this 7th day of July 2011.

Del Min Amy Chen,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2011–18238 Filed 7–19–11; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–75,131]

JLG Industries, Inc., Access Division, a Subsidiary of Oshkosh Corporation, Hagerstown, MD; Notice of Termination of Reconsideration Investigation

On April 14, 2011, the Department of Labor (Department) issued an Affirmative Determination Regarding Application for Reconsideration for workers and former workers of JLG Industries, Inc., Access Division, a subsidiary of Oshkosh Corporation, Hagerstown, Maryland. The Department's Notice of affirmative determination was published in the **Federal Register** on April 25, 2011 (76 FR 22922).

On July 11, 2011, the Department issued an amended certification applicable to workers and former workers of JLG Industries, Inc., a subsidiary of Oshkosh Corporation, Access Segment, McConnellsburg, Pennsylvania (TA–W–75,067) and Access Division, Hagerstown, Maryland (TA–W–75,067A). The Department's Notice of amended certification will soon be published in the **Federal Register.**

Because the petitioning group of workers is covered by a certification (TA–W–75,076A) which expires on March 9, 2013, further investigation in this case would serve no purpose, and the reconsideration investigation has been terminated.

Conclusion

After careful review of the administrative record and the findings of the reconsideration investigation, I am terminating the investigation of the petition for worker adjustment assistance filed on behalf of workers and former workers of JLG Industries, Inc., Access Division, a subsidiary of Oshkosh Corporation, Hagerstown, Maryland.

Signed in Washington, DC, on this 11th day of July 2011.

Del Min Amy Chen,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2011–18240 Filed 7–19–11; 8:45 am]

BILLING CODE 4510–FN–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Agency Information Collection Activities: Proposed Collection; Comment Request; Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice of a request for comments regarding a new information collection.

SUMMARY: As part of a Federal Government-wide effort to streamline the process to seek feedback from the public on service delivery, the National Archives and Records Administration (NARA) has submitted a Generic Information Collection Request (Generic ICR): ''Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery'' to OMB for approval under the Paperwork Reduction Act (PRA).

DATES: Comments must be submitted August 19, 2011.

ADDRESSES: Written comments may be submitted to Mr. Nicholas A. Fraser, Desk Officer for NARA, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–5167; or electronically mailed to *Nicholas_A._Fraser@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: To request additional information, please contact Tamee Fechhelm at telephone number 301–837–1694 or fax number 301–713–7409.

SUPPLEMENTARY INFORMATION:

Title: Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery.

Abstract: The information collection activity will garner qualitative customer and stakeholder feedback in an efficient, timely manner, in accordance with the Administration's commitment to improving service delivery. By qualitative feedback we mean information that provides useful insights on perceptions and opinions, but are not statistical surveys that yield quantitative results that can be generalized to the population of study. This feedback will provide insights into customer or stakeholder perceptions, experiences and expectations, provide an early warning of issues with service, or focus attention on areas where communication, training or changes in operations might improve delivery of products or services. These collections will allow for ongoing, collaborative and actionable communications between the Agency and its customers and stakeholders. It will also allow feedback to contribute directly to the improvement of program management.

Feedback collected under this generic clearance will provide useful information, but it will not yield data that can be generalized to the overall population. This type of generic clearance for qualitative information will not be used for quantitative information collections that are designed to yield reliably actionable results, such as monitoring trends over time or documenting program performance. Such data uses require more rigorous designs that address: the target population to which generalizations will be made, the sampling frame, the sample design (including stratification and clustering), the precision requirements or power calculations that justify the proposed sample size, the expected response rate, methods for assessing potential non-response bias, the protocols for data collection, and any testing procedures that were or will be undertaken prior to fielding the study. Depending on the degree of influence the results are likely to have, such collections may still be eligible for submission for other generic mechanisms that are designed to yield quantitative results.

The Agency received no comments in response to the 60-day notice published in the **Federal Register** of May 3, 2011 (76 FR 24920).

Below we provide NARA's projected average estimates for the next three years:

Current Actions: New collection of information.

Type of Review: New Collection.

Affected Public: Individuals and households, businesses and organizations, State, Local or Tribal Government.

Average Expected Annual Number of activities: 20.

Respondents: 25,000.

Annual responses: 1.

Frequency of Response: Once per request.

Average minutes per response: 30.

Burden hours: 12,500.

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 control number.

Dated: July 15, 2011.

Michael L. Wash,

Executive for Information Services/CIO.

[FR Doc. 2011–18410 Filed 7–19–11; 8:45 am]

BILLING CODE 7515–01–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 August 19, 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 Records Management Services (ACNR) using one of the following means:

Mail: NARA (ACNR), 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, Records Management Services (ACNR), 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, Grain Inspection, Packers, and Stockyards Administration (N1–545–08–21, 6 items, 5 temporary items). Records of the Legislative and Legal division, including correspondence files, cooperative and reimbursable agreements, and docket administrative files. Proposed for permanent retention are official docket files relating to the development of laws and regulations.

2. Department of Agriculture, Grain Inspection, Packers, and Stockyards Administration (N1–545–08–22, 18 items, 15 temporary items). Records of the Technical Services Division, including general inquiries, administrative work tracking records, raw laboratory data and analysis, research agreements, records created in developing calibrations and quality control, and interim and draft documents for program records. Proposed for permanent retention are policies, final research products, and market needs analyses.

3. Department of Agriculture, Risk Management Agency (N1–258–09–5, 7 items, 7 temporary items). Actuarial records including county field notes, requests, inspections, insurance files, and determined yield documentation used to calculate risk, create actuarial logarithms, and provide insurance offers.

4. Department of Agriculture, Risk Management Agency (N1–258–09–6, 5 items, 5 temporary items). Records of the Insurance Program including correspondence, assessments, information, and reports documenting internal program activity and meetings or events with outside entities.

5. Department of Agriculture, Risk Management Agency (N1–258–09–10, 1 item, 1 temporary item). Compliance case files including insurance applications, acreage reports, and correspondence used to assess compliance in the crop insurance program.

6. Department of the Army, Agency-wide (N1–AU–10–15, 1 item, 1 temporary item). Master files of an electronic information system containing network security information such as lists of common vulnerabilities, exploitation and threats, intrusion events, and remediation methods.

7. Department of Defense, Office of the Secretary of Defense (N1–330–11–2, 1 item, 1 temporary item). Master files of an electronic information system containing medical inventories, quality assurance records, and medical technology and readiness information used for managing logistics of treatment facilities.

8. Department of Defense, Office of the Secretary of Defense (N1–330–11–3, 4 items, 4 temporary items). Master files of electronic information systems containing physician credentialing and qualifications records, and adverse actions and malpractice data; medical and dental expense, personnel, and workload data; patient movement management records; and Individuals with Disabilities Education Act implementation records.

9. Department of Defense, Office of the Secretary of Defense (N1–330–11–4, 1 item, 1 temporary item). Master files of an electronic information system containing voter registration information for U.S. citizens overseas, including personal identifiers, contact information, and party affiliation data.

10. Department of Defense, Office of the Secretary of Defense (N1–330–11–5, 1 item, 1 temporary item). Master file of an electronic information system containing testing data on individuals seeking entrance into the Military Services, including personal identifiers, educational experience, and test scores.

11. Department of Homeland Security, U.S. Immigration and Customs Enforcement (N1–567–11–5, 2 items, 2 temporary items). Master files of an electronic information system containing status information on agreements with state and local law enforcement agencies and vetting of state and local law enforcement officers to receive agency credentials.

12. Department of Homeland Security, U.S. Immigration and Customs Enforcement (N1–567–11–13, 4 items, 4 temporary items). Master files of an electronic information system containing approved and denied requests for court orders for recordings of oral, wire, and electronic communications, and queries on previous court order requests.

13. Department of Justice, Federal Bureau of Investigation (N1–65–11–2, 2 items, 2 temporary items). Master files and audit report logs of an electronic information system used to share law enforcement data in the law enforcement community.

14. Department of Justice, Federal Bureau of Investigation (N1–65–11–4, 2 items, 2 temporary items). Records maintained as part of an electronic information system that records activity associated with subjects of interest within a separate and broader electronic law enforcement activity tracking system.

15. Department of Justice, Federal Bureau of Investigation (N1–65–11–28, 175 items, 151 temporary items). Administrative files for selected classifications through October 15, 1995, consisting of administrative and logistical records, citizen correspondence, and routine requests for information.

16. Department of Justice, Tax Division (N1–60–09–46, 3 items, 3 temporary items). Internal Web site records including Web content, management, and operations records.

17. Department of Labor, Women's Bureau (N1–86–10–1, 1 item, 1 temporary item). Master files of an electronic information system used to track contact information, publications, events, meetings, and exhibits related to current Bureau initiatives.

18. Department of State, Bureau of Diplomatic Security (N1–59–11–14, 5 items, 5 temporary items). Records of the Office of the Chief Financial Officer, including routine budget correspondence, apportionments, allotments, reimbursements, and miscellaneous obligations files.

19. Department of State, Bureau of Diplomatic Security (DAA–0059–2011–0002, 4 items, 4 temporary items). Records of the Office of the Chief Technology Officer, including program management records, correspondence, and copies of intra-agency agreements.

20. Department of Transportation, Federal Transit Administration (N1–408–11–1, 1 item, 1 temporary item). Law and legal records, including correspondence and reports relating to the development and accomplishment of policies and programs.

21. Department of Transportation, Federal Transit Administration (N1–408–11–2, 2 items, 2 temporary items). Records relating to legal procurement and contract appeals.

22. Department of Transportation, Federal Transit Administration (N1–408–11–3, 2 items, 2 temporary items). Case and reference files relating to legislation involving the agency and its grantees.

23. Department of Transportation, Federal Transit Administration (N1–408–11–4, 2 items, 1 temporary item). Litigation records consisting of correspondence, pleadings, dispositions, transcripts pertaining to court actions, and non-significant case files. Proposed for permanent retention are case files of historical or legal significance.

24. Department of the Treasury, Alcohol and Tobacco Tax and Trade Bureau (N1–564–09–3, 1 item, 1 temporary item). External Web site content records consisting of general information about the Bureau.

25. Department of the Treasury, Alcohol and Tobacco Tax and Trade Bureau (N1–564–09–6, 1 item, 1 temporary item). Master files of an electronic information system used to track processing and results for alcohol sample formulation and ingredients.

26. Federal Deposit Insurance Corporation, Agency-wide (N1–34–11–1, 4 items, 4 temporary item). Reduction of retention period for records previously approved as temporary, including records relating to bank transaction authorizations and insurance assessment and appeal files.

27. Office of the Director of National Intelligence, Office of Legislative Affairs (N1–576–11–5, 8 items, 4 temporary items). Includes copies of Congressional materials received from other agencies, non-substantive drafts and working papers, and reference files. Proposed for permanent retention are program records, Congressional materials and communications, and substantive working papers.

Dated: July 12, 2011.

Paul M. Wester, Jr.,

Chief Records Officer for the U.S. Government.

[FR Doc. 2011–18411 Filed 7–19–11; 8:45 am]

BILLING CODE 7515–01–P

NATIONAL CAPITAL PLANNING COMMISSION

Public Comment and Public Meeting on Draft Revisions to the Transportation Element and Federal Workplace Element of the Comprehensive Plan for the National Capital: Federal Elements

AGENCY: National Capital Planning Commission.

ACTION: Notice of public comment period and public meeting.

SUMMARY: The National Capital Planning Commission (NCPC), the Planning Commission for the Federal Government within the National Capital Region, has released for public comment draft revisions to the Transportation and Federal Workplace Elements of the

Comprehensive Plan for the National Capital: Federal Elements. The Comprehensive Plan for the National Capital: Federal Elements addresses matters relating to Federal Properties and Federal Interests in the National Capital Region, and provides a decision-making framework for actions the NCPC takes on specific plans and proposals submitted by Federal government agencies for the NCPC review as required by law. The Transportation Element articulates policies that guide actions on federal employee commuting, transportation investment, and integrating federal facilities into the regional transportation network. The Federal Workplace Element provides policies for the location, development and management of federal workplaces throughout the region. All interested parties are invited to submit written comments and/or attend the public meeting. The draft revised Transportation and Federal Workplace Elements are available online at *http://www.ncpc.gov/compplan*. Printed copies are available upon request from the contact person noted below.

DATE AND TIME: The public comment period closes on September 12, 2011. A public meeting to discuss the draft revisions to the Transportation Element and the Federal Workplace Element will be held on August 10, 2011 from 6:30 p.m. to 8:30 p.m.

ADDRESSES: Mail written or hand deliver comments on the draft revisions to Comprehensive Plan Public Comment, National Capital Planning Commission, 401 9th Street, NW., Suite 500, Washington, DC 20004. The public meeting will be held at 401 9th Street, NW., North Lobby, Suite 500, Washington, DC 20004.

FOR FURTHER INFORMATION CONTACT: David Zaidain at (202) 482–7230 or *david.zaidain@ncpc.gov*. Please confirm meeting attendance with Mr. Zaidain or as noted below.

SUPPLEMENTARY INFORMATION:

Electronic Access and Filing Addresses

You may submit comments electronically at the public comment portal at *http://www.ncpc.gov/compplan*. Confirm meeting attendance at *http://www.ncpc.gov.rsvp*.

Speaker Sign-Up and Speaking Time Limits

Individuals interested in speaking at the meeting should indicate their intent on the speaker sign-up sheet available at the meeting. Speakers are asked to limit their remarks to five minutes. applies.

Authority: (40 U.S.C. 8721(e)(2)).

July 13, 2011.

Anne R. Schuyler,

General Counsel.

[FR Doc. 2011–18032 Filed 7–19–11; 8:45 am]

BILLING CODE M

NUCLEAR REGULATORY COMMISSION

[NRC–2011–0152]

Evaluations of Explosions Postulated To Occur at Nearby Facilities and on Transportation Routes Near Nuclear Power Plants

AGENCY: Nuclear Regulatory Commission.

ACTION: Draft regulatory guide; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC or the Commission) is issuing for public comment draft regulatory guide (DG), DG–1270, ''Evaluations of Explosions Postulated to Occur at Nearby Facilities and on Transportation Routes Near Nuclear Power Plants''. This draft regulatory guide describes for applicants and licensees of nuclear power reactors some methods and assumptions the NRC's staff finds acceptable for evaluating postulated explosions at nearby facilities and transportation routes.

DATES: Submit comments by September 19, 2011. Comments received after this date will be considered if it is practical to do so, but the NRC is able to ensure consideration only for comments received on or before this date. Although a time limit is given, comments and suggestions in connection with items for inclusion in guides currently being developed or improvements in all published guides are encouraged at any time.

ADDRESSES: Please include Docket ID NRC–2011–0152 in the subject line of your comments. 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 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–2011–0152. Address questions about NRC dockets to Carol Gallagher, telephone: 301–492–3668; e-mail: *Carol.Gallagher@nrc.gov*.
- *Mail comments to:* Cindy Bladey, Chief, Rules, Announcements, and Directives Branch (RADB), Office of Administration, Mail Stop: TWB–05–B01M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.
- *Fax comments to:* RADB at 301–492–3446.

You can access publicly available documents related to this draft regulatory guide 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, O1–F21, 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 online in the NRC Library 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 the 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 draft regulatory guide is available electronically under ADAMS Accession Number ML110390554. The regulatory analysis is available electronically under ADAMS Accession Number ML110400261.
- *Federal Rulemaking Web Site:* Public comments and supporting materials related to this draft regulatory guide can be found at *http://www.regulations.gov* by searching on Docket ID NRC–2011–0152.

Electronic copies of DG–1270 are available through the NRC's public Web site under Draft Regulatory Guides in the ''Regulatory Guides'' collection of the NRC's Library at *http://www.nrc.gov/reading-rm/doc-collections/*.

Regulatory guides are not copyrighted, and Commission approval is not required to reproduce them.

FOR FURTHER INFORMATION CONTACT: Mekonen Bayssie, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–251–7489; e-mail: *Mekonen.Bayssie@nrc.gov*.

SUPPLEMENTARY INFORMATION: The NRC is issuing for public comment a draft guide in the NRC's ''Regulatory Guide'' series. This series was developed to describe and make available to the public such information as methods that are acceptable to the NRC staff for implementing specific parts of the NRC's regulations, techniques that the staff uses in evaluating specific problems or postulated accidents, and data that the staff needs in its review of applications for permits and licenses.

The draft regulatory guide is temporarily identified by its task number, DG–1270, which should be mentioned in all related correspondence. The DG–1270 is proposed Revision 2 of Regulatory Guide 1.91, dated February 1978.

This guide describes for applicants and licensees of nuclear power reactors some methods and assumptions the NRC's staff finds acceptable for evaluating postulated explosions at nearby facilities and transportation routes. It describes the calculation of safe distances based on estimates of TNT-equivalent mass of explosive materials, the calculation of exposure rates based on hazardous cargo transportation frequencies, and the calculation of blast load effects.

Dated at Rockville, Maryland, this 13th day of July 2011.

For the Nuclear Regulatory Commission.

Thomas H. Boyce,

Chief, Regulatory Guide Development Branch, Division of Engineering, Office of Nuclear Regulatory Research.

[FR Doc. 2011–18270 Filed 7–19–11; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64887; File No. SR–NYSEAMEX–2011–51]

Self-Regulatory Organizations; NYSE Amex LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Conforming Certain of Its Financial Responsibility and Related Operational Rules to a Recently-Approved Financial Industry Regulatory Authority Rule Change

July 14, 2011.

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 July 13, 2011, NYSE Amex LLC (the ''Exchange'' or ''NYSE Amex'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to conform certain of its financial responsibility and related operational Rules to a recently-approved Financial Industry Regulatory Authority (''FINRA'') rule change.[4] The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and *http://www.nyse.com.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to conform certain of its financial responsibility and related operational Rules to a recently-approved FINRA rule change.

Background

On July 30, 2007, FINRA's predecessor, the National Association of Securities Dealers, Inc. (''NASD''), and NYSE Regulation, Inc. (''NYSER'') consolidated their member firm regulation operations into a combined organization, FINRA. Pursuant to Rule 17d–2 under the Securities Exchange Act of 1934, as amended (the ''Act''), New York Stock Exchange, LLC (''NYSE''), NYSER and FINRA entered into an agreement (the ''Agreement'') to reduce regulatory duplication for their members by allocating to FINRA certain regulatory responsibilities for certain NYSE rules and rule interpretations (''FINRA Incorporated NYSE Rules''). NYSE Amex became a party to the Agreement effective December 15, 2008.[5]

As part of its effort to reduce regulatory duplication and relieve firms that are members of FINRA, NYSE and NYSE Amex of conflicting or unnecessary regulatory burdens, FINRA is now engaged in the process of reviewing and amending the NASD and FINRA Incorporated NYSE Rules in order to create a consolidated FINRA rulebook.[6]

In connection with the rule consolidation efforts between the Exchange and FINRA, FINRA recently received approval for the adoption of certain financial responsibility and related operational rules in the consolidated FINRA Rules, including Rules 4150 (Guarantees by, or Flow Through Benefits for, Members), 4311 (Carrying Agreements), 4522 (Periodic Security Counts, Verifications and Comparisons) and 4523 (Assignment of Responsibility for General Ledger Accounts and Identification of Suspense Accounts) and for the deletion of NASD Rule 3230, FINRA Incorporated NYSE Rules 322, 382, 440.10 and 440.20 and FINRA Incorporated NYSE Rule Interpretations 382/01 through 382/05, 409(a)/01 and 440.20/01.[7]

The Exchange proposes to adopt the FINRA rule changes within its own Rules as follows. First, the Exchange proposes to delete the text of NYSE

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[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See* Securities Exchange Act Release No. 63375 (November 24, 2010), 75 FR 74759 (December 1, 2010) (Notice of filing of SR–FINRA–2010–061). *See* also Securities Exchange Act Release No. 63999 (March 1, 2011), 76 FR 12380 (March 7, 2011) (Notice of filing of amendment number 1 and order granting accelerated approval of SR–FINRA–2010–061).

[5] *See* Securities Exchange Act Release Nos. 56148 (July 26, 2007), 72 FR 42146 (August 1, 2007) (order approving the Agreement); 56147 (July 26, 2007), 72 FR 42166 (August 1, 2007) (SR–NASD–2007–054) (order approving the incorporation of certain NYSE Rules as ''Common Rules''); and 60409 (July 30, 2009), 74 FR 39353 (August 6, 2009) (order approving the amended and restated Agreement, adding NYSE Amex LLC as a party). Paragraph 2(b) of the Agreement sets forth procedures regarding proposed changes by FINRA, NYSE or NYSE Amex to the substance of any of the Common Rules.

[6] FINRA's rulebook currently has three sets of rules: (1) NASD Rules, (2) FINRA Incorporated NYSE Rules, and (3) consolidated FINRA Rules. The FINRA Incorporated NYSE Rules apply only to those members of FINRA that are also members of the NYSE (''Dual Members''), while the consolidated FINRA Rules apply to all FINRA members. For more information about the FINRA rulebook consolidation process. *See* FINRA Information Notice, March 12, 2008.

[7] *See supra* note 4.

Amex Equities Rules 322, 382 and Supplementary Material .10 and .20 to Rule 440.

Second, the Exchange proposes to adopt the text of FINRA Rules 4150, 4311, 4522 and 4523 as NYSE Amex Equities Rules 4150, 4311, 4522 and 4523, with certain technical changes. Specifically, for consistency with Exchange rules, the Exchange proposes to change all references to ''members'' to ''member organizations.''

Third, the Exchange proposes certain technical changes to delete cross-references to the NYSE Amex Equities Rules that are proposed to be deleted, as identified above, which will no longer be applicable or, in certain circumstances, replace them with cross-references to the newly proposed NYSE Amex Equities Rules, where applicable. The technical changes are proposed within NYSE Amex Equities Rules 405, 409 and 416.

The Exchange proposes that these changes be effective on the same date as FINRA makes FINRA Rules 4150, 4311, 4522 and 4523 effective.[8]

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,[9] in general, and furthers the objectives of Section 6(b)(5),[10] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system. Specifically, the Exchange believes that the proposed rule change supports the objectives of the Act by providing greater harmonization between NYSE Amex Equities Rules and FINRA Rules of similar purpose, resulting in less burdensome and more efficient regulatory compliance. To the extent the Exchange has proposed changes that differ from the FINRA version of the Rules, such changes are technical in nature and do not change the substance of the proposed NYSE Amex Equities Rules.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[11] and Rule 19b–4(f)(6) thereunder.[12] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6)(iii) thereunder.

A proposed rule change filed under Rule 19b–4(f)(6)[13] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b4(f)(6)(iii),[14] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission hereby grants that request. The proposed rule change provides greater harmonization between NYSE Amex Rules and FINRA Rules of similar purpose. The Commission believes that such harmonization increases regulatory compliance while reducing the burden of such compliance. Waiving the 30-day operative delay will enable this change to be implemented immediately so that the benefits associated with regulatory harmonization may be realized promptly. Therefore, the Commission believes it is consistent with the protection of investors and public interest to waive the 30-day operative delay and designate the proposal as operative upon filing.[15]

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

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–NYSEAMEX–2011–51 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–NYSEAMEX–2011–51. 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 such filings also will be available for inspection and copying

[8] *See* FINRA Regulatory Notice 11–26. The implementation date is currently scheduled for August 1, 2011. NYSE Amex has also submitted a companion rule filing amending its rules in accordance with FINRA's rule changes. *See* SR–NYSE–2011–33.

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(5).

[11] 15 U.S.C. 78s(b)(3)(A)(iii).

[12] 17 CFR 240.19b–4(f)(6).

[13] 17 CFR 240.19b–4(f)(6).

[14] 17 CFR 240.19b–4(f)(6)(iii).

[15] For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

at 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–NYSEAMEX–2011–51 and should be submitted on or before August 10, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–18194 Filed 7–19–11; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64893; File No. SR–CBOE–2011–068]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend Credit Option Margin Pilot Program to January 17, 2012

July 14, 2011.

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 July 13, 2011, Chicago Board Options Exchange, Incorporated (''CBOE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b–4(f)(6) thereunder.[4] 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

CBOE proposes to extend its Credit Option Pilot Program through January 17, 2012. The text of the rule proposal is available on the Exchange's Web site (*http://www.cboe.org/legal*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

On February 2, 2011, the Commission approved the Exchange's proposal to establish a Credit Option Margin Pilot Program (''Program'').[5] The proposal became effective on a pilot basis to run on a parallel track with FINRA Rule 4240 that similarly operates on an interim pilot basis and is currently scheduled to expire on July 16, 2011.[6]

On July 11, 2011, FINRA submitted a rule proposal to, among other things, extend the pilot program for FINRA Rule 4240 to January 17, 2012.[7] Since CBOE's Program was approved on a pilot basis to run on a parallel track with FINRA Rule 4240, CBOE is now currently proposing to similarly extend the duration of the Program.

CBOE notes for the Commission that there are currently Credit Options listed for trading on the Exchange that have open interest. As a result, CBOE believes that is in the public interest for the Program to continue uninterrupted.

In the future, if the Exchange proposes an additional extension of the Credit Option Margin Pilot Program or proposes to make the Program permanent, then the Exchange will submit a filing proposing such amendments to the Program.

2. Statutory Basis

The Exchange believes this rule proposal is consistent with the Act and the rules and regulations under the Act applicable to a national securities exchange and, in particular, the requirements of Section 6(b) of the Act.[8] Specifically, the Exchange believes that the proposed rule change is consistent with the Section 6(b)(5) Act[9] requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts and, in general, to protect investors and the public interest, and because it enhances fair competition among exchange markets.

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

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[10] and Rule 19b–4(f)(6) thereunder.[11]

CBOE has requested that the Commission waive the five-day pre-filing notice requirement specified in Rule 19b–4(f)(6)(iii) under the Act,[12]

[16] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

[5] *See* Securities Exchange Act Release No. 63819 (February 2, 2011), 76 FR 6838 (February 8, 2011) (order approving [SR–CBOE–2010–106]). To implement the Program, the Exchange amended Rule 12.3(l), *Margin Requirements,* to make CBOE's margin requirements for Credit Options consistent with FINRA Rule 4240, *Margin Requirements for Credit Default Swaps.* CBOE's Credit Options (*i.e.,* Credit Default Options and Credit Default Basket Options) are analogous to credit default swaps.

[6] *See* Securities Exchange Act Release No. 63391 (November 30, 2010), 75 FR 75718 (December 10, 2010) (notice of filing for immediate effectiveness extending FINRA Rule 4240 margin interim pilot program to July 16, 2011).

[7] *See* [SR–FINRA–2011–034]. In the filing, FINRA proposes to make additional modifications to FINRA Rule 4240, which are not the subject matter of this filing.

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(6).

[12] 17 CFR 240.19b–4(f)(6)(iii). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to submit to 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

Continued

and the 30-day operative delay, so that the proposal may become effective immediately upon filing. The Commission waives the five-day pre-filing notice requirement. In addition, the Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest.[13] This will allow the Program to continue without interruption and extend the benefits of a pilot program that the Commission approved and previously extended. Accordingly, the Commission waives the 30-day operative delay requirement and designates the proposed rule change as operative upon filing with the Commission.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is 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–2011–068 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–2011–068. 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 CBOE. 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–2011–068 and should be submitted on or before August 10, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Cathy H. Ahn,

Deputy Secretary.

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change, or such shorter time as designated by the Commission.

[13] For the purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64892; File No. SR–FINRA–2011–034]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change To Amend FINRA Rule 4240 (Margin Requirements for Credit Default Swaps)

July 14, 2011.

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 July 11, 2011, Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II, below, which Items have been prepared by FINRA. 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

FINRA is proposing to extend to January 17, 2012 the implementation of FINRA Rule 4240 (Margin Requirements for Credit Default Swaps) on an interim pilot program basis and to make other revisions to update the rule. FINRA Rule 4240, as approved by the SEC on May 22, 2009, and as extended by FINRA on November 22, 2010, will expire on July 16, 2011. The rule implements an interim pilot program with respect to margin requirements for certain transactions in credit default swaps.

The text of the proposed rule change is set forth below. Proposed new language is italicized; proposed deletions are in brackets.

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4000. Financial and Operational Rules.

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4200. Margin.

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4240. Margin Requirements for Credit Default Swaps.

(a) Effective Period of Interim Pilot Program.

This Rule establishes an interim pilot program ("Interim Pilot Program") with respect to margin requirements for any transactions in credit default swaps executed by a member (regardless of the type of account in which the transaction is booked), including those in which the offsetting matching hedging transactions ("matching transactions") are effected by the member in contracts that are cleared through [the central counterparty clearing services of the Chicago Mercantile Exchange ("CME")] *a clearing agency or derivatives clearing organization that provides central counterparty clearing services using a margin methodology approved by FINRA as announced in a Regulatory Notice ("approved margin methodology").* The Interim Pilot Program shall automatically expire on [July 16, 2011] *January 17, 2012.* For purposes of this Rule, the term "credit default swap" ("CDS") shall [mean any "eligible credit default swap" as defined in Securities Act Rule 239T(d), as well as any other CDS that would otherwise meet such definition but for being subject to individual negotiation,] *include any product that is commonly known to the trade as a credit default swap and is a swap or security-based swap as defined pursuant to Section*

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

1a(47) of the Commodity Exchange Act and Section 3(a)(68) of the Exchange Act, respectively, or the joint rules and guidance of the CFTC and the SEC and their staff. [and t]*T*he term ''transaction'' shall include any ongoing CDS position.

(b) Central Counterparty Clearing Arrangements.

Any member, prior to establishing any clearing arrangement with respect to CDS transactions that makes use of any central counterparty clearing services provided by any clearing agency *or derivatives clearing organization* [, pursuant to Securities Act Rule 239T(a)(1),] must notify FINRA in advance in writing, in such manner as may be specified by FINRA in a Regulatory Notice.

(c) Margin Requirements.

(1) CDS Cleared [on the Chicago Mercantile Exchange] *Through a Clearing Agency or Derivatives Clearing Organization Using an Approved Margin Methodology.*

Members shall require as a minimum for computing customer or broker-dealer margin, with respect to any customer or broker-dealer transaction in CDS with a member in which the member executes a matching transaction that makes use of the central counterparty clearing facilities of [the CME (''CME matching customer-side transaction'')] *a clearing agency or derivatives clearing organization using an approved margin methodology pursuant to this Rule,* the applicable margin pursuant to [CME rules (sometimes referred to in such rules as a ''performance bond'')] *the rules of such clearing agency or derivatives clearing organization* regardless of the type of account in which the transaction in CDS is booked. Members shall, based on the risk monitoring procedures and guidelines set forth in paragraph (d) of this Rule, determine whether the applicable [CME] *clearing agency or derivatives clearing organization* requirements are adequate with respect to their customer and broker-dealer accounts and the positions in those accounts and, where appropriate, increase such margin in excess of such minimum margin. For this purpose, members are permitted to use the margin requirements set forth in Supplementary Material .01 of this Rule.

The aggregate amount of margin the member collects from customers and broker-dealers for transactions in CDS must equal or exceed the aggregate amount of margin the member is required to post at [CME] *the clearing agency or derivatives clearing organization* with respect to those customer and broker-dealer transactions.

[CME matching customer-side t]*T*ransactions *that are cleared through a clearing agency or derivatives clearing organization using an approved margin methodology pursuant to this Rule* are not subject to the provisions of paragraph (c)(2) of this Rule.

(2) CDS That Are Cleared on Central Counterparty Clearing Facilities *That Do Not Use an Approved Margin Methodology* [Other Than the CME] or That Settle Over-the-Counter (''OTC'').

Members shall require, with respect to any transaction in CDS that makes use of central counterparty clearing facilities [other than the CME] *that do not use an approved margin methodology pursuant to this Rule* or that settle OTC, the applicable minimum margin as set forth in Supplementary Material .01 of this Rule regardless of the type of account in which the transaction in CDS is booked. However, members shall, based on the risk monitoring procedures and guidelines set forth in paragraph (d) of this Rule, determine whether such margin is adequate with respect to their customer and broker-dealer accounts and, where appropriate, increase such requirements.

(d) through (e) No Change.

. . . Supplementary Material:

.01 No Change.

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II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On May 22, 2009, the Commission approved FINRA Rule 4240,[3] which implements an interim pilot program (the ''Interim Pilot Program'') with respect to margin requirements for certain transactions in credit default swaps (''CDS''). On November 22, 2010, FINRA extended the implementation of Rule 4240 to July 16, 2011.[4]

As explained in the Approval Order,[5] FINRA Rule 4240, coterminous with certain Commission actions,[6] is intended to address concerns arising from systemic risk posed by CDS, including, among other things, risks to the financial system arising from the lack of a central clearing counterparty to clear and settle CDS. On July 21, 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (the ''Dodd-Frank Act''),[7] Title VII of which established a comprehensive new regulatory framework for swaps and security-based swaps, including certain CDS. The new legislation was intended among other things to enhance the authority of regulators to implement new rules designed to reduce risk, increase transparency, and promote market integrity with respect to such products.

FINRA believes it is appropriate to extend the Interim Pilot Program for a limited period, to January 17, 2012, pending the final implementation of new Commodity Futures Trading Commission (''CFTC'') and SEC rules pursuant to Title VII of the Dodd-Frank Act that would provide greater regulatory clarity as to margin requirements for the products addressed by FINRA Rule 4240.

[3] *See* Securities Exchange Act Release No. 59955 (May 22, 2009), 74 FR 25586 (May 28, 2009) (Notice of Approval of Proposed Rule Change; File No. SR–FINRA–2009–012) (''Approval Order'').

[4] *See* Securities Exchange Act Release No. 63391 (November 30, 2010), 75 FR 75718 (December 6, 2010) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change; File No. SR–FINRA–2010–063).

[5] *See* 74 FR 25588 through 25589.

[6] In early 2009 the Commission enacted interim final temporary rules (the ''interim final temporary rules'') providing enumerated exemptions under the federal securities laws for certain CDS to facilitate the operation of one or more central clearing counterparties in such CDS. *See* Securities Act Release No. 8999 (January 14, 2009), 74 FR 3967 (January 22, 2009) (Temporary Exemptions for Eligible Credit Default Swaps To Facilitate Operation of Central Counterparties To Clear and Settle Credit Default Swaps); Securities Act Release No. 9063 (September 14, 2009), 74 FR 47719 (September 17, 2009) (Extension of Temporary Exemptions for Eligible Credit Default Swaps To Facilitate Operation of Central Counterparties To Clear and Settle Credit Default Swaps); Securities Act Release No. 9158 (November 19, 2010), 75 FR 72660 (November 26, 2010) (Extension of Temporary Exemptions for Eligible Credit Default Swaps To Facilitate Operation of Central Counterparties To Clear and Settle Credit Default Swaps). *See also* Securities Exchange Act Release No. 59578 (March 13, 2009), 74 FR 11781 (March 19, 2009) (Order Granting Temporary Exemptions in Connection with Request of Chicago Mercantile Exchange Inc. and Citadel Investment Group, L.L.C. Related to Central Clearing of Credit Default Swaps); Securities Exchange Act Release No. 59165 (December 24, 2008), 74 FR 133 (January 2, 2009) (Order Granting Temporary Exemptions for Broker-Dealers and Exchanges Effecting Transactions in Credit Default Swaps).

[7] Public Law 111–203, 124 Stat. 1376 (2010).

FINRA has revised the definition of ''CDS'' set forth in paragraph (a) of the Rule to reflect the effectiveness of the definitions of ''swap'' and ''security-based swap'' in Section 1a(47) of the Commodity Exchange Act [8] and Section 3(a)(68) of the Act,[9] respectively, pursuant to the Dodd-Frank Act.

FINRA has revised FINRA Rule 4240(a) to clarify that the Interim Pilot Program applies with respect to margin requirements for any transactions in CDS executed by a member (regardless of the type of account in which the transaction is booked), including those in which the offsetting matching hedging transactions (''matching transactions'') are effected by the member in contracts that are cleared through a clearing agency or derivatives clearing organization that provides central counterparty clearing services using a margin methodology approved by FINRA as announced in a *Regulatory Notice* (''approved margin methodology''). FINRA believes that this serves the interest of regulatory efficiency and is consistent with the goals set forth in the Approval Order, which noted that FINRA would consider margin methodology proposals from central clearing counterparties and would amend Rule 4240 as appropriate.[10]

FINRA has requested the Commission to find good cause pursuant to Section 19(b)(2) of the Act [11] for approving the proposed rule change prior to the 30th day after its publication in the **Federal Register**, such that FINRA can prevent FINRA Rule 4240 from lapsing and implement the proposed rule change on July 16, 2011. The proposed rule change will expire on January 17, 2012.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[12] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. FINRA believes that the proposed rule change will further the purposes of the Act because, consistent with the goals set forth by the Commission when it adopted the interim final temporary rules with respect to the operation of central counterparties to clear and settle CDS, and pending the final implementation of new CFTC and SEC rules pursuant to Title VII of the Dodd-Frank Act, the margin requirements set forth by the proposed rule change will help to stabilize the financial markets.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments were neither solicited nor received.

III. Commission's Findings and Order Granting Accelerated Approval of a Proposed Rule Change

FINRA has requested that the Commission find good cause pursuant to Section 19(b)(2) of the Act for approving the proposed rule change prior to the 30th day after publication in the **Federal Register**.[13] The Commission finds good cause for approving the proposed rule change prior to the 30th day after the date of publication of notice of filing. The accelerated approval will, consistent with the goals set forth by the Commission when it adopted the interim final temporary rules with respect to the operation of central counterparties to clear and settle CDS, and pending the final implementation of new CFTC and SEC rules pursuant to Title VII of the Dodd-Frank Act, help to stabilize the financial markets by setting forth margin requirements for certain transactions in CDS. The Commission believes the proposed revisions to paragraph (a) of FINRA Rule 4240 are consistent with the goals set forth in the Approval Order, which noted that FINRA would consider margin methodology proposals from central clearing counterparties and would amend Rule 4240 as appropriate.[14]

In particular, the Commission finds that the proposed rule change is consistent with Section 15A(b)(6) of the Act, which requires, among other things, that FINRA rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.[15] This allows the existing pilot program to continue without interruption and extend the benefits of a pilot program that the Commission has previously approved and extended.

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–FINRA–2011–034 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–FINRA–2011–034. 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 FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You

[8] 7 U.S.C. 1a(47).

[9] 15 U.S.C. 78c(a)(68).

[10] *See* 74 FR 25589. FINRA has made conforming revisions to paragraphs (b), (c)(1) and (c)(2) of the Rule. *See* Exhibit 5.

[11] 15 U.S.C. 78s(b)(2).

[12] 15 U.S.C. 78*o*–3(b)(6).

[13] 15 U.S.C. 78s(b)(2).

[14] *See* Section II.A.1. of this release.

[15] In approving this rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR–FINRA–2011–034 and should be submitted on or before August 10, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–18221 Filed 7–19–11; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64886; File No. SR–BX–2011–042]

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Modify Rule 7027 of the NASDAQ OMX BX Pricing Schedule

July 14, 2011.

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 July 1, 2011, NASDAQ OMX BX, Inc. (the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the 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

BX proposes to modify Rule 7027 of its pricing schedule. BX will implement the proposed change immediately upon filing. The text of the proposed rule change is available at the Exchange's principal office, at *http://www.nasdaqomxbx.cchwallstreet.com*, the Commission's Public Reference Room, and at the Commission's Web site at *http://www.sec.gov*.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, BX 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. BX 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

BX is amending Rule 7027, which allows affiliated members to aggregate their activity under certain provisions of BX's fee schedule that make fees dependent upon the volume of their activity. For example, various provisions of Rule 7018 contain pricing tiers, under which the fees charged to, or rebates received by, members are dependent upon their share volumes. Affiliated members that might not qualify for a favorable pricing tier by themselves may be able to qualify by aggregating their activity.

Under the rule, a member may request that BX aggregate its activity with the activity of its affiliates. A member requesting aggregation of affiliate activity is required to certify to BX the affiliate status of entities whose activity it seeks to aggregate, and is required to inform BX immediately of any event that causes an entity to cease to be an affiliate. In contrast with the common definition of affiliate, which identifies one entity as an affiliate of another if it controls it, is controlled by it, or is under common control with it, Rule 7027 requires that one affiliated member own 100% of the voting interests in the other, or that they are both under the common control of a parent that owns 100% of each.

BX conducts a review of information regarding the entities, and reserves the right to request additional information to verify the affiliate status of an entity. BX then approves a request unless it determines that the member's certification is not accurate.[3] Although BX is not changing the process for review and approval, it has determined that it would promote the clarity of the rule to add text describing this process.

Because BX's bills are prepared on a monthly basis, recognizing an affiliation in the middle of a month would require BX to engage in a complex proration of members' bills. Accordingly, it has been BX's practice to recognize an affiliation request either at the beginning of the month in which the affiliation occurs or at the beginning of the following month. BX believes, however, that the clarity of the rule would be enhanced by adopting a stated policy with respect to the timing of recognition of aggregation requests. Accordingly, BX is amending the rule by adding a new paragraph (a)(2). The paragraph stipulates that if two or more members become affiliated on or prior to the sixteenth day of a month, and submit a request for aggregation on or prior to the twenty-second day of the month, an approval of the request by BX shall be deemed effective as of the first day of the month. Thus, for example, if one member acquires another, the acquisition is completed by June 16, and the members file a request for aggregation by June 22, BX's approval of the request would allow the members to aggregate all activity during June. This would be the case regardless of the time required for BX to review and approve the request. However, if members become affiliated after the sixteenth day of the month, or do not submit a request for aggregation until after the twenty-second day, the request would not be recognized until the following month.

2. Statutory Basis

BX believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[4] in general, and with Section 6(b)(5) of the Act[5] in particular, in that the proposal is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. BX believes that the change will result in the adoption of a clear policy with respect to the meaning, administration, and enforcement of Rule 7027, thereby promoting members' understanding of the parameters of the rule and the efficiency of its administration.

BX further believes that the proposed rule change is consistent with Section 6(b)(4) of the Act,[6] in that it provides for the equitable allocation of reasonable dues, fees and other charges among

[16] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] In the event of an inaccurate certification, BX would refer the matter to its regulatory services provider, the Financial Industry Regulatory Authority (''FINRA''), to investigate whether the member had violated BX rules and to take appropriate disciplinary action.

[4] 15 U.S.C. 78f.

[5] 15 U.S.C. 78f(b)(5).

[6] 15 U.S.C. 78f(b)(4).

members and issuers and other persons using any facility or system which BX operates or controls. All similarly situated members are subject to the same fee structure, and access to BX is offered on fair and non-discriminatory terms. The addition of rule language stipulating that the timing for recognition of requests for aggregation is reasonable because it establishes a standard for implementation of such requests that is easy to administer and that reflects the need for BX to review and approve aggregation requests while avoiding the complexities associated with proration of the bills of members that affiliate during the course of a month. The provision is equitable because all members seeking to aggregate their activity are subject to the same parameters, in accordance with a commonsense standard that recognizes an affiliation as of the month's beginning closes in time to when the affiliation occurs, provided the members submit a timely filing.

B. Self-Regulatory Organization's Statement on Burden on Competition

BX does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. Because the market for order execution and routing is extremely competitive, members may readily opt to disfavor BX's execution services if they believe that alternatives offer them better value. BX does not believe that the proposed changes will impair the ability of members or competing order execution venues to maintain their competitive standing in the financial markets.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(i) of the Act.[7] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

[7] 15 U.S.C. 78s(b)(3)(a)(i).

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–BX–2011–042 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–BX–2011–042. 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 the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BX–2011–042 and should be submitted on or before August 10, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–18220 Filed 7–19–11; 8:45 am]

BILLING CODE 8011–01–P

[8] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64885; File No. SR–NASDAQ–2011–093]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Modify Rule 7027 of the NASDAQ Pricing Schedule

July 14, 2011.

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 July 1, 2011, The NASDAQ Stock Market LLC (the ''Exchange'' or ''NASDAQ'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by NASDAQ. 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

NASDAQ proposes to modify Rule 7027 of its pricing schedule. NASDAQ will implement the proposed change immediately upon filing. The text of the proposed rule change is available from NASDAQ's Web site at *http://nasdaq.cchwallstreet.com*, at NASDAQ's principal office, at the Commission's Public Reference Room, and at the Commission's Web site at *http://www.sec.gov*.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NASDAQ 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. NASDAQ has prepared summaries, set forth in Sections A, B, and C below, of

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

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

NASDAQ is amending Rule 7027, which allows affiliated members to aggregate their activity under certain provisions of NASDAQ's fee schedule that make fees dependent upon the volume of their activity. For example, various provisions of Rule 7018 contain pricing tiers, under which the fees charged to, or rebates received by, members are dependent upon their share volumes. Affiliated members that might not qualify for a favorable pricing tier by themselves may be able to qualify by aggregating their activity.

Under the rule, a member may request that NASDAQ aggregate its activity with the activity of its affiliates. A member requesting aggregation of affiliate activity is required to certify to NASDAQ the affiliate status of entities whose activity it seeks to aggregate, and is required to inform NASDAQ immediately of any event that causes an entity to cease to be an affiliate. In contrast with the common definition of affiliate, which identifies one entity as an affiliate of another if it controls it, is controlled by it, or is under common control with it, Rule 7027 requires that one affiliated member own 100% of the voting interests in the other, or that they are both under the common control of a parent that owns 100% of each.

NASDAQ conducts a review of information regarding the entities, and reserves the right to request additional information to verify the affiliate status of an entity. NASDAQ then approves a request unless it determines that the member's certification is not accurate.[3] Although NASDAQ is not changing the process for review and approval, it has determined that it would promote the clarity of the rule to add text describing this process.

Because NASDAQ's bills are prepared on a monthly basis, recognizing an affiliation in the middle of a month would require NASDAQ to engage in a complex proration of members' bills. Accordingly, it has been NASDAQ's practice to recognize an affiliation request either at the beginning of the month in which the affiliation occurs or at the beginning of the following month. NASDAQ believes, however, that the clarity of the rule would be enhanced by adopting a stated policy with respect to the timing of recognition of aggregation requests. Accordingly, NASDAQ is amending the rule by adding a new paragraph (a)(2). The paragraph stipulates that if two or more members become affiliated on or prior to the sixteenth day of a month, and submit a request for aggregation on or prior to the twenty-second day of the month, an approval of the request by NASDAQ shall be deemed effective as of the first day of the month. Thus, for example, if one member acquires another, the acquisition is completed by June 16, and the members file a request for aggregation by June 22, NASDAQ's approval of the request would allow the members to aggregate all activity during June. This would be the case regardless of the time required for NASDAQ to review and approve the request. However, if members become affiliated after the sixteenth day of the month, or do not submit a request for aggregation until after the twenty-second day, the request would not be recognized until the following month.

Finally, NASDAQ is replacing references to specific rules containing fees under which aggregation may occur with a general reference to ''any provision of the Rule 7000 Series where the charge assessed, or the credit provided, by NASDAQ depends on the volume of a member's activity.''

2. Statutory Basis

NASDAQ believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[4] in general, and with Section 6(b)(5) of the Act[5] in particular, in that the proposal is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. NASDAQ believes that the change will result in the adoption of a clear policy with respect to the meaning, administration, and enforcement of Rule 7027, thereby promoting members' understanding of the parameters of the rule and the efficiency of its administration.

NASDAQ further believes that the proposed rule change is consistent with Section 6(b)(4) of the Act,[6] in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which NASDAQ operates or controls. All similarly situated members are subject to the same fee structure, and access to NASDAQ is offered on fair and non-discriminatory terms. The addition of rule language stipulating that the timing for recognition of requests for aggregation is reasonable because it establishes a standard for implementation of such requests that is easy to administer and that reflects the need for NASDAQ to review and approve aggregation requests while avoiding the complexities associated with proration of the bills of members that affiliate during the course of a month. The provision is equitable because all members seeking to aggregate their activity are subject to the same parameters, in accordance with a commonsense standard that recognizes an affiliation as of the month's beginning closes [sic] in time to when the affiliation occurs, provided the members submit a timely filing.

B. Self-Regulatory Organization's Statement on Burden on Competition

NASDAQ does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. Because the market for order execution and routing is extremely competitive, members may readily opt to disfavor NASDAQ's execution services if they believe that alternatives offer them better value. NASDAQ does not believe that the proposed changes will impair the ability of members or competing order execution venues to maintain their competitive standing in the financial markets.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section

[3] In the event of an inaccurate certification, NASDAQ would refer the matter to its regulatory services provider, the Financial Industry Regulatory Authority (''FINRA''), to investigate whether the member had violated NASDAQ rules and to take appropriate disciplinary action.

[4] 15 U.S.C. 78f.

[5] 15 U.S.C. 78f(b)(5).

[6] 15 U.S.C. 78f(b)(4).

19(b)(3)(A)(i) of the Act.[7] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

• Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or

• Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NASDAQ–2011–093 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–NASDAQ–2011–093. 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 the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2011–093 and should be submitted on or before August 10, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–18219 Filed 7–19–11; 8:45 am]

BILLING CODE 8011–01–P

[7] 15 U.S.C. 78s(b)(3)(a)(i).

[8] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64888; File No. SR–NYSE–2011–33]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Conforming Certain of Its Financial Responsibility and Related Operational Rules to a Recently-Approved Financial Industry Regulatory Authority Rule Change

July 14, 2011.

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 July 13, 2011, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to conform certain of its financial responsibility and related operational Rules to a recently-approved Financial Industry Regulatory Authority (''FINRA'') rule change.[4] The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and *http://www.nyse.com.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to conform certain of its financial responsibility and related operational Rules to a recently-approved FINRA rule change.

Background

On July 30, 2007, FINRA's predecessor, the National Association of Securities Dealers, Inc. (''NASD''), and NYSE Regulation, Inc. (''NYSER'') consolidated their member firm regulation operations into a combined organization, FINRA. Pursuant to Rule 17d–2 under the Act, NYSE, NYSER and FINRA entered into an agreement (the ''Agreement'') to reduce regulatory duplication for their members by allocating to FINRA certain regulatory responsibilities for certain NYSE rules and rule interpretations (''FINRA Incorporated NYSE Rules''). NYSE Amex LLC (''NYSE Amex'') became a party to the Agreement effective December 15, 2008.[5]

As part of its effort to reduce regulatory duplication and relieve firms that are members of FINRA, NYSE and NYSE Amex of conflicting or unnecessary regulatory burdens, FINRA

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See* Securities Exchange Act Release No. 63375 (November 24, 2010), 75 FR 74759 (December 1, 2010) (Notice of filing of SR–FINRA–2010–061). *See* also Securities Exchange Act Release No. 63999 (March 1, 2011), 76 FR 12380 (March 7, 2011) (Notice of filing of amendment number 1 and order granting accelerated approval of SR–FINRA–2010–061).

[5] *See* Securities Exchange Act Release Nos. 56148 (July 26, 2007), 72 FR 42146 (August 1, 2007) (order approving the Agreement); 56147 (July 26, 2007), 72 FR 42166 (August 1, 2007) (SR–NASD–2007–054) (order approving the incorporation of certain NYSE Rules as ''Common Rules''); and 60409 (July 30, 2009), 74 FR 39353 (August 6, 2009) (order approving the amended and restated Agreement, adding NYSE Amex LLC as a party). Paragraph 2(b) of the Agreement sets forth procedures regarding proposed changes by FINRA, NYSE or NYSE Amex to the substance of any of the Common Rules.

is now engaged in the process of reviewing and amending the NASD and FINRA Incorporated NYSE Rules in order to create a consolidated FINRA rulebook.[6]

In connection with the rule consolidation efforts between the Exchange and FINRA, FINRA recently received approval for the adoption of certain financial responsibility and related operational rules in the consolidated FINRA Rules, including Rules 4150 (Guarantees by, or Flow Through Benefits for, Members), 4311 (Carrying Agreements), 4522 (Periodic Security Counts, Verifications and Comparisons) and 4523 (Assignment of Responsibility for General Ledger Accounts and Identification of Suspense Accounts) and for the deletion of NASD Rule 3230, FINRA Incorporated NYSE Rules 322, 382, 440.10 and 440.20 and FINRA Incorporated NYSE Rule Interpretations 382/01 through 382/05, 409(a)/01 and 440.20/01.[7]

The Exchange proposes to adopt the FINRA rule changes within its own Rules as follows. First, the Exchange proposes to delete the text of NYSE Rules 322, 382, Supplementary Material .10 and .20 to Rule 440 and Rule Interpretations 382/01 through 382/05, 409(a)/01 and 440.20/01.

Second, the Exchange proposes to adopt the text of FINRA Rules 4150, 4311, 4522 and 4523 as NYSE Rules 4150, 4311, 4522 and 4523, with certain technical changes. Specifically, for consistency with Exchange rules, the Exchange proposes to change all references to ''members'' to ''member organizations.''

Third, the Exchange proposes certain technical changes to delete cross-references to the NYSE Rules that are proposed to be deleted, as identified above, which will no longer be applicable or, in certain circumstances, replace them with cross-references to the newly proposed NYSE Rules, where applicable. The technical changes are proposed within NYSE Rules 86, 405, 409 and 416.

The Exchange proposes that these changes be effective on the same date as FINRA makes FINRA Rules 4150, 4311, 4522 and 4523 effective.[8]

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,[9] in general, and furthers the objectives of Section 6(b)(5),[10] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system. Specifically, the Exchange believes that the proposed rule change supports the objectives of the Act by providing greater harmonization between NYSE Rules and FINRA Rules of similar purpose, resulting in less burdensome and more efficient regulatory compliance. To the extent the Exchange has proposed changes that differ from the FINRA version of the Rules, such changes are technical in nature and do not change the substance of the proposed NYSE Rules.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[11] and Rule 19b–4(f)(6) thereunder.[12] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6)(iii) thereunder.

A proposed rule change filed under Rule 19b–4(f)(6)[13] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b4(f)(6)(iii),[14] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission hereby grants that request. The proposed rule change provides greater harmonization between NYSE Rules and FINRA Rules of similar purpose. The Commission believes that such harmonization increases regulatory compliance while reducing the burden of such compliance. Waiving the 30-day operative delay will enable this change to be implemented immediately so that the benefits associated with regulatory harmonization may be realized promptly. Therefore, the Commission believes it is consistent with the protection of investors and public interest to waive the 30-day operative delay and designates the proposal as operative upon filing.[15]

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

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–NYSE–2011–33 on the subject line.

[6] FINRA's rulebook currently has three sets of rules: (1) NASD Rules, (2) FINRA Incorporated NYSE Rules, and (3) consolidated FINRA Rules. The FINRA Incorporated NYSE Rules apply only to those members of FINRA that are also members of the NYSE (''Dual Members''), while the consolidated FINRA Rules apply to all FINRA members. For more information about the FINRA rulebook consolidation process. See FINRA Information Notice, March 12, 2008.

[7] *See supra* note 4.

[8] *See* FINRA Regulatory Notice 11–26. The implementation date is currently scheduled for August 1, 2011. NYSE Amex has also submitted a companion rule filing amending its rules in accordance with FINRA's rule changes. *See* SR–NYSEAmex–2011–51.

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(5).

[11] 15 U.S.C. 78s(b)(3)(A)(iii).

[12] 17 CFR 240.19b–4(f)(6).

[13] 17 CFR 240.19b–4(f)(6).

[14] 17 CFR 240.19b–4(f)(6)(iii).

[15] For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

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–NYSE–2011–33. 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 such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR–NYSE–2011–33 and should be submitted on or before August 10, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–18195 Filed 7–19–11; 8:45 am]

BILLING CODE 8011–01–P

[16] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #12687 and #12688]

Mississippi Disaster #MS–00049

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the State of Mississippi (FEMA–1983–DR), dated 07/12/2011.

Incident: Flooding.

Incident Period: 05/03/2011 through 06/17/2011.

Effective Date: 07/12/2011.

Physical Loan Application Deadline Date: 09/12/2011.

Economic Injury (EIDL) Loan Application Deadline Date: 04/12/2012.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 07/12/2011, Private Non-Profit organizations that provide essential services of governmental nature may file disaster loan applications at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Adams, Bolivar, Claiborne, Coahoma, Humphreys, Issaquena, Jefferson, Sharkey, Tunica, Warren, Washington, Wilkinson, Yazoo.

The Interest Rates are:

	Percent
For Physical Damage:	
Non-Profit Organizations with Credit Available Elsewhere	3.250
Non-Profit Organizations without Credit Available Elsewhere	3.000
For Economic Injury:	
Non-Profit Organizations without Credit Available Elsewhere	3.000

The number assigned to this disaster for physical damage is 126876 and for economic injury is 126886.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

James E. Rivera,

Associate Administrator for Disaster Assistance.

[FR Doc. 2011–18256 Filed 7–19–11; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #12653 and #12654]

North Dakota Disaster Number ND–00024

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 2.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for the State of North Dakota (FEMA–1981–DR), dated 06/24/2011.

Incident: Flooding.

Incident Period: 02/14/2011 and continuing.

Effective Date: 07/13/2011.

Physical Loan Application Deadline Date: 08/23/2011.

EIDL Loan Application Deadline Date: 03/21/2012.

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: The notice of the Presidential disaster declaration for the State of North Dakota, dated 06/24/2011 is hereby amended to include the following areas as adversely affected by the disaster:

Primary Counties: (Physical Damage and Economic Injury Loans): Barnes, Ramsey, Richland, and the Spirit Lake Nation.

Contiguous Counties: (Economic Injury Loans Only):

North Dakota: Benson, Cass, Cavalier, Griggs, Lamoure, Nelson, Ransom, Sargent, Steele, Stutsman, Towner, Walsh.

Minnesota: Clay, Traverse, Wilkin.

South Dakota: Marshall, Roberts.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

James E. Rivera,

Associate Administrator for Disaster Assistance.

[FR Doc. 2011–18258 Filed 7–19–11; 8:45 am]

BILLING CODE 8025–01–P

SOCIAL SECURITY ADMINISTRATION

Agency Information Collection Activities: Comment Request

The Social Security Administration (SSA) publishes a list of information collection packages requiring clearance by the Office of Management and Budget (OMB) in compliance with Public Law 104–13, the Paperwork Reduction Act of 1995, effective October 1, 1995. This notice includes revisions to OMB-approved information collections.

SSA is soliciting comments on the accuracy of the agency's burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility, and clarity; and ways to minimize burden on respondents, including the use of automated collection techniques or other forms of information technology. Mail, e-mail, or fax your comments and recommendations on the information collection(s) to the OMB Desk Officer and SSA Reports Clearance Officer at the following addresses or fax numbers.

(OMB), Office of Management and Budget, *Attn:* Desk Officer for SSA, *Fax:* 202–395–6974, *E-mail address: OIRA_Submission@omb.eop.gov.*

(SSA), Social Security Administration, DCBFM, *Attn:* Reports Clearance Officer, 1333 Annex Building, 6401 Security Blvd., Baltimore, MD 21235, *Fax:* 410–965–6400, *E-mail address: OPLM.RCO@ssa.gov.*

SSA submitted the information collections listed below to OMB for clearance. Your comments on the information collections would be most useful if OMB and SSA receive them within 30 days from the date of this publication. To be sure we consider your comments, we must receive them no later than August 19, 2011. You can obtain a copy of the OMB clearance packages by calling the SSA Reports Clearance Officer at 410–965–8783 or by writing to the above email address.

1. Application for Supplemental Security Income—20 CFR 416.207 and 416.305–416–335, Subpart C—0960–0229. The Supplemental Security Income (SSI) program provides aged, blind, and disabled individuals who have little or no income with funds for food, clothing, and shelter. Individuals complete Form SSA–8000 to apply for SSI. SSA uses the information from Form SSA–8000 and its electronic intranet counterpart, the Modernized SSI Claims Systems (MSSICS), to determine: (1) Whether SSI claimants meet all statutory and regulatory eligibility requirements; and (2) SSI payment amounts. The respondents are applicants for SSI.

Type of Request: Revision of an OMB-approved information collection.

Type of response	Number of respondents	Frequency of response	Average burden per response (minutes)	Total annual burden (hours)
Paper Form	25,625	1	41	17,510
MSSICS	138,120	1	36	82,872
MSSICS/w Signature Proxy	1,117,515	1	35	651,884
Totals	1,281,260			752,266

Note: This is a correction notice. SSA published incorrect burden information for this collection at 76 FR 28297 on May 16, 2011. We are correcting this error here.

2. Disability Update Report—20 CFR 404.1589–.1595, 416.988–.996—0960–0511. SSA periodically reviews current disability beneficiaries' cases to determine if they should continue to receive disability payments. SSA uses Form SSA–455 to determine if: (1) There is enough evidence to warrant referring the case for a full medical continuing disability review (CDR); (2) the beneficiary's impairment is unchanged or only slightly changed, precluding the need for a CDR; or (3) there are unresolved work-related issues. The respondents are recipients of Social Security disability benefits.

Type of Request: Revision of an OMB-approved information collection.

Number of Respondents: 1,100,000.

Frequency of Response: 1.

Average Burden per Response: 15 minutes.

Estimated Annual Burden: 275,000 hours.

Dated: *July 15, 2011.*

Faye Lipsky,

Reports Clearance Officer, Center for Reports Clearance, Social Security Administration.

[FR Doc. 2011–18247 Filed 7–19–11; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF STATE

[Public Notice 7530]

Waiver of Restriction on Assistance to the Central Government of Kyrgyzstan

Pursuant to Section 7086(c)(2) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2010 (Division F, Pub. L. 111–117) as carried forward under the Department of Defense and Full-Year Continuing Appropriations Act, 2011 (Pub. L. 112–10) (''the Act''), and Department of State Delegation of Authority Number 245–1, I hereby determine that it is important to the national interest of the United States to waive the requirements of Section 7086(c)(1) of the Act with respect Kyrgyzstan and I hereby waive such restriction.

This determination shall be reported to the Congress, and published in the **Federal Register**.

Dated: June 6, 2011.

Thomas Nides,

Deputy Secretary of State for Management and Resources.

[FR Doc. 2011–18287 Filed 7–19–11; 8:45 am]

BILLING CODE 4710–46–P

DEPARTMENT OF STATE

[Public Notice 7529]

Waiver of Restriction on Assistance to the Central Government of Turkmenistan

Pursuant to Section 7086(c)(2) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2010 (Div. F, Pub. L. 111–117) as carried forward under the Department of Defense and Full-Year Continuing Appropriations Act, 2011 (Div. B, Pub. L. 112–10) (''the Act''), and Department of State Delegation of Authority Number 245–1, I hereby determine that it is important to the national interest of the United States to waive the requirements of Section 7086(c)(1) of the Act with respect to Turkmenistan, and I hereby waive such restriction.

This determination shall be reported to the Congress, and published in the **Federal Register**.

Dated: June 24, 2011.

Thomas Nides,

Deputy Secretary for Management and Resources.

[FR Doc. 2011–18292 Filed 7–19–11; 8:45 am]

BILLING CODE 4710–46–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Passenger Facility Charge (PFC) Approvals and Disapprovals

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Monthly Notice of PFC Approvals and Disapprovals. In June 2011, there were seven applications approved. This notice also includes information on one application, approved in May 2011, inadvertently left off the May 2011 notice. Additionally, 18 approved amendments to previously approved applications are listed.

SUMMARY: The FAA publishes a monthly notice, as appropriate, of PFC approvals and disapprovals under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Pub. L. 101–508) and Part 158 of the Federal Aviation Regulations (14 CFR part 158). This notice is published pursuant to paragraph d of § 158.29.

PFC Applications Approved

Public Agency: Springfield Airport Authority, Springfield, Illinois.

Application Number: 11–12–C–00–SPI.

Application Type: Impose and use a PFC.

PFC Level: $4.50.

Total PFC Revenue Approved in this Decision: $1,122,457.

Earliest Charge Effective Date: December 1, 2011.

Estimated Charge Expiration Date: July 1, 2016.

Class of Air Carriers Not Required to Collect PFC'S: Nonscheduled/on-demand air carriers filing FAA Form 1800–31.

Determination: Approved. Based on information submitted in the public agency's application, the FAA has determined that the proposed class accounts for less than 1 percent of the total annual enplanements at Abraham Lincoln Capital Airport.

Brief Description of Projects Approved for Collection and Use:

Seelbach property I—runway approach protection.

Seelbach property II—runway approach protection.

Gatschenberger property I—runway approach protection.

Gatschenberger property II—runway approach protection.

Woods property—runway approach protection.

Ingram property—runway approach protection.

Myers property—runway approach protection.

West property—runway approach protection.

Acquire vacuum sweeper vehicle (with liquid recovery), snow plow vehicle and snow plows.

Snow removal equipment broom.

Acquire aircraft rescue and firefighting vehicle and rehabilitate aircraft rescue and firefighting building.

Wildlife study.

Update airport layout plan/geographic information system/Exhibit A update.

Perimeter fence, phase 2.

Perimeter fence, phase 3.

Security system construction.

Terminal lighting and ceiling rehabilitation.

Terminal boiler plant renovation.

Upgrade terminal fire alarm system, phase 2.

Terminal parking lot reconfiguration/rehabilitation.

Terminal passenger services area improvements.

Terminal Americans with Disabilities Act improvements.

Install runway guard lights.

North quadrant general aviation ramp.

Taxiway G widening and access taxiway construction.

Taxiway Yankee phase 1 design.

Runway 13/31 rehabilitation, phase 1.

Runway 13/31 rehabilitation, phase 2.

Runway 18/36 rehabilitation.

Decision Date: May 31, 2011.

For Further Information Contact: Chad Oliver, Chicago Airports District Office, (847) 294–7199.

Public Agency: Birmingham Airport Authority, Birmingham, Alabama.

Application Number: 11–10–U–00–BHM.

Application Type: Use PFC revenue.

PFC Level: $4.50.

Total PFC Revenue Approved for Use in this Decision: $4,133,110.

Earliest Charge Effective Date: July 1, 2010.

Estimated Charge Expiration Date: February 1, 2031.

Class of Air Carriers Not Required to Collect PFC'S: No change from previous decision.

Brief Description of PROJECT APPROVED for Use: Terminal demolition.

Decision Date: June 2, 2011.

For Further Information Contact: Jonathan Linguist, Jackson Airports District Office, (601) 664–9893.

Public Agency: County of Broward, Fort Lauderdale, Florida.

Application Number: 11–12–C–00–FLL.

Application Type: Impose and use a PFC.

PFC Level: $4.50.

Total PFC Revenue Approved in this Decision: $1,102,698,394.

Earliest Charge Effective Date: January 1, 2018.

Estimated Charge Expiration Date: September 1, 2030.

Class of Air Carriers Not Required to Collect PFC'S: Nonscheduled/on-demand air carriers.

Determination: Approved. Based on information submitted in the public agency's application, the FAA has determined that the proposed class accounts for less than 1 percent of the total annual enplanements at Fort Lauderdale/Hollywood International Airport.

Brief Description of Projects Approved for Collection and Use at a $4.50 PFC Level:

Terminal 4—design for eastern expansion.

Security access control system.

Replace old airfield signage.

Land acquisition and demolition related to expansion of runway 10R/28L.

Brief Description Of Project Partially Approved for Collection and Use at a $4.50 PFC LEVEL: Runway 10R/28L expansion and enabling projects.

Determination: The public agency proposed that PFCs finance 35-foot wide runway and taxiway shoulders. The FAA found that only 25-foot wide shoulders were eligible and justified.

Brief Description of Project Approved for Collection and USE at a $3.00 PFC Level: In-roadway crosswalk warning lights.

Brief Description of Disapproved Project: Geographic information system—implementation.

Determination: The FAA determined that this project did not meet the requirements of § 158.15(b).

Decision Date: June 6, 2011.

For Further Information Contact: Susan Moore, Orlando Airports District Office, (407) 812–6331.

Public Agency: Monterey Peninsula Airport District, Monterey, California.

Application Number: 11–17–C–00–MRY.

Application Type: Impose and use a PFC.

PFC Level: $4.50.

Total PFC Revenue Approved in this Decision: $775,000.

Earliest Charge Effective Date: December 1, 2011.

Estimated Charge Expiration Date: December 1, 2012.

Class of Air Carriers Not Required to Collect PFC'S: Nonscheduled/on-demand air carriers filing FAA Form 1800–31.

Determination: Approved. Based on information submitted in the public agency's application, the FAA has determined that the proposed class accounts for less than 1 percent of the total annual enplanements at Monterey Peninsula Airport.

Brief Description of Projects Approved for Collection and Use: Runway 10R/28L safety area construction, phase 2. Terminal improvements—weather protection canopies.

Decision Date: June 9, 2011.

For Further Information Contact: Gretchen Kelly, San Francisco Airports District Office, (650) 876–2778, extension 623.

Public Agency: Piedmont Triad Airport Authority, Greensboro, North Carolina.

Application Number: 11–01–C–00–GSO.

Application Type: Impose and use a PFC.

PFC Level: $4.50.

Total PFC Revenue Approved in this Decision: $43,872,158.

Earliest Charge Effective Date: September 1, 2011.

Estimated Charge Expiration Date: May 1, 2022.

Class of Air Carriers Not Required to Collect PFC'S: Air taxi/commercial operators.

Determination: Approved. Based on information submitted in the public agency's application, the FAA has determined that the proposed class accounts for less than 1 percent of the total annual enplanements at Piedmont Triad International Airport.

Brief Description of projects Approved for Collection and Use:

Runway 5L/23R construction.

Terminal expansion—security checkpoints.

Decision Date: June 10, 2011.

For Further Information Contact: John Marshall, Atlanta Airports District Office, (404) 305–7153.

Public Agency: City of Kansas City, Missouri.

Application Number: 11–07–U–00–MCI.

Application Type: Use PFC revenue.

PFC Level: $3.00.

Total PFC Revenue Approved for Use in this Decision: $11,000,000.

Earliest Charge Effective Date: July 1, 2014.

Estimated Charge Expiration Date: June 1, 2015.

Class of Air Carriers Not Required to Collect PFC'S: No change from previous decision.

Brief Description of Projects Approved for Use: Airfield sand and deicing facility.

Airfield snow removal equipment building.

Decision Date: June 15, 2011.

For Further Information Contact: Todd Madison, Central Region Airports Division, (816) 329–2640.

Public Agency: City of Colorado Springs, Colorado.

Application Number: 11–18–C–00–COS.

Application Type: Impose and use a PFC.

PFC Level: $3.00.

Total PFC Revenue Approved in this Decision: $4,490,089.

Earliest Charge Effective Date: August 1, 2013.

Estimated Charge Expiration Date: April 1, 2015.

Class of Air Carriers Not Required to Collect PFC'S: None.

Brief Description of Projects Approved for Collection and Use:

Rehabilitation of taxiways M and F (phase 1)—design.

Rehabilitation of taxiways E, G and H (phase III).

Fleet improvement (phase IV).

Airfield guidance signs and surface painted holding position signs.

Security checkpoint expansion.

Decision Date: June 22, 2011.

For Further Information Contact: Chris Schaffer, Denver Airports District Office, (303) 342–1258.

Public Agency: City of Eugene, Oregon.

Application Number: 11–11–C–00–EUG.

Application Type: Impose and use a PFC.

PFC Level: $4.50.

Total PFC Revenue Approved in this Decision: $5,513,282.

Earliest Charge Effective Date: May 1, 2012.

Estimated Charge Expiration Date: December 1, 2014.

Class of Air Carriers Not Required to Collect PFC'S:

Nonscheduled/on-demand air carriers filing FAA Form 1800–31.

Determination: Approved. Based on information submitted in the public agency's application, the FAA has determined that the proposed class accounts for less than 1 percent of the total annual enplanements at Mahlon Sweet Field.

Brief Description of Projects Approved for Collection and Use: Terminal checkpoint reconfiguration. Baggage claim expansion. North terminal stairway enclosure.

Decision Date: June 23, 2011.

For Further Information Contact: Trang Tran, Seattle Airports District Office, (425) 227–1662.

AMENDMENTS TO PFC APPROVALS

Amendment No. city, state	Amendment approved date	Original approved net PFC revenue	Amended approved net PFC revenue	Original estimated charge exp. date	Amended estimated charge exp. date
06–05–C–01–CLL, College Station, TX	06/01/11	$799,557	$755,492	04/01/09	04/01/09
06–05–C–03–MOB, Mobile, AL	06/02/11	4,835,101	4,850,267	02/01/12	06/01/15
07–02–C–01–ECP, Panama City, FL	06/02/11	41,968,640	41,968,640	04/01/39	04/01/39
92–01–C–06–STL, St. Louis, MO	06/02/11	58,088,964	84,607,850	08/01/95	03/01/95
06–06–C–01–RSW, Fort Myers, FL	06/03/11	6,932,692	4,846,352	02/01/15	11/01/14
05–05–C–06–SJU, San Juan, PR	06/07/11	499,314,667	479,036,578	08/01/31	06/01/30
09–06–C–01–FNL, Loveland, CO	06/08/11	350,000	470,000	01/01/13	12/01/11
01–04–C–01–IMT, Iron Mountain, MI	06/09/11	73,815	45,815	06/01/04	06/01/04
08–13–C–01–MRY, Monterey, CA	06/09/11	856,394	573,074	08/01/09	08/01/09
10–11–C–01–ATL, Atlanta, GA	06/14/11	422,480,178	422,480,178	01/01/23	01/01/23
10–12–C–01–ATL, Atlanta, GA	06/14/11	19,332,000	19,332,000	03/01/23	03/01/23
07–09–C–01–DBQ, Dubuque, IA	06/14/11	885,694	28,654	10/01/15	10/01/15
07–09–C–02–DBQ, Dubuque, IA	06/16/11	28,654	0	10/01/15	10/01/15
07–03–C–02–HRL, Harlingen, TX	06/16/11	3,590,824	3,876,104	07/01/09	07/01/09
95–01–C–01–MMH, Monterey, CA	06/17/11	166,632	0	09/01/02	09/01/05
*03–02–C–01–SFB, Orlando, FL	06/17/11	13,312,090	13,312,090	07/01/14	12/01/12
09–14–C–01–MRY, Monterey, CA	06/24/11	980,026	909,255	08/01/10	12/01/10

AMENDMENTS TO PFC APPROVALS—Continued

Amendment No. city, state	Amendment approved date	Original approved net PFC revenue	Amended approved net PFC revenue	Original estimated charge exp. date	Amended estimated charge exp. date
11–16–U–03–MRY, Monterey, CA	06/24/11	NA	NA	12/01/11	12/01/11.

Notes: The amendment denoted by an asterisk (*) include a change to the PFC level charged from $2.00 per enplaned passenger to $4.00 per enplaned passenger. For Orlando, FL, this change is effective on September 1, 2011.

Issued in Washington, DC, on July 7, 2011.

Joe Hebert,

Manager, Financial Analysis and Passenger Facility Charge Branch.

[FR Doc. 2011–17968 Filed 7–19–11; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice of Final Federal Agency Actions on Proposed Highway in Indiana

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of Limitation on Claims for Judicial Review of Actions by FHWA, United States Fish and Wildlife Service (USFWS), DOI, and United States Army Corps of Engineers (USACE), DoD.

SUMMARY: This notice announces actions taken by the FHWA and the USACE that are final within the meaning of 23 U.S.C. 139(l)(1). The actions relate to proposed highway projects, including I–69 from Evansville to Indianapolis in the Counties of Vanderburgh, Warrick, Gibson, Pike, Daviess, Greene, Monroe, Morgan, Johnson and Marion, State of Indiana, and a 13.1 mile segment of I–69 in the Counties of Warrick and Gibson, State of Indiana. These actions grant or amend licenses, permits, and approvals for the projects.

DATES: By this notice, the FHWA is advising the public of final agency actions subject to 23 U.S.C. 139(l)(1) and are final within the meaning of that law. A claim seeking judicial review of those Federal agency actions that are covered by this notice will be barred unless the claim is filed on or before January 17, 2012. If the Federal law that authorizes judicial review of a claim provides a time period of less than 180 days for filing such claim, then the shorter time period applies.

FOR FURTHER INFORMATION CONTACT: For the FHWA: Ms. Michelle Allen, Federal Highway Administration, Indiana Division, 575 North Pennsylvania Street, Room 254, Indianapolis, IN 46204–1576; telephone: (317) 226–7344; e-mail: *Michelle.Allen@dot.gov.* The FHWA Indiana Division Office's normal business hours are 7:30 a.m. to 4 p.m., e.t. For the USFWS: Mr. Scott Pruitt, Field Supervisor, Bloomington Field Office, USFWS, 620 South Walker Street, Bloomington, IN 47403–2121; telephone: 812–334–4261; e-mail: *Scott_Pruitt@fws.gov.* Normal business hours for the USFWS Bloomington Field Office are: 8 a.m. to 4:30 p.m., e.t. For the USACE: Mr. Greg Mckay, Chief, North Section Regulatory Branch, Louisville District, United States Army Corps of Engineers, P.O. Box 59, Louisville, KY 40201–0059; telephone: (502) 315–6685; e-mail: *gregory.a.mckay@usace.army.mil.* Normal business hours are 8 a.m. to 5 p.m., e.t. You may also contact Mr. Thomas Seeman, Project Manager, Indiana Department of Transportation (INDOT), 100 North Senate Avenue, Indianapolis, IN 46204; telephone: (317) 232–5336; e-mail: *TSeeman@indot.IN.gov.* Normal business hours for the Indiana Department of Transportation are: 8 a.m. to 4:30 p.m., e.t.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the FHWA and other Federal agencies have taken final agency actions by issuing licenses, permits, and approvals for the highway projects in the State of Indiana that are listed below. The actions by the Federal agencies on a project, and the laws under which such actions were taken, are described in the Record of Decision (ROD), Section 404 Discharge of Dredged or Fill Material Permit and Regional General Permit letters, the Revised Programmatic Biological Opinion and Incidental Take Statement, and in other documents in the FHWA administrative record for the project. The ROD and other documents from the FHWA administrative record files for the listed projects are available by contacting the FHWA or the Indiana Department of Transportation (INDOT) at the addresses provided above. Project information may also be available through the INDOT I–69 Project Web site at *http://www.i69indyevn.org/.* People unable to access the Web site may contact FHWA or INDOT at the addresses listed above. This notice applies to all Federal agency decisions on the listed project as of the issuance date of this notice and all laws under which such actions were taken, including but not limited to: 1. National Environmental Policy Act (NEPA) [42 U.S.C. 4321–4351]. 2. Endangered Species Act [16 U.S.C. 1531–1544]. 3. Federal-Aid Highway Act [23 U.S.C. 109 and 23 U.S.C. 128]. 4. Clean Air Act, 42 U.S.C. 7401–7671(q). 5. Section 4(f) of the Department of Transportation Act of 1966 [49 U.S.C. 303]. 6. Section 106 of the National Historic Preservation Act of 1966, as amended [16 U.S.C. 470(f) *et seq.*]. 7. Bald and Golden Eagle Protection Act [16 U.S.C. 688–688d]. 8. Clean Water Act, 33 U.S.C. 1251–1377 (Section 404, Section 402, Section 401, Section 319).

The projects subject to this notice are:

1. *Project:* The I–69 highway project from Evansville to Indianapolis. *Location:* I–64 just north of Evansville to I–465 in Indianapolis west of the I–465/SR 37 interchange, in the Counties of Vanderburgh, Warrick, Gibson, Pike, Daviess, Greene, Monroe, Morgan, Johnson and Marion, State of Indiana. The FHWA had previously issued a Tier 1 FEIS and ROD for the entire I–69 project from Evansville to Indianapolis, Indiana. A ''Notice of Limitation on Claims for Judicial Review of Actions by FHWA and United States Fish and Wildlife Service (USFWS), DOI,'' was published in the **Federal Register** on April 17, 2007 (at 72 FR 19228–02). A claim seeking judicial review of the Tier 1 decisions must have been filed by October 15, 2007, to avoid being barred under 23 U.S.C. 139(l). Notice is hereby given that, subsequent to the earlier FHWA notice, the USFWS has taken final agency actions within the meaning of 23 U.S.C. 139(l)(1) by issuing an ''Amendment to the Tier 1 Revised Programmatic Biological Opinion (dated August 24, 2006) for the I–69, Evansville to Indianapolis, Indiana Highway''. The actions by the USFWS, related final actions by other Federal agencies, and the laws under which such actions were taken, are described in the USFWS ''Amendment to Tier 1 Revised Programmatic Biological Opinion for the I–69, Evansville to Indianapolis, Indiana

Highway'' and related records. That information is available by contacting the USFWS at the address provided above.

Previous actions taken by the USFWS for the Tier 1, I–69 project, pursuant to the Endangered Species Act, 16 U.S.C. 1531–1544, included its concurrence with the FHWA's determination that the I–69 project was not likely to adversely affect the eastern fanshell mussel (*Cyprogenia stegaria*) and that the project was likely to adversely affect, but not jeopardize, the bald eagle. The USFWS also concluded that the project was not likely to jeopardize the continued existence of the Indiana bat and was not likely to adversely modify the bat's designated Critical Habitat. These USFWS decisions were described in the Programmatic Biological Opinion issued on December 3, 2003, the Revised Programmatic Biological Opinion issued on August 24, 2006, and other documents in the Tier 1 project records. A Notice of Limitation on Claims for Judicial Review of these actions and decisions by the USFWS, DOI, was published in the **Federal Register** on April 17, 2007. A claim seeking judicial review of the Tier 1 decisions must have been filed by October 15, 2007, to avoid being barred under 23 U.S.C. 139(l).

On May 31, 2011, USFWS issued the Amendment to the Tier 1 Revised Programmatic Biological Opinion (RPBO) and Incidental Take Statement (ITS). USFWS decided to issue the Amendment to the RPBO primarily based on the discovery of the disease White Nose Syndrome in the State of Indiana, including the action area (which is within the Indiana bat Midwest Recovery Unit). Additionally, one new Indiana bat maternity colony was discovered within the right-of-way of Section 4 of the I–69 Project (which begins just east of the intersection of U.S. 231 and SR45/SR58 in Greene County, Indiana and terminates at SR 37 near Victor Pike in Monroe County, Indiana), and other new information revealed minor forest impacts within critical habitat for the Indiana bat (specifically, the Ray's Cave Winter Use Area). In light of this new information, USFWS chose to reevaluate impacts to the Indiana bat and to update the 2006 Tier 1 RPBO and ITS. The Amendment to the Tier 1 RPBO contains new analysis and comment for each of the sections of the 2006 Tier 1 RPBO affected by the new information, and USFWS affirmed that all other sections of the Tier 1 RPBO remain valid. Based on analysis of the new information, USFWS concluded that overall the amount of project impacts decreased since completion of the Tier 1 analysis and that no additional impacts to the habitat of the Indiana bat are anticipated. USFWS further concluded that appreciable reductions in the likelihood of survival and recovery of the Indiana bat due to the construction, operation and maintenance of the I–69 Evansville to Indianapolis project are unlikely to occur, and therefore FHWA demonstrated that the proposed action is unlikely to jeopardize the continued existence of the Indiana bat or its designated critical habitat. USFWS did not conduct any new analysis for either the bald eagle or the eastern fanshell mussel (*Cyprogenia stegaria*), and the non-jeopardy conclusion regarding impacts to the bald eagle still stands as stated in the original Tier 1 Biological Opinion (dated December 3, 2003).

2. *Project:* Section 1 of the I–69 highway project from Evansville to Indianapolis. *Location:* I–64 just north of Evansville to just north of SR 64 west of Oakland City. Section 1 of the I–69 project extends from the I–64/I–164/SR 57 interchange north of Evansville to approximately one-half mile north of SR 64 near Oakland City, Indiana. Section 1 is a new alignment, fully access-controlled highway that has an approximately 350-foot-wide right-of-way. The ROD selected Alternative 4 for section 1, as described in the I–69 Evansville to Indianapolis, Indiana, Tier 2 Final Environmental Impact Statement, Evansville to Oakland City (FEIS). The ROD also approved the locations of the interchanges, grade separations, and access roads (which include new roads, road relocations, and realignments). On February 1, 2008, the FHWA published a ''Notice of Final Federal Agency Actions on Proposed Highway in Indiana'' in the **Federal Register** (at 73 FR 6241–01) for the Section 1, 13.1 mile segment of I–69 in the Counties of Warrick and Gibson, State of Indiana. Notice is hereby given that, subsequent to the earlier FHWA notice, the USACE has taken final agency actions within the meaning of 23 U.S.C. 139(l)(1) by issuing permits and approvals for the highway project. The actions by the USACE, related final actions by other Federal agencies, and the laws under which such actions were taken, are described in the USACE decisions and its project records, referenced as Department of the Army (DA) Permit, Number LRL–2007–1043. That information is available by contacting the USACE at the address provided above.

On June 7, 2010, INDOT filed an individual permit application with the USACE for authorization under Section 404 of the Clean Water Act, 33 U.S.C. 1344, to construct crossings and relocations of four (4) unnamed tributaries to Smith Creek on Section 1 of the I–69 project. On June 15, 2011, the USACE took final action in issuing the Department of the Army (DA) Individual Permit for the construction of crossing and relocation of four (4) unnamed tributaries to Smith Creek for Section 1 I–69 project, Number LRL–2007–1043, as described in the USACE decision and its administrative record for the project. As part of the Section 1 project, which begins at I–64 just north of Evansville and extends to just north of SR 64 west of Oakland City, there is one (1) crossing of water resources requiring an individual permit from the USACE. Subject to the permit conditions, INDOT is permitted to discharge 1,149 cubic yards of fill material below the Ordinary Highway Water Mark of 1,780 linear feet of stream channels (the four unnamed tributaries to Smith Creek). In addition, in a letter dated January 25, 2010, the USACE has authorized impacts at 52 other sites under their jurisdiction within Section 1 of the I–69 project in Warrick and Gibson Counties via the Regional General Permit No. 1 (LRL–2007–1043–djd) issued jointly by the Louisville, Detroit and Chicago Districts on December 15, 2009. In the letter dated January 25, 2010 from Ms. Deborah Duda Snyder of the Indianapolis Regulatory Office of the USACE to Ms. Laura Hilden of INDOT, the USACE verified that 52 individual stream and wetland impacts are authorized under the Regional General Permit No. 1, subject to special permit conditions requiring compensatory wetland and stream mitigation in accordance with the approved ''I–69 Section 1 Compensatory Mitigation Plan'' (dated October 16, 2007; revised February 8, 2008).

The actions by the Federal agencies on the project, and the laws under which such actions were taken, are described in the Amendment to the Tier 1 Revised Programmatic Biological Opinion and Incidental Take Statement, the Department of the Army (DA) Individual Permit (LRL–2007–1043) and Regional General Permit letter (LRL–2007–1043–djd), and in other documents in the FHWA administrative record for the project. The ROD and other documents from the FHWA administrative record files for Tier 1 of the I–69 project and for the I–69 Tier 2 Section 1project are available by contacting FHWA, USACE, USFWS or INDOT at the addresses provided above. Project information may also be available through the INDOT I–69

Project Web site at *http://www.i69indyevn.org/.*

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Authority: 23 U.S.C. 139(*l*)(1).

Robert F. Tally Jr.,

Division Administrator, Indianapolis, Indiana.

[FR Doc. 2011–18241 Filed 7–19–11; 8:45 am]

BILLING CODE

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. AB 55 (Sub-No. 707X)]

CSX Transportation, Inc.; Abandonment Exemption; in Hardin County, OH

CSX Transportation, Inc. (CSXT), filed a verified notice of exemption under 49 CFR pt. 1152 subpart F—*Exempt Abandonments* to abandon an approximately 0.21-mile rail line on its Northern Region, Toledo Branch Subdivision, between milepost QTA 24.95 near Fontaine Street and milepost QTA 25.16 near the intersection of Fontaine Street and Champion Court, in Kenton, Hardin County, Ohio. The line traverses United States Postal Service Zip Code 43326.

CSXT has certified that: (1) No local traffic has moved over the line for at least 2 years; (2) there is no overhead traffic on the line; (3) no formal complaint filed by a user of rail service on the line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Surface Transportation Board (Board) or with any U.S. District Court or has been decided in favor of complainant within the 2-year period; and (4) the requirements at 49 CFR 1105.7(c) (environmental report), 49 CFR 1105.11 (transmittal letter), 49 CFR 1105.12 (newspaper publication), and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.

As a condition to this exemption, any employee adversely affected by the abandonment shall be protected under *Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho,* 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, this exemption will be effective on August 19, 2011, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues,[1] formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2),[2] and trail use/rail banking requests under 49 CFR 1152.29 must be filed by August 1, 2011. Petitions to reopen or requests for public use conditions under 49 CFR 1152.28 must be filed by August 9, 2011, with the Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001.

A copy of any petition filed with the Board should be sent to CSXT's representative: Louis E. Gitomer, 600 Baltimore Ave., Suite 301, Towson, MD 21204.

If the verified notice contains false or misleading information, the exemption is void *ab initio.*

CSXT has filed a combined environmental and historic report which addresses the effects, if any, of the abandonment on the environment and historic resources. OEA will issue an environmental assessment (EA) by August 25, 2011. Interested persons may obtain a copy of the EA by writing to OEA (Room 1100, Surface Transportation Board, Washington, DC 20423–0001) or by calling OEA at (202) 245–0305. Assistance for the hearing impaired is available through the Federal Information Relay Service at 1–800–877–8339. Comments on environmental and historic preservation matters must be filed within 15 days after the EA becomes available to the public.

Environmental, historic preservation, public use, or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision.

Pursuant to the provisions of 49 CFR 1152.29(e)(2), CSXT shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by CSXT's filing of a notice of consummation by July 20, 2012, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: July 14, 2011.

By the Board,

Rachel D. Campbell,

Director, Office of Proceedings.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2011–18162 Filed 7–19–11; 8:45 am]

BILLING CODE 4915–01–P

[1] The Board will grant a stay if an informed decision on environmental issues (whether raised by a party or by the Board's Office of Environmental Analysis (OEA) in its independent investigation) cannot be made before the exemption's effective date. *See Exemption of Out-of-Serv. Rail Lines,* 5 I.C.C.2d 377 (1989). Any request for a stay should be filed as soon as possible so that the Board may take appropriate action before the exemption's effective date.

[2] Each OFA must be accompanied by the filing fee, which is currently set at $1,500. *See* 49 CFR 1002.2(f)(25).

DEPARTMENT OF THE TREASURY

Proposed Collection; Comment Request

AGENCY: Department of the Treasury.

ACTION: Notice and request for comment.

SUMMARY: The Department of the Treasury, on behalf of itself and the Bureau of Consumer Financial Protection (CFPB), 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.

Currently, the Department of the Treasury is soliciting comments concerning a proposed generic information collection for development and evaluation of integrated mortgage loan disclosures required by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203.

DATES: Written comments are encouraged and must be received on or before September 19, 2011 to be assured of consideration.

ADDRESSES: Direct all written comments to Pamela Blumenthal, Consumer Financial Protection Bureau, 1801 L Street, NW., Washington, DC 20036.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Pamela Blumenthal, Consumer Financial Protection Bureau, 1801 L Street, NW., Washington, DC 20036; (202) 435–7167 or by e-mail at *pamela.blumenthal@treasury.gov.*

SUPPLEMENTARY INFORMATION:

Title: Generic Clearance for Development and Qualitative Evaluation of Integrated Mortgage Loan Disclosure Forms.

OMB Number: 1505–XXXX.

Summary of Collection: The Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, Title X, requires the Consumer Financial Protection Bureau (the''CFPB'' or the ''Bureau'') to develop model forms that will integrate separate disclosures concerning residential mortgage loans that are required under the Truth in Lending Act (''TILA'') and Real Estate Settlement Procedures Act (''RESPA''). The development of the integrated disclosures will involve qualitative testing of the disclosures given in connection with consummation of the transaction and may involve testing of additional disclosures required by TILA and RESPA during the shopping, application, and origination process. The CFPB will collect qualitative data through a variety of collection methods, which may include interviews, focus groups and the internet, to inform its design and development of the mandated integrated disclosures and their implementation. The information collected through qualitative evaluation methods will inform the disclosure form's design and content, using an iterative process to improve the draft form to make it easier for consumers to use the document to identify the terms of the loan, compare among different loan products, and understand the final terms of the loan transaction.

The development and evaluation process that will be conducted may use focus group sessions, think-aloud interviews, and usability studies. Data collection tools will include: consent forms; participant questionnaires; protocols for individual interviews and focus groups; and tools that seek input from a larger community through the internet.

The Bureau will only submit a collection for approval under this generic clearance if it meets the following conditions:

- The collections are voluntary;
- The collections are low-burden for respondents (based on considerations of total burden hours, total number of respondents, or burden-hours per respondent) and are low-cost for both the respondents and the Federal Government;
- Personally identifiable information (PII) is collected only to the extent necessary and is not retained;
- Information gathered and released beyond the Bureau will indicate the qualitative nature of the information; and
- Information gathered will yield qualitative information; the collections will not be designed or expected to yield statistically reliable results or used as though the results are generalizable to the population of study.

The core objective of the data collection is to help identify and refine specific features of the content or design of the forms to maximize communication effectiveness while minimizing compliance burden. Feedback collected under this generic clearance provides useful information, but it does not yield data that can be generalized to the overall population. This type of generic clearance for qualitative information will not be used for quantitative information collections that are designed to yield reliably actionable results, such as monitoring trends over time or documenting program performance.

As a general matter, information collections will not result in any new system of records containing privacy information and will not ask questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs, and other matters that are commonly considered private.

Type of Review: New Collection.

Affected Public: Individuals and businesses or other for-profit institutions.

Annual Burden Estimates: Below is a preliminary estimate of the aggregate burden hours for this generic clearance.

Process	Number of respondents	Number of responses per respondent	Average burden per response (minutes)	Total burden hours
Focus groups	50	1	90	75
One-on-one interviews	60	1	90	90
Screening	400	1	10	67
Travel time to site	110		30	55
Internet tools	5000	5	5	2,084
Total				2,371

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information, to search data sources, to complete and review the collection of information; and to transmit or otherwise disclose the information.

Robert Dahl,

Treasury PRA Clearance Officer.

[FR Doc. 2011–18188 Filed 7–19–11; 8:45 am]

BILLING CODE 4810–25–P

DEPARTMENT OF THE TREASURY

Order Granting Temporary Exemptions From Certain Government Securities Act Provisions and Regulations in Connection With a Request From ICE Clear Credit LLC (Formerly ICE Trust U.S. LLC) Related to Central Clearing of Credit Default Swaps, and Request for Comments

AGENCY: Department of the Treasury, Office of the Assistant Secretary for Financial Markets.

ACTION: Notice of temporary exemptions.

SUMMARY: The Department of the Treasury (''Treasury'' or ''We'') is granting by order temporary exemptions from certain Government Securities Act of 1986 provisions and regulations regarding transactions in credit default swaps that reference government securities. ICE Clear Credit LLC requested these temporary exemptions for itself, its Clearing Members, and certain brokers that are not registered as government securities brokers. Treasury will revisit these exemptions when the Commodity Futures Trading Commission and the Securities and Exchange Commission issue final rules or guidance to implement Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act. The temporary exemptions could become unavailable if the facts and circumstances, as represented in the request, change. Treasury is also soliciting public comment on this order.

DATES: Effective date: July 16, 2011. Submit comments on or before September 19, 2011.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

You may download this order from *http:// www.regulations.gov* or the Bureau of the Public Debt's Web site at *http://www.treasurydirect.gov.* You may also e-mail comments to *govsecreg@bpd.treas.gov.*

Paper Comments

Send paper comments to Department of the Treasury, Bureau of the Public Debt, Government Securities Regulations Staff, 799 9th Street, NW., Washington, DC 20239–0001.

Please submit your comments using only one method and provide your full name and mailing address. We will post all comments on the Bureau of the Public Debt's Web site at *http:// www.treasurydirect.gov.* The order and comments will also be available for public inspection and copying at the Treasury Department Library, Main Treasury Building, 1500 Pennsylvania Avenue, NW., Washington, DC 20220. To visit the library, call (202) 622–0990 for an appointment. In general, comments received, including attachments and other supporting materials, are part of the public record and are available to the public. Do not submit any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

FOR FURTHER INFORMATION CONTACT: Lori Santamorena, Kurt Eidemiller, or Kevin Hawkins, Department of the Treasury, Bureau of the Public Debt, at 202–504–3632.

SUPPLEMENTARY INFORMATION:

I. Section 15C of the Securities Exchange Act of 1934

Section 15C of the Securities Exchange Act of 1934 (''Exchange Act''), as amended by the Government Securities Act of 1986 (''GSA'') [1] governs transactions in government securities [2] by government securities brokers [3] and government securities dealers.[4] Treasury regulations promulgated under the GSA impose obligations on government securities brokers and government securities dealers concerning financial responsibility, protection of customer securities and balances, and recordkeeping and reporting.

Section 15C(a) of the Exchange Act (Title I of the GSA) requires government securities brokers and government securities dealers that effect transactions in or induce the purchase or sale of government securities to be registered with the Securities and Exchange Commission (''SEC'').[5] This registration requirement does not apply to financial institutions or brokers and dealers that are already registered under the Exchange Act, as long as written notice is filed with the appropriate regulatory agency.[6] All government securities brokers and government securities dealers are required to comply with the requirements in Treasury's GSA regulations that are set out at 17 CFR parts 400–449.[7] Treasury's GSA regulations, for the most part, incorporate with some modifications SEC rules for non-financial institution government securities brokers and government securities dealers and the appropriate regulatory agency [8] rules for financial institutions that are required to file notice as government securities brokers and government securities dealers.

Section 15C(a)(5) of the Exchange Act provides that the Secretary of the Treasury (''Secretary''):

> By rule or order, upon the Secretary's own motion or upon application, may conditionally or unconditionally exempt any government securities broker or government securities dealer, or class of government securities brokers or government securities dealers, from any provision of subsection (a), (b), or (d) of this section, other than subsection (d)(3), or the rules thereunder, if the Secretary finds that such exemption is consistent with the public interest, the protection of investors, and the purposes of [the Exchange Act].

Treasury, in coordination with the SEC, has previously issued several temporary exemptive orders to ICE Trust U.S. LLC (''ICE Trust'') to facilitate the central clearing of credit default swaps (''CDS'') [9] that reference

1 Public Law 99–571, 100 Stat. 3208 (1986).

2 The term *government securities,* as defined at 15 U.S.C. 78c(a)(42), means: (A) Securities which are direct obligations of, or obligations guaranteed as to principal or interest by, the United States; (B) securities which are issued or guaranteed by the Tennessee Valley Authority or by corporations in which the United States has a direct or indirect interest and which are designated by the Secretary of the Treasury for exemption as necessary or appropriate in the public interest or for the protection of investors; (C) securities issued or guaranteed as to principal or interest by any corporation the securities of which are designated, by statute specifically naming such corporation, to constitute exempt securities within the meaning of the laws administered by the SEC; and (D) generally ''any put, call, straddle, option, or privilege'' on a government security other than one that is traded on a national securities exchange or for which quotations are disseminated through an automated quotation system operated by a registered securities association. Certain Canadian government obligations are also included for certain purposes.

3 A *government securities broker* generally is ''any person regularly engaged in the business of effecting transactions in government securities for the account of others,'' with certain exclusions. 15 U.S.C. 78c(a)(43).

4 A *government securities dealer* generally is ''any person engaged in the business of buying and selling government securities for his own account, through a broker or otherwise,'' with certain exclusions. 15 U.S.C. 78c(a)(44).

5 15 U.S.C. 78o–5(a)(1)(A).

6 15 U.S.C. 78o–5(a)(1)(B).

7 17 CFR part 400 Rules of general application; 17 CFR part 401 Exemptions; 17 CFR part 402 Financial responsibility; 17 CFR part 403 Protection of customer securities and balances; 17 CFR part 404 Recordkeeping and preservation of records; 17 CFR part 405 Reports and audit; 17 CFR part 420 Large position reporting; and 17 CFR part 449 Forms, section 15C of the Securities Exchange Act of 1934. The GSA regulations also include requirements for custodial holdings by depository institutions at 17 CFR part 450, which were issued under Title II of the GSA.

8 The definition of *appropriate regulatory agency* with respect to a government securities broker or a government securities dealer is set out at 15 U.S.C. 78c(a)(34)(G). The definition includes the Board of Governors of the Federal Reserve System, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, and in limited circumstances the SEC.

9 A CDS is a bilateral contract between two parties, known as counterparties. The value of this

government securities. On March 6, 2009, Treasury granted a temporary exemption [10] from the provisions of section 15C(a), (b), and (d) (other than subsection (d)(3)) of the Exchange Act, and the rules thereunder, to ICE Trust, certain ICE Trust participants, and certain eligible contract participants (''ECPs'').[11] In the same order Treasury also granted a limited temporary exemption from certain GSA regulatory requirements to government securities brokers and government securities dealers that are not financial institutions.[12] On December 7, 2009, Treasury extended the expiration date of these temporary exemptions until March 7, 2010.[13] On January 28, 2010, Treasury granted a temporary, conditional exemption until March 7, 2010, to certain ICE Trust Clearing Members and certain ECPs to accommodate using ICE Trust to clear customer CDS transactions.[14] On March 7, 2010, Treasury granted a conditional, temporary exemption from certain GSA provisions and regulations to certain ICE Trust participants and certain ECPs.[15] In the same order Treasury also granted a temporary exemption from certain GSA regulatory requirements for registered or noticed government securities brokers and government securities dealers that are not financial institutions. On November 30, 2010, Treasury issued an order extending the expiration date of these temporary exemptions until July 16, 2011.[16] Treasury received no comments on its previous orders.

II. Legislative Developments

President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act'') [17] into law effective July 16, 2011, and the facts and circumstances for Treasury's previous exemptive orders changed.

The legislation was enacted, among other reasons, to reduce risk, increase transparency, and promote market integrity within the financial system, including by: (1) Providing for the registration and comprehensive regulation of swap dealers, security-based swap dealers, major swap participants and major security-based swap participants; (2) imposing clearing and trade execution requirements on swaps and security-based swaps, subject to certain exceptions; (3) creating rigorous recordkeeping and real-time reporting regimes; and (4) enhancing the rulemaking and enforcement authorities of the SEC and the Commodity Futures Trading Commission (''CFTC'') with respect to, among others, all registered entities and intermediaries subject to their oversight.[18]

Title VII of the Dodd-Frank Act established a comprehensive new regulatory framework for swaps and security-based swaps, and provided the SEC and the CFTC with the authority to regulate over-the-counter derivatives. The SEC and CFTC, in consultation with the Board of Governors of the Federal Reserve System, have issued proposed rules and proposed interpretive guidance under the Commodity Exchange Act (''CEA'') and the Exchange Act to implement relevant changes required by provisions of the Dodd-Frank Act, including the regulation of CDS.[19]

Under Title VII of the Dodd-Frank Act, the CFTC was given regulatory authority over swaps and the SEC was given regulatory authority over security-based swaps.[20] The definition of the term ''security-based swap,'' however, excludes swaps based on ''exempted securities.'' [21] A CDS generally would be a swap and not a security-based swap if it is based upon an exempted security (other than a municipal security). Because the CFTC has jurisdiction over swaps and the SEC has jurisdiction over security-based swaps, and because a CDS on an exempted security would be a swap and not a security-based swap, it is subject to CFTC jurisdiction.

The CFTC and SEC recently took action to defer many Dodd-Frank requirements regulating swaps and security-based swaps that would otherwise have gone into effect on July 16, 2011. On June 14, 2011, the CFTC issued a notice of proposed order and request for comment [22] with respect to the effective dates of provisions of the Dodd-Frank Act relating to the regulation of the swaps markets. Similarly, the SEC has released orders [23] granting temporary exemptions and other temporary relief, and providing information on compliance dates, applicable to the regulation of the security-based swaps markets. The SEC noted in certain of its orders that the temporary exemptions extended neither to the Exchange Act provisions applicable to government securities as set forth in Section 15C and its underlying rules and regulations, nor to the related definitions of ''government securities,'' ''government securities broker,'' and ''government securities dealer.'' The SEC further noted that it does not have authority under Section 36 of the Exchange Act to issue

financial contract is based on underlying obligations of a single entity (reference entity) or on a particular security or other debt obligation, or an index of several such entities, securities, or obligations. Under a CDS contract, the obligation of a seller to make payments is triggered by a default or other credit event as to such entity or entities or such security or securities.

[10] 74 FR 10647, March 11, 2009 Order Granting Temporary Exemptions from Certain Provisions of the Government Securities Act and Treasury's Government Securities Act Regulations in Connection with a Request on Behalf of ICE US Trust LLC Related to Central Clearing of Credit Default Swaps, and Request for Comments, available at: *http://www.treasurydirect.gov/instit/statreg/gsareg/gsareq_treasexemptiveorder309.pdf.*

[11] ECPs are defined in section 1a(18) of the Commodity Exchange Act, 7 U.S.C. 1 *et seq.* The use of the term ECPs in the March 6, 2009 order refers to the definition of ECPs in effect on March 6, 2009, and excludes persons that are ECPs under former section 1a(12)(C).

[12] Registered or noticed government securities brokers and government securities dealers that are not financial institutions were temporarily exempted from the regulations in 17 CFR parts 402, 403, 404, and 405 with exceptions.

[13] 74 FR 64127, December 7, 2009 Order Extending Temporary Exemptions from Certain Government Securities Act Provisions and Regulations in Connection with a Request from ICE Trust U.S. LLC Related to Central Clearing of Credit Default Swaps, available at: *http://www.treasurydirect.gov/instit/statreg/gsareg/FR_Treasury_Order_ICE_Extension_(12-7-09).pdf.*

[14] 75 FR 4626, January 28, 2010 Order Granting a Temporary Exemption from Certain Government Securities Act Provisions and Regulations in Connection with a Request from ICE Trust U.S. LLC Related to Central Clearing of Credit Default Swaps, and Request for Comments, available at: *http://www.treasurydirect.gov/instit/statreg/gsareg/TreasuryICEOrderFedRegisterJan282010.pdf.*

[15] 75 FR 11627, March 11, 2010 Order Granting Temporary Exemptions from Certain Government Securities Act Provisions and Regulations in Connection with a Request From ICE Trust U.S. LLC Related to Central Clearing of Credit Default Swaps, and Request for Comments, available at: *http://www.treasurydirect.gov/instit/statreg/gsareg/TreasuryExemptiveOrderMarch112010FedRegister.pdf.*

[16] 75 FR 75722, December 6, 2010 Order Extending Temporary Exemptions from Certain Government Securities Act Provisions and Regulations in Connection with a Request from ICE Trust U.S. LLC Related to Central Clearing of Credit Default Swaps, available at: *http://www.treasurydirect.gov/instit/statreg/gsareg/TreasuryExemptiveOrderFedRegisterDec2010.pdf.*

[17] Public Law 111–203, 124 Stat. 1376 (July 21, 2010).

[18] *See http://www.sec.gov* and *http://www.cftc.gov* for a listing of all related proposed rulemakings.

[19] *Id.*

[20] The statute defines ''security-based swap'' as an agreement, contract, or transaction that is a ''swap'' (without regard to the exclusion from that definition for security-based swaps) and that also has certain characteristics specified in the statute.

[21] As of January 11, 1983, the date of enactment of the Futures Trading Act of 1982, Public Law 97–44, 96 Stat. 2294, section 3(a)(12) of the Exchange Act, 15 U.S.C. 78c(a)(12), provided that, among other securities, ''exempted securities'' include: (i) ''Securities which are direct obligations of, or obligations guaranteed as to principal or interest by, the United States;'' (ii) certain securities issued or guaranteed by corporations in which the United States has a direct or indirect interest as designated by the Secretary of the Treasury; and (iii) certain other securities as designated by the SEC in rules and regulations.

[22] *Available at http://cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2011-15195a.pdf.*

[23] Available at *http://www.sec.gov/spotlight/dodd-frank.shtml.*

exemptions in connection with these provisions.[24]

III. ICE Clear Credit LLC (''ICE Credit'') Request for Exemption

On July 6, 2011, Treasury received a letter (''the ICE Credit request'') [25] from ICE Credit requesting that, to avoid legal uncertainty, Treasury grant an exemption from the registration provisions of the GSA and Treasury regulations thereunder to ICE Credit and its Clearing Members [26] and unregistered government securities brokers [27] who enter into transactions with ICE Credit Clearing Members involving CDS that reference government securities and are submitted to ICE Credit for clearance and settlement.

In its request, ICE Credit contends that central clearing has several important market efficiency and investor protection benefits over clearing CDS on a bilateral basis. ICE Credit asserts that: a highly regulated central counterparty with significant financial resources substantially reduces the risk of counterparty default; the ICE Credit Rules allow a streamlined process for a party to a CDS transaction to move one or more pieces of its CDS portfolio from one Clearing Member to another (portability), which will result in a more efficient CDS marketplace, greater investor choice, and meaningful investor protection; central clearing provides a robust mechanism for the segregation and protection of margin provided by market participants; and the central counterparty model improves transparency.

ICE Credit's request also acknowledges that ICE Credit will be subject to a new regulatory framework that includes comprehensive oversight of aspects of its CDS business including eligibility requirements, books and records, systems, and margin requirements of both ICE Credit and its Clearing Members. It also acknowledges that all rule changes must be approved by the SEC in accordance with regulations promulgated under Section 19(b) of the Exchange Act, and either self-certified with or approved by the CFTC in accordance with the CEA. Further, upon the effective date of Title VII of the Dodd-Frank Act, Ice Credit will be deemed registered [28] as a derivatives clearing organization (''DCO'') [29] with the CFTC and will be subject to regular audit or risk reviews by the CFTC based on the 18 Core Principles set forth in the CEA.[30]

ICE Credit's request notes that it will be subject to regulation of all aspects of its clearing activities, including eligibility requirements, margin required from Clearing Members, and the procedures relating to default. ICE Credit Clearing Members effecting customer transactions in CDS will be registered as futures commission merchants (''FCMs'') [31] with the CFTC and as either broker-dealers or securities-based swaps dealers with the SEC.

ICE Credit is also requesting an exemption for certain unregistered government securities brokers. ICE Credit explains that its Clearing Members may use the facilities of unregistered government securities brokers to execute CDS and submit such transactions for clearance and settlement to ICE Credit. ICE Credit notes that the use of unregistered government securities brokers by CDS market participants is a means of promoting an orderly and efficient market for CDS that reference government securities.

ICE Credit also contends in its request that CDS that reference government securities may not be exempt from the definition of ''security'' under the Exchange Act. As a result, and in the absence of relief, ICE Credit, its Clearing Members, and certain unregistered government securities brokers that are engaged in the business of effecting transactions in government securities may have to register as government securities brokers or government securities dealers in accordance with section 15C of the Exchange Act.

ICE Credit believes that an exemption is warranted in light of the comprehensive regulatory scheme imposed by the Dodd-Frank Act. ICE Credit argues that the registration of ICE Credit, its Clearing Members, and certain unregistered government securities brokers as government securities brokers or government securities dealers could create complex interpretive issues that result in legal uncertainty.

The ICE Credit request states that, to date, the products eligible for clearing at ICE Credit include CDS transactions involving certain indices and CDS contracts based on individual reference entities or securities (single-name CDS contracts) that meet ICE Credit's risk management and other criteria. The request also states that as of June 1, 2011, ICE Credit has cleared a notional amount of $666 billion of CDS on behalf of its 15 current Clearing Members. To date, ICE Credit has not cleared any CDS contracts that reference government securities.

IV. Temporary Exemption for ICE Credit, ICE Credit Clearing Members, and Certain Unregistered Government Securities Brokers

In light of the comprehensive regulatory framework established by the Dodd-Frank Act, the application of the GSA registration requirements to ICE Credit, its Clearing Members, and certain unregistered government securities brokers in CDS transactions that are not currently registered or noticed government securities brokers or government securities dealers is not warranted at this time.

Accordingly, the Secretary, by order, is granting a temporary exemption to ICE Credit, its Clearing Members, and certain unregistered government securities brokers from the provisions of section 15C(a), (b), and (d) (other than subsection (d)(3)) of the Exchange Act, and the rules thereunder.[32] This temporary exemption is confined solely to these entities' transactions in CDS that reference government securities and are cleared by ICE Credit. This temporary exemption does not apply to any ICE Credit Clearing Members or government securities brokers that are registered or noticed as government securities brokers or government securities dealers.[33]

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[24] 15 U.S.C. 78mm(b).

[25] Letter from Kevin R. McClear, General Counsel, ICE Trust U.S. LLC to the Commissioner of the Public Debt, Van Zeck, July 6, 2011, available at: *http://www.treasurydirect.gov/instit/statreg/gsareg/gsareg.htm.* As noted in its request, on July 16, 2011, ICE Trust reorganized its corporate structure. ICE Trust changed from a New York-chartered limited purpose trust company to a Delaware limited liability company. ICE Trust also changed its name from ICE Trust U.S. LLC to ICE Clear Credit LLC and became a DCO with respect to swaps.

[26] The ICE Credit rulebook defines a Clearing Member as ''a person that has been approved by ICE Credit for the submission of an agreement or contract and that is party to an agreement with ICE Credit specifically relating to transactions in agreement or contract. Under ICE Credit rules, a Clearing Member must meet substantial eligibility criteria prior to being permitted to become a Clearing Member, which criteria include standards of business integrity, financial capacity, creditworthiness, operational capability, experience and competence as may be established by ICE Credit from time to time.'' The ICE Credit rulebook is publicly available online at *https://www.theice.com/publicdocs/clear_us/ICE_Trust_Rules.pdf.*

[27] In its request, ICE Credit refers to unregistered government securities brokers as ''inter-dealer brokers.'' *See* note 25, *supra.*

[28] *See* Dodd-Frank Act section 725(b).

[29] 7 U.S.C. 1a(9).

[30] *See* Section 5b(c)(2) of the CEA.

[31] 7 U.S.C. 1a(28).

[32] *See* note 5, *supra.*

[33] As used in this order, *registered or noticed government securities brokers or government securities dealers* encompasses all brokers, dealers, and entities required to register or file notice pursuant to section 15C(a)(1) of the Exchange Act.

V. Temporary Exemption for Registered or Noticed Government Securities Brokers and Government Securities Dealers That Are Not Financial Institutions

The Secretary is also granting a temporary exemption to registered or noticed government securities brokers and government securities dealers that are not financial institutions [34] from the regulations in 17 CFR parts 402, 403, 404, and 405, with exceptions.[35] This temporary exemption is confined solely to these entities' transactions in CDS that reference government securities and are cleared by ICE Credit.

With respect to noticed government securities brokers and government securities dealers that are financial institutions (and also ICE Credit Clearing Members), the GSA regulations generally adopt the appropriate regulatory agency rules for financial institutions that are comparable to the CFTC rules to which the temporary exemption does not extend. The GSA regulations also incorporate rules of the appropriate regulatory agencies that are otherwise applicable to financial institutions.

Treasury is not extending this temporary exemption to financial institution government securities brokers and government securities dealers. They should continue to comply with existing rules.

Treasury believes that continuing to facilitate the central clearing of CDS transactions through the granting of the temporary exemptions in this order is consistent with the public interest, the protection of investors, and the purposes of the Exchange Act. These temporary exemptions will remain in effect unless Treasury revokes or modifies them. As of the effective date of Treasury's order, the CFTC and the SEC have not issued final rules or interpretive guidance to implement Title VII of the Dodd-Frank Act.[36] When they do, Treasury will revisit these exemptions.

While providing temporary exemptions from certain provisions of section 15C of the Exchange Act, Treasury is not making a determination, for purposes of this order, on whether particular CDS that reference government securities are "government securities" as defined by the Exchange Act. The exemptions being granted in this order are not intended to limit regulatory authority of other regulators.

VI. Consultations and Considerations

In granting these temporary exemptions, Treasury has consulted with and considered the views of the staffs of the CFTC, the SEC, and the appropriate regulatory agencies for financial institutions.

Treasury bases this order on the facts and circumstances presented and representations made by ICE Credit in its request. These temporary exemptions could become unavailable if the facts or circumstances change such that the representations in the request are no longer materially accurate. If this were to happen, the status of existing positions in cleared CDS that reference government securities would remain unchanged, but no new positions could be established pursuant to the temporary exemptions unless approved by Treasury.

ICE Credit must promptly notify Treasury in writing if any of the relevant information provided to obtain these temporary exemptions changes.

VII. Solicitation of Comments

We request comments on the temporary exemptions we are granting in this order to accommodate central clearing of CDS that reference government securities by ICE Credit. We are also soliciting public comment on whether there is a need for broader exemptive relief from provisions of the GSA and Treasury regulations in light of the Dodd-Frank Act amendments to the Exchange Act. For example, is it necessary to provide similar exemptive relief to other entities that engage in transactions in CDS that reference government securities and are not submitted to a central counterparty ("uncleared")?

Treasury will continue to monitor ICE Credit's progress and the development of central counterparties for the CDS market and determine to what extent, if any, additional action might be necessary.

Treasury also will continue to consult with the staffs of the CFTC, the SEC, and the appropriate regulatory agencies for financial institutions on this matter.

VIII. Conclusion

It is hereby ordered, pursuant to section 15C(a)(5) of the Exchange Act, that:

(a) *Temporary Exemption for ICE Clear Credit LLC ("ICE Credit"), ICE Credit Clearing Members, and Certain Government Securities Brokers.*

(1) *Persons eligible.* This temporary exemption is available to a) ICE Credit and b) ICE Credit Clearing Members and unregistered government securities brokers who enter into transactions with ICE Credit Clearing Members involving CDS that reference government securities and are submitted to ICE Credit for clearance and settlement. However, this temporary exemption is not available to ICE Credit Clearing Members and government securities brokers that are registered or noticed as government securities brokers or government securities dealers under section 15C(a)(1) of the Exchange Act.

(2) *Scope of the temporary exemption.* Subject to the exclusions in paragraph (a)(1), such entities shall temporarily be exempt from the provisions of section 15C(a), (b), and (d) (other than subsection (d)(3)) of the Exchange Act, and the rules thereunder.

(b) *Temporary Exemption for Registered or Noticed Government Securities Brokers and Government Securities Dealers that are not Financial Institutions.*

ICE Credit Clearing Members and government securities brokers that are registered or noticed government securities brokers and government securities dealers but not financial institutions are exempt from the regulations in 17 CFR parts 402, 403, 404, and 405 with respect to their transactions with ICE Credit Clearing Members involving CDS that reference government securities and are submitted to ICE Credit for clearance and settlement. However, this order does not exempt registered or noticed government securities brokers or government securities dealers that are not financial institutions from the following:

(1) The capital requirements for registered government securities brokers and government securities dealers in part 402 of the GSA regulations (which are comparable to SEC Rule 15c3–1 on net capital);

(2) The provisions of part 403 of the GSA regulations that incorporate and modify SEC Rule 15c3–3 on reserves and custody of securities;

(3) The provisions of parts 404 and 405 of the GSA regulations that incorporate and modify SEC Rules 17a–3 through 17a–5, 17h–1T and 17h–2T, on records and reports; and

(4) The provisions of part 404 of the GSA regulations that incorporate and modify SEC Rule 17a–13 on quarterly security counts.

The temporary exemptions contained in this order are based on the facts and circumstances presented in the request. These temporary exemptions could

[34] A *financial institution* is defined in 15 U.S.C. 78c(a)(46).

[35] This order does not exempt registered or noticed government securities brokers or government securities dealers that are not financial institutions from the regulations regarding capital requirements, reserves and custody of securities, records and reports, and quarterly security counts.

[36] *See* notes 21 and 22, *supra.*

become unavailable if the facts or circumstances change such that the representations in the request are no longer materially accurate. ICE Credit must promptly notify Treasury in writing if any of the information provided to obtain these temporary exemptions changes. If an underlying representation were to no longer be accurate, the status of existing positions in cleared CDS that reference government securities would remain unchanged, but no new positions could be established pursuant to the temporary exemptions unless approved by Treasury.

IX. Paperwork Reduction Act

There is no new collection of information contained in this order, and, therefore, the Paperwork Reduction Act does not apply.

Mary J. Miller,

Assistant Secretary for Financial Markets.

[FR Doc. 2011–18307 Filed 7–15–11; 4:15 pm]

BILLING CODE 4810–39–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

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 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)). Currently, the IRS is soliciting comments concerning Determination of Substitute Agent for a Consolidated Group.

DATES: Written comments should be received on or before September 19, 2011 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette B. Lawrence, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of revenue procedure should be directed to Elaine Christophe, (202) 622–3179, Internal Revenue Service, Room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet at *Elaine.H.Christophe@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Determination of Substitute Agent for a Consolidated Group.

OMB Number: 1545–1793.

Revenue Procedure Number: 2002–43 (TD 9255).

Abstract: Revenue Procedure 2002–43 provides any instructions that apply to any designation of a substitute agent, notification of the existence of a default substitute agent, a request for the designation of a substitute agent, and request for replacement of a previously designated substitute agent. The instructions also provide for the automatic approval of requests by a terminating common parent to designate its qualifying successor as a substitute agent.

Current Actions: There are no changes being made to the revenue procedure at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 200.

Estimated Average Time per Respondent: 2 hours.

Estimated Total Annual Burden Hours: 400.

The following paragraph applies to all of the collections of information covered by this notice:

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.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record.

Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: July 6, 2011.

Yvette B. Lawrence,

IRS Reports Clearance Officer.

[FR Doc. 2011–18255 Filed 7–19–11; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

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 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)). Currently, the IRS is soliciting comments concerning Form 8804–C, Certificate of Partner-Level Items to Reduce Section 1446 Withholding, and Special Rules to Reduce Section 1446 Withholding.

DATES: Written comments should be received on or before September 19, 2011 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette B. Lawrence, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Elaine Christophe, (202) 622–3179, at Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet at *Elaine.H.Christophe@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Certificate of Partner-Level Items to Reduce Section 1446 Withholding.

OMB Number: 1545–1934.

Form Number: Form 8804–C.

Abstract: Form 8804–C will be a form a foreign partner would voluntary submit to the partnership if it chooses to provide a certification that could reduce or eliminate the partnership's need to withhold 1446 tax.

Current Actions: There is no change in the paperwork burden previously approved by OMB. This form is being submitted for renewal purposes only.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses and other for-profit organizations, individuals or households, and not-for-profit organizations.

Estimated Number of Respondents: 23,477.

Estimated Time per Respondent: 18 hour 42 minutes.

Estimated Total Annual Burden Hours: 439,020.

Title: Special Rules to Reduce Section 1446 Withholding.

OMB Number: 1545–1934.

Form Number: TD 9394.

Abstract: This document contains final regulations regarding when a partnership may consider certain deductions and losses of a foreign partner to reduce or eliminate the partnership's obligation to pay withholding tax under section 1446 on effectively connected taxable income allocable under section 704 to such partner.

Current Actions: There is no change in the paperwork burden previously approved by OMB. This form is being submitted for renewal purposes only.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses and other for-profit organizations, individuals or households, and not-for-profit organizations.

Estimated Number of Respondents: 16,775.

Estimated Time per Respondent: 26 minutes.

Estimated Total Annual Burden Hours: 7,418.

The following paragraph applies to all of the collections of information covered by this notice:

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.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: July 7, 2011.

Yvette B. Lawrence,

IRS Reports Clearance Officer.

[FR Doc. 2011–18260 Filed 7–19–11; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

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 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)). Currently, the IRS is soliciting comments concerning Financial Asset Securitization Investment Trusts; Real Estate Mortgage Investment Conduits (TD 9004 (final)).

DATES: Written comments should be received on or before September 19, 2011 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette B. Lawrence, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulations should be directed to Elaine Christophe at Internal Revenue Service, Room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or at (202) 622–3179, or through the Internet at *Elaine.H.Christophe@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Financial Asset Securitization Investment Trusts; Real Estate Mortgage Investment Conduits.

OMB Number: 1545–1675.

Regulation Project Number: [REG–100276–97; REG–122450–98]; TD 9004 (final).

Abstract: REG–122450–98 Sections 1.860E–1(c)(4)–(10) of the Treasury Regulations provide circumstances under which a transferor of a noneconomic residual interest in a Real Estate Mortgage Investment Conduit (REMIC) meeting the investigation, and two representation requirements may avail itself of the safe harbor by satisfying either the formula test or asset test. This regulation provides start-up and transitional rules applicable to financial asset securitization investment trust. TD 9004 contains final regulations relating to safe harbor transfers of noneconomic residual interests in real estate mortgage investment conduits (REMICs). The final regulations provide additional limitations on the circumstances under which transferors may claim safe harbor treatment.

Current Actions: There are no changes being made to this existing regulation.

Type of Review: Extension of currently approved collection.

Affected Public: Business or other for-profit.

Estimated Number of Respondents and/or Record-Keeping: 620.

Estimated Average Annual Burden Hours per Respondent and/or Recordkeeping: 1 hour 58 minutes.

Estimated Total Annual Reporting and/or RecordKeeping Burden: 1,220.

The following paragraph applies to all of the collections of information covered by this notice:

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.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: July 5, 2011.

Yvette B. Lawrence,

IRS Reports Clearance Officer.

[FR Doc. 2011–18263 Filed 7–19–11; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

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 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)). Currently, the IRS is soliciting comments concerning information collection requirements related to Arbitrage Restrictions on Tax-Exempt Bonds.

DATES: Written comments should be received on or before September 19, 2011 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette Lawrence, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulation should be directed to Elaine Christophe, (202) 622–3179, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet at *Elaine.H.Christophe@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Arbitrage Restrictions on tax-Exempt Bonds.

OMB Number: 1545–1490.

Regulation Project Number: FI–28–96 (TD 8801).

Abstract: This regulation provides guidance concerning the arbitrage restrictions applicable to tax-exempt bonds issued by state and local governments and contains rules regarding the use of proceeds of state and local bonds to acquire higher yielding investments. The regulation provides safe harbors for establishing the fair market value of all investments purchased for yield restricted defeasance escrows. Further, the regulation requires that issuers must retain certain records and information with the bond documents. The recordkeeping requirements are necessary for the IRS to determine that an issuer of tax-exempt bonds has not paid more than fair market value for nonpurpose investments under section 148 of the Internal Revenue Code.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of currently approved collection.

Affected Public: State, local, or tribal governments, and not-for-profit institutions.

Estimated Number of Respondents: 1,400.

Estimated Time per Respondent: 1 hour.

Estimated Total Annual Burden Hours: 1,425.

The following paragraph applies to all of the collections of information covered by this notice:

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.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record.

Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: July 1, 2011.

Yvette Lawrence,

IRS, Reports Clearance Officer.

[FR Doc. 2011–18264 Filed 7–19–11; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 5498–SA

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

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 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)). Currently, the IRS is soliciting comments concerning Form 5498–SA, HSA, Archer MSA, or Medicare Advantage MSA Information.

DATES: Written comments should be received on or before September 19, 2011 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette B. Lawrence, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Elaine Christophe (202) 622–3179, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet at *Elaine.H.Christophe@irs.gov*.

SUPPLEMENTARY INFORMATION: *Title:* HSA, Archer MSA, or Medicare Advantage MSA Information.

OMB Number: 1545–1518.

Form Number: 5498–SA.

Abstract: This form is used to report contributions to a medical savings account as required by Internal Revenue Code section 220(h).

Current Actions: There are no changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses or other for-profit organizations.

Estimated Number of Responses: 41,105.

Estimated Time per Response: 10 min.

Estimated Total Annual Burden Hours: 6,988.

The following paragraph applies to all of the collections of information covered by this notice:

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.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record.

Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: July 5, 2011.

Yvette B. Lawrence,

IRS Reports Clearance Officer.

[FR Doc. 2011–18249 Filed 7–19–11; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Notice 2005–41

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

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 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)). Currently, the IRS is soliciting comments concerning Guidance Regarding Qualified Intellectual Property Contributions.

DATES: Written comments should be received on or before September 19, 2011 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette B. Lawrence, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of notice should be directed to Elaine Christophe, at (202) 622–3179, or at Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet, at *Elaine.H.Christophe@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Guidance Regarding Qualified Intellectual Property Contributions.

OMB Number: 1545–1937.

Notice Number: Notice 2005–41.

Abstract: Notice 2005–41 explains new rules governing charitable contributions of intellectual property made after June 3, 2004. The notice explains the method by which a donor of qualified intellectual property may notify the donee that the donor intends to treat the contribution as a qualified donation under section 170(m). Donors of qualified intellectual property will use the required notification as evidence that they have satisfied the section 170(m) notification requirement.

Current Actions: There are no changes being made to the notice at this time.

Type of Review: Extension of currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 30.

Estimated Average Time per Respondent: 1 hour.

Estimated Total Annual Burden Hours: 30.

The following paragraph applies to all of the collections of information covered by this notice:

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.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: July 7, 2011.

Yvette B. Lawrence,

IRS Reports Clearance Officer.

[FR Doc. 2011–18265 Filed 7–19–11; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Notice 2002–27

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

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 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)). Currently, the IRS is soliciting comments concerning IRA Required Minimum Distribution Reporting.

DATES: Written comments should be received on or before September 19, 2011 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette B. Lawrence, Internal Revenue Service, Room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of notice should be directed to Elaine Christophe, at (202) 622–3179, or at Internal Revenue Service, Room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet, at *Elaine.H.Christophe@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: IRA Required Minimum Distribution Reporting.

OMB Number: 1545–1779.

Notice Number: Notice 2002–27.

Abstract: Notice 2002–27 (Notice 2003–2, Notice 2003–3 & Notice 2009–9) provides guidance with respect to the reporting requirements, that is, data that custodians and trustees of IRAs must furnish IRA owners in those instances where there must be a minimum distribution from an individual retirement arrangement.

Current Actions: There are no changes being made to the notice at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations, and not-for-profit institutions.

Estimated Number of Respondents: 78,000.

Estimated Average Time per Respondent: 15 hours.

Estimated Total Annual Burden Hours: 1,170,000.

The following paragraph applies to all of the collections of information covered by this notice:

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.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: July 6, 2011.

Yvette B. Lawrence,

IRS Reports Clearance Officer.

[FR Doc. 2011–18266 Filed 7–19–11; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

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 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)). Currently, the IRS is soliciting comments concerning Revision of Income Tax Regulations under Sections 897, 1445, and 6109 to require use of Taxpayer Identifying Numbers on Submission under the Section 897 and 1445 regulations.

DATES: Written comments should be received on or before September 19, 2011 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette B. Lawrence, Internal Revenue Service, Room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulations should be directed to Elaine Christophe at Internal Revenue Service, Room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or at (202) 622–3179, or through the Internet at *Elaine.H.Christophe@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Revision of Income Tax Regulations under Section 897, 1445, and 6109 to require use of Taxpayer Identifying Numbers on Submission under the Section 897 and 1445 regulations.

OMB Number: 1545–1797.

Regulation Project Number: REG–106876–00 (TD 9082).

Abstract: The collection of information relates to applications for withholding certificates under Treas. Reg–1.1445–3 to be filed with the IRS with respect to: (1) Dispositions of U.S. real property interests that have been used by foreign persons as a principal residence within the prior 5 years and excluded from gross income under section 121 and (2) dispositions of U.S. real property interests by foreign persons in deferred like kind exchanges that qualify for nonrecognition under section 1031.

Current Actions: There are no changes to this existing regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals or households and Business or other for-profit.

Estimated Number of Respondents: 150.

Estimated Total Annual Reporting Burden: 600.

Estimated Average Annual Burden per Respondent: 4.

The following paragraph applies to all of the collections of information covered by this notice:

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.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: July 6, 2011.

Yvette B. Lawrence,

IRS Reports Clearance Office.

[FR Doc. 2011–18268 Filed 7–19–11; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

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 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)). Currently, the IRS is soliciting comments concerning the Reporting of Gross Proceeds Payment to Attorneys.

DATES: Written comments should be received on or before September 19, 2011 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette B. Lawrence, Internal Revenue Service, Room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of this regulation should be directed to, Elaine Christophe at (202) 622–3179, or at Internal Revenue Service, Room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet, at *Elaine.H.Christophe@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Reporting of Gross Proceeds Payment to Attorneys.

OMB Number: 1545–1644.

Regulation Project Number: TD 9270.

Abstract: This document contains final regulations relating to the reporting of payments of gross proceeds to attorneys. The regulations reflect changes to the law made by the Taxpayer Relief Act of 1997 (1997 Act). The final regulations will affect attorneys who receive payments of gross proceeds on behalf of their clients and will affect certain payors (for example, defendants in lawsuits and their insurance companies and agents) that, in the course of their trades or businesses, make payments to these attorneys.

Current Actions: There is no change to this regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations, not-for-profit institutions and Federal, state, local or tribal governments.

The burden is reflected in the burden of Form 1099–MISC.

The following paragraph applies to all of the collections of information covered by this notice:

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.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: July 6, 2011.

Yvette B. Lawrence,

IRS Reports Clearance Officer.

[FR Doc. 2011–18269 Filed 7–19–11; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

Lending and Investment

AGENCY: Office of Thrift Supervision (OTS), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The proposed information collection request (ICR) described below has been submitted to the Office of Management and Budget (OMB) for review and approval, as required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3507. OTS is soliciting public comments on the proposal.

DATES: Submit written comments on or before August 19, 2011. A copy of this ICR, with applicable supporting documentation, can be obtained from *RegInfo.gov* at *http://www.reginfo.gov/public/do/PRAMain.*

ADDRESSES: Send comments, referring to the collection by title of the proposal or by OMB approval number, to OMB and OTS at these addresses: Office of Information and Regulatory Affairs, Attention: Desk Officer for OTS, U.S. Office of Management and Budget, 725 17th Street, NW., Room 10235, Washington, DC 20503, or by fax to (202) 393–6974; and Information Collection Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552

FOR FURTHER INFORMATION CONTACT: For further information or to obtain a copy of the submission to OMB, please contact Ira L. Mills at *ira.mills@ots.treas.gov*, or on (202) 906–6531.

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.

Title of Proposal: Lending and Investment.

OMB Number: 1550–0078.

Form Number: N/A.

Description: Current OTS regulations for the documentation of loans and investments for safety and soundness purposes are found at 12 CFR 560 and 562.1, 563.41, 563.170, and 590.4. OTS also requires certain loan disclosures to borrowers with respect to adjustable rate mortgage loans (12 CFR 560.210) in accordance with regulations issued by the Federal Reserve Board (12 CFR 226.19(b) and 226.20(c)).

OTS uses the information during the examination process to ensure that savings associations are complying with applicable rules and regulations as well as engaging in safe and sound lending practices.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit.

Estimated Number of Respondents: 731.

Estimated Frequency of Response: On occasion.

Estimated Total Burden: 266,489 hours.

Clearance Officer: Ira L. Mills, (202) 906–6531, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

Dated: July 14, 2011

Ira L. Mills,

Paperwork Clearance Officer, Office of Chief Counsel, Office of Thrift Supervision.

[FR Doc. 2011–18313 Filed 7–19–11; 8:45 am]

BILLING CODE 6720–01–P

DEPARTMENT OF VETERANS AFFAIRS

Privacy Act of 1974; System of Records

AGENCY: Department of Veterans Affairs (VA).

ACTION: Notice of establishment of new system of records.

SUMMARY: The Privacy Act of 1974 (5 U.S.C. 552(e)(4)) requires that all agencies publish in the **Federal Register** a notice of the existence and character of their systems of records. Notice is hereby given that the Department of Veterans Affairs (VA) is establishing a new system of records entitled ''Ethics Consultation Web-based Database (ECWeb)-VA'' (152VA10E).

DATES: Comments on this new system of records must be received no later than August 19, 2011. If no public comment is received, the new system will become effective August 19, 2011.

ADDRESSES: Written comments may be submitted through *http://www.Regulations.gov;* by mail or hand-delivery to the Director, Regulations Management (02REG), Department of Veterans Affairs, 810 Vermont Ave., NW., Room 1068, Washington, DC 20420; or by fax to (202) 273–9026. Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m. Monday through Friday (except holidays). Please call (202) 461–4902 for an appointment. In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS).

FOR FURTHER INFORMATION CONTACT: Kenneth Berkowitz, MD, Chief, Ethics Consultation, National Center for Ethics in Health Care (10E), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420; telephone (202) 501–0364.

SUPPLEMENTARY INFORMATION:

I. Description of Proposed Systems of Records

Designed by the National Center for Ethics in Health Care (Ethics Center), ECWeb is a Web-based database tool that reinforces sound ethics consultation practices and provides a consistent electronic method for documenting, storing, retrieving and evaluating ethics consultation data. It is part of the Ethics Center's overall efforts to improve the quality of ethics practice throughout VHA.

Specific data related to an ethics consultation are entered into designed fields in each consultation record. A note summarizing the ethics consultation may be generated and added to the patient's health record. Additionally, data is stored, retrieved, and analyzed to improve ethics consultation practices and the quality of care to Veteran patients.

Categories of individuals covered by the system:

1. Veterans who have applied for health care services under Title 38, U.S.C., Chapter 17, and members of their immediate families.
2. Spouse, surviving spouse, and children of Veterans who have applied for health care services under Title 38, U.S.C., Chapter 17.
3. Individuals who the Veteran has included in health care planning, *e.g.,* legally appointed Durable Power of Attorney for Health Care or other authorized surrogate under VHA Handbook 1004.01.
4. Individuals examined or treated under contract or resource sharing agreements.
5. Individuals examined or treated for research or donor purposes.
6. Individuals who have applied for Title 38 benefits but who do not meet the requirements under Title 38 to receive such benefits.
7. Individuals who were provided medical care under emergency conditions for humanitarian reasons.
8. Pensioned members of allied forces provided health care services under Title 38, U.S.C., Chapter I.
9. Current and former employees.
10. Contractors employed by VA.

II. Proposed Routine Use Disclosures of Data in the System

We are proposing to establish the following Routine Use disclosures of information maintained in the system. To the extent that records contained in the system include information protected by 45 CFR Parts 160 and 164, *i.e.,* individually identifiable health information, and 38 U.S.C. 7332, *i.e.,* medical treatment information related to drug abuse, alcoholism or alcohol abuse, sickle cell anemia or infection with the human immunodeficiency virus, that information cannot be disclosed under a routine use unless there is also specific statutory authority in 38 U.S.C. 7332 and regulatory authority in 45 CFR Parts 160 and 164 permitting disclosure.

1. Disclosure of health care information as deemed necessary and proper to Federal, state and local government agencies and national health organizations in order to assist in the development of programs that will be beneficial to claimants, to protect their rights under law, and assure that they are receiving all benefits to which they are entitled.

2. Disclosure of health care information furnished and the period of care, as deemed necessary and proper, to accredited service organization representatives and other approved agents, attorneys, and insurance companies to aid claimants whom they represent in the preparation, presentation and prosecution of claims under laws administered by VA, state or local agencies.

3. VA may disclose on its own initiative any information in this system, except the names and home addresses of Veterans and their dependents, which is relevant to a suspected or reasonably imminent violation of law, whether civil, criminal or regulatory in nature, and whether arising by general or program statute or by regulation, rule or order issued pursuant thereto, to a Federal, state, local, tribal, or foreign agency charged with the responsibility of investigating or prosecuting such violation, or charged with enforcing or implementing the statute, regulation, rule or order. On its own initiative, VA may also disclose the names and addresses of Veterans and their dependents to a Federal agency charged with the responsibility of investigating or prosecuting civil, criminal or regulatory violations of law, or charged with enforcing or implementing the statute, regulation, rule or order issued pursuant thereto.

4. Disclosure of individually-identifiable health care information may be made by appropriate VA personnel to the extent necessary and on a need-to-know basis, consistent with good medical and ethical practices, to family members and/or the person(s) with whom the patient has a meaningful relationship.

5. Relevant information may be disclosed in the course of presenting evidence to a court, magistrate or administrative tribunal, in matters of guardianship, inquests and

commitments; to private attorneys representing Veterans rated incompetent in conjunction with issuance of Certificates of Incompetency; and to probation and parole officers in connection with Court required duties.

6. Relevant information may be disclosed to a guardian ad litem in relation to his or her representation of a claimant in any legal proceeding.

7. Any relevant information may be disclosed to attorneys, insurance companies, employers, third parties liable or potentially liable under health plan contracts, and to courts, boards, or commissions, only to the extent necessary to aid VA in preparation, presentation, and prosecution of claims authorized under Federal, state, or local laws, and regulations promulgated thereunder.

8. Disclosure of health information, excluding name and home address, (unless name and address is furnished by the requester) for research purposes determined to be necessary and proper, to epidemiological and other research entities approved by the Under Secretary for Health.

9. In order to conduct Federal research necessary to accomplish a statutory purpose of an agency, at the written request of the head of the agency, or designee of the head of that agency, the name(s) and address(es) of present or former personnel of the Armed Services and/or their dependents may be disclosed (a) to a Federal department or agency or (b) directly to a contractor of a Federal department or agency. When a disclosure of this information is to be made directly to the contractor, VA may impose applicable conditions on the Department, agency and/or contractor to ensure the appropriateness of the disclosure to the contractor.

10. Relevant information may be disclosed to the Department of Justice and United States Attorneys in defense or prosecution of litigation involving the United States, and to Federal agencies upon their request in connection with review of administrative tort claims filed under the Federal Tort Claims Act, 28 U.S.C. 2672.

11. Health care information concerning a non-judicially declared incompetent patient may be disclosed to a third party upon the written authorization of the patient's next of kin in order for the patient or, consistent with the best interest of the patient, a member of the patient's family, to receive a benefit to which the patient or family member is entitled or, to arrange for the patient's discharge from a VA medical facility. Sufficient information to make an informed determination will be made available to such next-of-kin. If the patient's next-of-kin are not reasonably accessible, the Chief of Staff, Director, or designee of the custodial VA medical facility may make disclosure of health care information for these purposes.

12. Relevant health care information may be disclosed to a non-VA nursing home facility that is considering the patient for admission, when information concerning the individual's medical care is needed for the purpose of preadmission screening under 42 CFR 483.20(f), for the purpose of identifying patients who are mentally ill or mentally retarded, so they can be evaluated for appropriate placement.

13. Relevant health care information may be disclosed to a State Veterans Home for the purpose of medical treatment and/or follow-up at the State Home when VA makes payment of a per diem rate to the State Home for the patient receiving care at such home, and the patient receives VA medical care.

14. Relevant health care information may be disclosed to (a) A Federal agency or non-VA health care provider or institution when VA refers a patient for hospital or nursing home care or medical services, or authorizes a patient to obtain non-VA medical services and the information is needed by the Federal agency or non-VA institution or provider to perform the services; or (b) a Federal agency or a non-VA hospital (Federal, state and local, public or private) or other medical installation having hospital facilities, blood banks, or similar institutions, medical schools or clinics, or other groups or individuals that have contracted or agreed to provide medical services, or share the use of medical resources under the provisions of 38 U.S.C. 513, 7409, 8111, or 8153, when treatment is rendered by VA under the terms of such contract or agreement or the issuance of an authorization, and the information is needed for purposes of medical treatment and/or follow-up determining entitlement to a benefit or, for VA to effect recovery of the costs of the medical care.

15. For program review purposes and the seeking of accreditation and/or certification, health care information may be disclosed to survey teams of The Joint Commission (TJC), and similar national accrediting agencies or boards with whom VA has a contract or agreement to conduct such reviews, but only to the extent that the information is necessary and relevant to the review.

16. Information from a named patient's VA medical record which relates to the performance of a health care student or provider may be disclosed to a medical or nursing school, or other health care related training institution, or other facility with which there is an affiliation, sharing agreement, contract, or similar arrangement when the student or provider is enrolled at or employed by the school or training institution, or other facility, and the information is needed for personnel management, rating and/or evaluation purposes.

17. Relevant health care information may be disclosed to individuals, organizations, private or public agencies, etc., with whom VA has a contract or sharing agreement for the provision of health care or administrative services.

18. Patient identifying information may be disclosed to Federal agencies and VA and government-wide third-party insurers responsible for payment of the cost of medical care for the identified patients, in order for VA to seek recovery of the medical care costs. These records may also be disclosed as part of a computer matching program to accomplish these purposes.

19. Relevant health care information may be disclosed to health and welfare agencies, housing resources and utility companies, possibly to be combined with disclosures to other agencies in situations where VA needs to act quickly in order to provide basic and/or emergency needs for the Veteran and Veteran's family where the family resides with the Veteran or serves as a caregiver.

20. The record of an individual who is covered by a system of records may be disclosed to a Member of Congress, or a staff person acting for the Member, when the Member or staff person requests the record on behalf of and at the written request of the individual.

21. Disclosure may be made to the National Archives and Records Administration in records management inspections conducted under authority of Title 44 U.S.C.

22. VA may disclose information from this system of records to the Department of Justice (DoJ), either on VA's initiative or in response to DoJ's request for the information, after either VA or DoJ determines that such information is relevant to DoJ's representation of the United States or any of its components in legal proceedings before a court or adjudicative body, provided that, in each case, the agency also determines prior to disclosure that release of the records to the DoJ is a use of the information contained in the records that is compatible with the purpose for which VA collected records. VA, on its own initiative, may disclose records in this system of records in legal

proceedings before a court or administrative body after determining that the disclosure of the records to the court or administrative body is a use of the information contained in the records that is compatible with the purpose for which VA collected the records.

23. Disclosure of relevant information may be made to individuals, organizations, private or public agencies, or other entities with whom VA has a contract or agreement or where there is a subcontract to perform such services as VA may deem practicable for the purposes of laws administered by VA, in order for the contractor or subcontractor to perform the services of the contract or agreement.

24. VA may disclose on its own initiative any information in the system, except the names and home addresses of Veterans and their dependents, that is relevant to a suspected or reasonably imminent violation of the law whether civil, criminal, or regulatory in nature and whether arising by general or program statue or by regulation, rule or order issued pursuant thereto, to a Federal, state, local, tribal or foreign agency charged with the responsibility of investigation or prosecuting such violation, or charged with enforcing or implementing the statute, regulation, rule or order. VA may also disclose on its own initiative the names and addresses of Veterans and their dependents to a Federal agency charged with the responsibility of investigating or prosecuting civil, criminal, or regulatory violations of law, or charged with enforcing or implementing the statutes, regulation, or order issued pursuant thereto.

25. Disclosure to other Federal agencies may be made to assist such agencies in preventing and detecting possible fraud or abuse by individuals in their operations and programs.

26. VA may, on its own initiative, disclose any information or records to appropriate agencies, entities, and persons when (1) VA suspects or has confirmed that the integrity or confidentiality of information in the system of records has been compromised; (2) the Department has determined that as a result of the suspected or confirmed compromise, there is a risk of embarrassment or harm to the reputations of the record subject, harm to economic or property interests, identify theft or fraud, or harm to the security, confidentiality, or integrity of this system or other systems (entity) that rely upon the potentially compromised information; and (3) the disclosure is to agencies, entities, or persons whom VA determines as reasonably necessary to assist or carry out the Department's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm. This routine uses permits disclosures by the Department to respond to a suspect or confirmed data breach, including the conduct of any risk analysis or provision of credit protection services as provided in 38 U.S.C. 5724, as the terms are defined in 38 U.S.C. 5727.

27. For program review purposes and the seeking of accreditation and/or certification, disclosure may be made to survey teams of TJC and similar national accreditation agencies or boards with whom VA has a contract or agreement to conduct such reviews, but only to the extent that the information is necessary and relevant to the review.

28. Disclosure of information may be made to the next-of-kin and/or the person(s) with whom the patient has a meaningful relationship to the extent necessary and on a need-to-know basis consistent with good medical and ethical practices.

29. Assist in quality improvement efforts with respect to ethics consultation practices as part of approved research or ongoing quality improvement projects.

III. Compatibility of the Proposed Routine Uses

The Privacy Act permits VA to disclose information about individuals without their consent for a routine use when the information will be used for a purpose that is compatible with the purpose for which we collected the information. In all of the routine use disclosures described above, the recipient of the information will use the information in connection with a matter relating to one of VA's programs, will use the information to provide a benefit to VA, or disclosure is required by law.

The notice of intent to publish and an advance copy of the system notice have been sent to the appropriate Congressional committees and to the Director of the Office of Management and Budget (OMB) as required by 5 U.S.C. 552a(r) (Privacy Act) and guidelines issued by OMB (65 FR 77677), December 12, 2000.

Approved: June 28, 2011.

John R. Gingrich,

Chief of Staff, Department of Veterans Affairs.

152VA10E

SYSTEM NAME:

Ethics Consultation Web-based Database (ECWeb)-VA.

SYSTEM LOCATION:

Automated records within the Ethics Consultation Web-based Database (ECWeb) may be maintained on a VA-owned server administered by the Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

The records include information concerning.

1. Veterans who have applied for health care services under Title 38, U.S.C., Chapter 17, and members of their immediate families.
2. Spouse, surviving spouse, and children of Veterans who have applied for health care services under Title 38, U.S.C., Chapter 17.
3. Beneficiaries of other Federal agencies.
4. Individuals examined or treated under contract or resource sharing agreements.
5. Individuals examined or treated for research or donor purposes.
6. Individuals who have applied for Title 38 benefits, but who do not meet the requirements under Title 38 to receive such benefits.
7. Individuals who were provided medical care under emergency conditions for humanitarian reasons.
8. Pensioned members of allied forces provided health care services under Title 38, U.S.C., Chapter I.
9. Current and former employees.
10. Contractors employed by the Department of Veterans Affairs.

CATEGORIES OF RECORDS IN THE SYSTEM:

The records may include information related to ethics consultations performed in and for VHA medical treatment facilities. Information may include relevant information from a medical record (a cumulative account of sociological, diagnostic, counseling, rehabilitation, drug and alcohol, dietetic, medical, surgical, dental, psychological, and/or psychiatric information compiled by VA professional staff and non-VA health care providers); subsidiary record information (*e.g.,* tumor registry, dental, pharmacy, nuclear medicine, clinical laboratory, radiology, and patient scheduling information); identifying information (*e.g.,* name, address, date of birth, partial social security number), military service information (*e.g.,* dates, branch and character of service, service number, medical information), family or authorized surrogate information (*e.g.,* next-of-kin and person to notify in an emergency), employment information (*e.g.,* occupation, employer name and address), and information pertaining to the individual's medical, surgical, psychiatric, dental, and/or psychological examination, evaluation, and/or treatment (*e.g.,* information related to the chief complaint and history of present illness; information related to physical, diagnostic, therapeutic, special examinations, clinical laboratory, pathology and x-ray findings, operations, medical history, medications prescribed and dispensed, treatment plan and progress, consultations; photographs taken for identification and medical treatment; education and research purposes; facility locations where treatment is provided; observations and clinical impressions of health care providers to include identity of providers and to include, as appropriate, the present state of the patient's health, an assessment of the patient's emotional, behavioral, and social status, as well as an assessment of the patient's rehabilitation potential and nursing care needs). In addition the record may include the name and contact information for health care providers, and information regarding medical care rendered by those providers.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Title 38, U.S.C., 501(b), 304, 7301, and 7304(a).

PURPOSE(S):

The automated records may be used for such purposes as: Ethics consultation; ongoing treatment of the patient; documentation of treatment provided; payment; health care operations such as producing various management and patient follow-up reports; responding to patient and other inquiries; for epidemiological research and other health care related studies; statistical analysis, resource allocation and planning; providing clinical and administrative support to patient medical care; for audits, reviews and investigations conducted by staff of the health care facility, the networks, VA Central Office, and the VA Office of Inspector General (OIG); sharing of health information between and among Veterans Health Administration (VHA), Department of Defense (DoD), Indian Health Services (IHS), and other government and private industry health care organizations; law enforcement investigations; quality improvement/assurance audits, reviews and investigations; personnel management and evaluation; employee ratings and performance evaluations, and employee disciplinary or other adverse action, including discharge; advising health care professional licensing or monitoring bodies or similar entities of activities of VA and former VA health care personnel; and, accreditation of a facility by an entity such as TJC.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

To the extent that records contained in the system include information protected by 45 CFR Parts 160 and 164, *i.e.,* individually identifiable health information, and 38 U.S.C. 7332, *i.e.,* medical treatment information related to drug abuse, alcoholism or alcohol abuse, sickle cell anemia or infection with the human immunodeficiency virus, that information cannot be disclosed under a routine use unless there is also specific statutory authority in 38 U.S.C. 7332 and regulatory authority in 45 CFR Parts 160 and 164 permitting disclosure.

1. Disclosure of health care information as deemed necessary and proper to Federal, state and local government agencies and national health organizations in order to assist in the development of programs that will be beneficial to claimants, to protect their rights under law, and assure that they are receiving all benefits to which they are entitled.

2. Disclosure of health care information furnished and the period of care, as deemed necessary and proper, to accredited service organization representatives and other approved agents, attorneys, and insurance companies to aid claimants whom they represent in the preparation, presentation and prosecution of claims under laws administered by VA, state or local agencies.

3. VA may disclose on its own initiative any information in this system, except the names and home addresses of Veterans and their dependents, which is relevant to a suspected or reasonably imminent violation of law, whether civil, criminal or regulatory in nature, and whether arising by general or program statute or by regulation, rule or order issued pursuant thereto, to a Federal, state, local, tribal, or foreign agency charged with the responsibility of investigating or prosecuting such violation, or charged with enforcing or implementing the statute, regulation, rule or order. On its own initiative, VA may also disclose the names and addresses of Veterans and their dependents to a Federal agency charged with the responsibility of investigating or prosecuting civil, criminal or regulatory violations of law, or charged with enforcing or implementing the statute, regulation, rule or order issued pursuant thereto.

4. Disclosure of individually-identifiable health care information may be made by appropriate VA personnel to the extent necessary and on a need-to-know basis, consistent with good medical and ethical practices, to family members and/or the person(s) with whom the patient has a meaningful relationship.

5. Relevant information may be disclosed in the course of presenting evidence to a court, magistrate or administrative tribunal, in matters of guardianship, inquests and commitments; to private attorneys representing Veterans rated incompetent in conjunction with issuance of Certificates of Incompetency; and to probation and parole officers in connection with Court required duties.

6. Relevant information may be disclosed to a guardian ad litem in relation to his or her representation of a claimant in any legal proceeding.

7. Any relevant information may be disclosed to attorneys, insurance companies, employers, third parties liable or potentially liable under health plan contracts, and to courts, boards, or commissions, only to the extent necessary to aid VA in preparation, presentation, and prosecution of claims authorized under Federal, state, or local laws, and regulations promulgated thereunder.

8. Disclosure of health information, excluding name and home address, (unless name and address is furnished by the requester) for research purposes determined to be necessary and proper, to epidemiological and other research entities approved by the Under Secretary for Health.

9. In order to conduct Federal research necessary to accomplish a statutory purpose of an agency, at the written request of the head of the agency, or designee of the head of that agency, the name(s) and address(es) of present or former personnel of the Armed Services and/or their dependents may be disclosed (a) To a Federal department or agency or (b) directly to a contractor of a Federal department or agency. When a disclosure of this information is to be made directly to the contractor, VA may impose applicable conditions on the department, agency and/or contractor to ensure the appropriateness of the disclosure to the contractor.

10. Relevant information may be disclosed to the Department of Justice and United States Attorneys in defense or prosecution of litigation involving the United States, and to Federal agencies upon their request in connection with review of administrative tort claims filed under the Federal Tort Claims Act, 28 U.S.C. 2672.

11. Health care information concerning a non-judicially declared

incompetent patient may be disclosed to a third party upon the written authorization of the patient's next of kin in order for the patient or, consistent with the best interest of the patient, a member of the patient's family, to receive a benefit to which the patient or family member is entitled or, to arrange for the patient's discharge from a VA medical facility. Sufficient information to make an informed determination will be made available to such next of kin. If the patient's next of kin are not reasonably accessible, the Chief of Staff, Director, or designee of the custodial VA medical facility may make disclosure of health care information for these purposes.

12. Relevant health care information may be disclosed to a non-VA nursing home facility that is considering the patient for admission, when information concerning the individual's medical care is needed for the purpose of preadmission screening under 42 CFR 483.20(f), for the purpose of identifying patients who are mentally ill or mentally retarded, so they can be evaluated for appropriate placement.

13. Relevant health care information may be disclosed to a State Veterans Home for the purpose of medical treatment and/or follow-up at the State Home when VA makes payment of a per diem rate to the State Home for the patient receiving care at such home, and the patient receives VA medical care.

14. Relevant health care information may be disclosed to (a) A Federal agency or non-VA health care provider or institution when VA refers a patient for hospital or nursing home care or medical services, or authorizes a patient to obtain non-VA medical services and the information is needed by the Federal agency or non-VA institution or provider to perform the services; or (b) a Federal agency or a non-VA hospital (Federal, state and local, public or private) or other medical installation having hospital facilities, blood banks, or similar institutions, medical schools or clinics, or other groups or individuals that have contracted or agreed to provide medical services, or share the use of medical resources under the provisions of 38 U.S.C. 513, 7409, 8111, or 8153, when treatment is rendered by VA under the terms of such contract or agreement or the issuance of an authorization, and the information is needed for purposes of medical treatment and/or follow-up, determining entitlement to a benefit or, for VA to effect recovery of the costs of the medical care.

15. For program review purposes and the seeking of accreditation and/or certification, health care information may be disclosed to survey teams of TJC, and similar national accrediting agencies or boards with whom VA has a contract or agreement to conduct such reviews, but only to the extent that the information is necessary and relevant to the review.

16. Information from a named patient's VA medical record which relates to the performance of a health care student or provider may be disclosed to a medical or nursing school, or other health care related training institution, or other facility with which there is an affiliation, sharing agreement, contract, or similar arrangement when the student or provider is enrolled at or employed by the school or training institution, or other facility, and the information is needed for personnel management, rating and/or evaluation purposes.

17. Relevant health care information may be disclosed to individuals, organizations, private or public agencies, etc., with whom VA has a contract or sharing agreement for the provision of health care or administrative services.

18. Patient identifying information may be disclosed to Federal agencies and VA and government-wide third-party insurers responsible for payment of the cost of medical care for the identified patients, in order for VA to seek recovery of the medical care costs. These records may also be disclosed as part of a computer matching program to accomplish these purposes.

19. Relevant health care information may be disclosed to health and welfare agencies, housing resources and utility companies, possibly to be combined with disclosures to other agencies, in situations where VA needs to act quickly in order to provide basic and/or emergency needs for the Veteran and Veteran's family where the family resides with the Veteran or serves as a caregiver.

20. The record of an individual who is covered by a system of records may be disclosed to a Member of Congress, or a staff person acting for the Member, when the Member of staff person requests the record on behalf of and at the written request of the individual.

21. Disclosure may be made to the National Archives and Records Administration in records management inspections conducted under authority of Title 44 U.S.C.

22. VA may disclose information from this system of records to the Department of Justice (DoJ), either on VA's initiative or in response to DoJ's request for the information, after either VA or DoJ determines that such information is relevant to DoJ's representation of the United States or any of its components in legal proceedings before a court or adjudicative body, provided that, in each case, the agency also determines prior to disclosure that release of the records to the DoJ is a use of the information contained in the records that is compatible with the purpose for which VA collected records. VA, on its own initiative, may disclose records in this system of records in legal proceedings before a court or administrative body after determining that the disclosure of the records to the court or administrative body is a use of the information contained in the records that is compatible with the purpose for which VA collected the records.

23. Disclosure of relevant information may be made to individuals, organizations, private or public agencies, or other entities with whom VA has a contract or agreement or where there is a subcontract to perform such services as VA may deem practicable for the purposes of laws administered by VA, in order for the contractor or subcontractor to perform the services of the contract or agreement.

24. VA may disclose on its own initiative any information in the system, except the names and home addresses of Veterans and their dependents, that is relevant to a suspected or reasonably imminent violation of the law whether civil, criminal, or regulatory in nature and whether arising by general or program statute or by regulation, rule or order issued pursuant thereto, to a Federal, state, local, tribal or foreign agency charged with the responsibility of investigating or prosecuting such violation, or charged with enforcing or implementing the statute, regulation, rule or order. VA may also disclose on its own initiative the names and addresses of Veterans and their dependents to a Federal agency charged with the responsibility of investigating or prosecuting civil, criminal, or regulatory violations of law, or charged with enforcing or implementing the statutes, regulation, or order issued pursuant thereto.

25. Disclosure to other Federal agencies may be made to assist such agencies in preventing and detecting possible fraud or abuse by individuals in their operations and programs.

26. VA may, on its own initiative, disclose any information or records to appropriate agencies, entities, and persons when (1) VA suspects or has confirmed that the integrity or confidentiality of information in the system of records has been compromised; (2) the Department has determined that as a result of the suspected or confirmed compromise,

there is a risk of embarrassment or harm to the reputations of the record subject, harm to economic or property interests, identify theft or fraud, or harm to the security, confidentiality, or integrity of this system or other systems (entity) that rely upon the potentially compromised information; and (3) the disclosure is to agencies, entities, or persons whom VA determines as reasonably necessary to assist or carry out the Department's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm. This routine uses permits disclosures by the Department to respond to a suspected or confirmed data breach, including the conduct of any risk analysis or provision of credit protection services as provided in 38 U.S.C. 5724, as the terms are defined in 38 U.S.C. 5727.

27. For program review purposes and the seeking of accreditation and/or certification, disclosure may be made to survey teams of TJC and similar national accreditation agencies or boards with whom VA has a contract or agreement to conduct such reviews, but only to the extent that the information is necessary and relevant to the review.

28. Disclosure of information may be made to the next-of-kin and/or the person(s) with whom the patient has a meaningful relationship to the extent necessary and on a need-to-know basis consistent with good medical and ethical practices.

29. Assist in quality improvement efforts with respect to ethics consultation practices as part of approved research or ongoing quality improvement projects.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records are maintained on electronic media in ECWeb on a centrally located VA-owned server. In most cases, copies of back-up computer files are maintained at off-site locations. Subsidiary record information is maintained at the various respective ethics consultation services within the health care facility and by individuals, organizations, and/or agencies with whom VA has a contract or agreement to perform such services, as the VA may deem practicable.

RETRIEVABILITY:

Records are retrieved by consultation number, name of ethics consultant, requester, ethics domain or topic, facility, keywords or phrases.

SAFEGUARDS:

1. Access to VA working and storage areas is restricted to VA employees on a ''need-to-know'' basis; strict control measures are enforced to ensure that disclosure to these individuals is also based on this same principle. Generally, VA file areas are locked after normal duty hours and the facilities are protected from outside access by the Federal Protective Service or other security personnel.

2. Access to computer rooms at health care facilities is generally limited by appropriate locking devices and restricted to authorized VA employees and vendor personnel. ADP peripheral devices are placed in secure areas (areas that are locked or have limited access) or are otherwise protected. Information in ECWeb may be accessed by authorized VA employees. Access to file information is controlled at two levels; the systems recognize authorized employees by series of individually unique passwords/codes as a part of each data message, and the employees are limited to only that information in the file, which is needed in the performance of their official duties. Information that is downloaded from ECWeb and maintained on personal computers is afforded similar storage and access protections as the data that is maintained in the original files. Access to information stored on automated storage media at other VA locations is controlled by individually unique passwords/codes.

3. Access to the Austin VA Data Processing Center is generally restricted to Center employees, custodial personnel, Federal Protective Service and other security personnel. Access to computer rooms is restricted to authorized operational personnel through electronic locking devices. All other persons gaining access to computer rooms are escorted. Information stored in the computer may be accessed by authorized VA employees at remote locations including VA health care facilities, Information Systems Centers, VA Central Office, and Veteran Integrated Service Networks. Access is controlled by individually unique passwords/codes, which must be changed periodically by the employee.

RETENTION AND DISPOSAL:

In accordance with the records disposition authority approved by the Archivist of the United States, paper records and information stored on electronic storage media are maintained for 75 years after the last episode of patient care then destroyed/deleted.

SYSTEM MANAGER(S) AND ADDRESS:

Official responsible for policies and procedures: Chief Ethics in Health Care Officer, National Center for Ethics in Health Care, Veterans Health Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420. Official maintaining the system: Director at the facility where the individuals were associated.

NOTIFICATION PROCEDURE:

Individuals seeking information regarding access to and contesting of ECWeb records may write, call or visit the last VA facility where medical care was provided or the National Center for Ethics in Health Care.

RECORD ACCESS PROCEDURE:

Individuals seeking information regarding access to and contesting of records in this system may write, call or visit the VA facility location where they are or were employed or made contact or the National Center for Ethics in Health Care.

CONTESTING RECORD PROCEDURES:

(See Record Access Procedures above.)

RECORD SOURCE CATEGORIES:

Information in this system of records is provided by the patient, family members or accredited representative, and friends, authorized surrogates, health care agents, employees, contractors, medical service providers, and various automated systems providing clinical and managerial support at VA health care facilities.

[FR Doc. 2011–18315 Filed 7–19–11; 8:45 am]

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FEDERAL REGISTER

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Part II

Federal Reserve System

12 CFR Part 235
Debit Card Interchange Fees and Routing; Final Rule

FEDERAL RESERVE SYSTEM

12 CFR Part 235

[Regulation II; Docket No. R–1404]

RIN 7100 AD 63

Debit Card Interchange Fees and Routing

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule.

SUMMARY: The Board is publishing a final rule, Regulation II, Debit Card Interchange Fees and Routing. This rule implements the provisions of Section 920 of the Electronic Fund Transfer Act, including standards for reasonable and proportional interchange transaction fees for electronic debit transactions, exemptions from the interchange transaction fee limitations, prohibitions on evasion and circumvention, prohibitions on payment card network exclusivity arrangements and routing restrictions for debit card transactions, and reporting requirements for debit card issuers and payment card networks. An interim final rule, with a request for comment, on standards for receiving a fraud-prevention adjustment to interchange transaction fees is published separately in the **Federal Register**.

DATES: *Effective date:* The final rule is effective October 1, 2011.

Compliance dates: For § 235.7(a) the general compliance date is April 1, 2012, except as follows: Payment card networks must comply with §§ 235.7(a)(1) and (a)(3) on October 1, 2011. Issuers must comply with § 235.7(a) on April 1, 2013, with respect to debit cards that use transaction qualification or substantiation systems and general-use prepaid cards sold on or after April 1, 2013. Issuers must comply with § 235.7(a) with respect to reloadable general-use prepaid cards sold and reloaded prior to April 1, 2013 by May 1, 2013. Issuers must comply with § 235.7(a) with respect to reloadable general-use prepaid cards sold prior to April 1, 2013 and reloaded after April 1, 2013 within 30 days of the reloading.

FOR FURTHER INFORMATION CONTACT: Dena Milligan, Attorney (202/452–3900), Legal Division, David Mills, Manager and Economist (202/530–6265), Division of Reserve Bank Operations & Payment Systems, or Mark Manuszak, Senior Economist (202/721–4509), Division of Research & Statistics; for users of Telecommunications Device for the Deaf (TDD) only, contact (202/263–4869); Board of Governors of the Federal Reserve System, 20th and C Streets, NW., Washington, DC 20551.

SUPPLEMENTARY INFORMATION:

I. Section 1075 of the Dodd-Frank Act

The Dodd-Frank Wall Street Reform and Consumer Protection Act (the ''Dodd-Frank Act'') was enacted on July 21, 2010.[1] Section 1075 of the Dodd-Frank Act amends the Electronic Fund Transfer Act (''EFTA'') (15 U.S.C. 1693 *et seq.*) by adding a new section 920 regarding interchange transaction fees and rules for payment card transactions.[2]

EFTA Section 920(a)(2) provides that, effective July 21, 2011, the amount of any interchange transaction fee that an issuer receives or charges with respect to an electronic debit transaction must be reasonable and proportional to the cost incurred by the issuer with respect to the transaction.[3] Section 920(a)(3) requires the Board to establish standards for assessing whether an interchange transaction fee is reasonable and proportional to the cost incurred by the issuer with respect to the transaction.

Under EFTA Section 920(a)(5), the Board may allow for an adjustment to an interchange transaction fee that is reasonably necessary to make allowance for costs incurred by the issuer in preventing fraud in relation to electronic debit transactions, provided the issuer complies with standards established by the Board relating to fraud prevention. Section 920(a)(8) also authorizes the Board to prescribe regulations in order to prevent circumvention or evasion of the restrictions on interchange transaction fees, and specifically authorizes the Board to prescribe regulations regarding any network fee to ensure that such a fee is not used to directly or indirectly compensate an issuer with respect to an electronic debit transaction and is not used to circumvent or evade the restrictions on interchange transaction fees.

EFTA Sections 920(a)(6) and (a)(7) exempt certain issuers and cards from the restrictions on interchange transaction fees described above. The restrictions on interchange transaction fees do not apply to issuers that, together with affiliates, have assets of less than $10 billion. The restrictions also do not apply to electronic debit transactions made using two types of debit cards—debit cards provided pursuant to certain government-administered payment programs and certain reloadable, general-use prepaid cards not marketed or labeled as a gift card or gift certificate. Section 920(a) provides, however, that beginning July 21, 2012, these two types of debit cards will not be exempt if the cardholder may be charged either an overdraft fee or a fee for the first withdrawal each month from automated teller machines (''ATMs'') in the issuer's designated ATM network.

In addition to rules regarding restrictions on interchange transaction fees, EFTA Section 920(b) requires the Board to prescribe rules related to the routing of debit card transactions. First, Section 920(b)(1) requires the Board to prescribe rules that prohibit issuers and payment card networks (''networks'') from restricting the number of networks on which an electronic debit transaction may be processed to one such network or two or more affiliated networks. Second, that section requires the Board to prescribe rules prohibiting issuers and networks from inhibiting the ability of any person that accepts debit cards from directing the routing of electronic debit transactions over any network that may process such transactions.

Section 920(a) requires the Board to establish interchange fee standards no later than April 21, 2011, and that section becomes effective on July 21, 2011. Section 920(b) requires the Board to issue rules that prohibit network exclusivity arrangements and debit card transaction routing restrictions no later than July 21, 2011, but does not establish an effective date for these provisions.

On December 28, 2010, the Board requested public comment on a proposed rule for implementing these provisions of the Dodd-Frank Act. As explained below, the Board received comments from more than 11,500 commenters regarding this proposal, including comments from issuers, payment card networks, merchants, consumers, consumer advocates, trade associations, and members of Congress. Prior to publishing its proposed rule, the Board also conducted a survey of issuers covered by EFTA Section 920 and of payment card networks to gather information regarding electronic debit transactions and related costs. Based on its review of the comments, the statutory provisions, the data available to the Board regarding costs, its understanding of the debit payment system, and other relevant information,

[1] Pub. L. 111–203, 124 Stat. 1376 (2010).

[2] EFTA Section 920 is codified as 15 U.S.C. 1693o-2. As discussed in more detail below, EFTA Section 920(c)(8) defines ''an interchange transaction fee'' (or ''interchange fee'') as any fee established, charged, or received by a payment card network for the purpose of compensating an issuer for its involvement in an electronic debit transaction.

[3] Electronic debit transaction (or ''debit card transaction'') is defined in EFTA Section 920(c)(5) as a transaction in which a person uses a debit card.

and for the reasons explained below, the Board has adopted this final rule. A companion interim final rule providing for a fraud-prevention adjustment to the interchange fee standards was also adopted, with a request for comment on the interim final rule.[4]

II. The Debit Card Industry

A. Overview of the Debit Card Industry

When introduced in the late 1960s and early 1970s, debit cards provided a new way for consumers to access funds in their deposit accounts, supplementing more traditional means such as checks and in-person withdrawals at bank branches.[5] Although initially debit cards were used to withdraw cash or perform other banking activities at ATMs, the system evolved to support payments made by consumers for the purchase of goods or services at merchants. Cardholders are also able to use their debit cards to get cash back at certain point-of-sale locations as part of the purchase transaction. Debit cards are generally issued by depository institutions to their deposit account holders.

Debit cards now play a prominent role in the U.S. payments system. Debit card payments have grown more than any other form of electronic payment over the past decade, increasing to 37.9 billion transactions in 2009.[6] Debit cards are used in 35 percent of noncash payment transactions, and have eclipsed checks as the most frequently used noncash payment method. Almost half of total third-party debits to deposit accounts are made using debit cards, compared to approximately 30 percent made by checks.[7] [8] Debit cards are accepted at about 8 million merchant locations in the United States.

A more recent innovation in card-based payments is the introduction of prepaid cards. Prepaid cards may or may not be reloadable and may be accepted broadly or restricted to purchases at particular merchants or for specific types of products. Prepaid card transaction volume is still low in comparison to other forms of electronic payments, such as debit cards, but is increasing rapidly. In particular, prepaid cards were used for 6 billion transactions in 2009, valued at $140 billion, with average annual growth rates of prepaid transaction volume and value of more than 20 percent between 2006 and 2009.[9]

In general, there are two types of debit card authentication methods on which current systems are based: PIN (personal identification number) and signature.[10] The infrastructure for PIN debit networks differs from that for signature debit networks. PIN debit networks, which evolved from the ATM networks, are single-message systems in which authorization and clearing information is carried in a single message. Signature debit networks, which leverage the credit card network infrastructure, are dual-message systems, in which authorization information is carried in one message and clearing information is carried in a separate message.

The authentication methods available for a given transaction generally depend on features of the consumer's card, the transaction, and the merchant's acceptance policy. According to the Board's survey of covered card issuers, more than 70 percent of debit cards outstanding (including prepaid cards) support both PIN- and signature-based transactions (88 percent, excluding prepaid cards).[11] In the current environment, however, certain transactions, such as transactions for hotel stays or car rentals, where the exact amount of the transaction is not known at the time of authorization, cannot readily be accommodated on PIN-based, single-message systems. In addition, PIN debit transactions generally are not currently accepted for Internet, telephone, and mail transactions. Overall, information collected by the Board indicates that roughly one-quarter of the merchant locations in the United States that accept debit cards have the capability to accept PIN-based debit transactions. Further, as discussed below in connection with § 235.2(m), new types of debit card transactions are emerging that are not ''PIN-based'' or ''signature-based'' as those terms traditionally have been used and use new cardholder authentication methods.

Debit card transactions typically are processed over one of two types of systems, often referred to as three-party and four-party systems.[12] The so-called four-party system is the model used for most debit card transactions; the four parties are the cardholder, the entity that issued the payment card to the cardholder (the issuer), the merchant, and the merchant's bank (the acquirer or merchant acquirer).[13] The network receives transaction information and data from the acquiring side of the market, routes the information to the issuer of the card (authorization and clearing), and determines each side's daily net settlement positions for interbank monetary transfers.[14]

In a three-party system, one entity acts as issuer and system operator, and often as acquirer as well. Thus, the three parties involved in a transaction are the cardholder, the merchant, and the system operator. The three-party model is used for some prepaid card transactions, but currently is not used for other debit card transactions in which the cardholder is debiting his or her bank account.

In a typical four-party system transaction, the cardholder initiates a purchase by providing his or her card or card information to a merchant. In the case of PIN debit, the cardholder also

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[4] *See* companion interim final rule published separately in the **Federal Register**.

[5] Check use has been declining since the mid-1990s as checks (and most likely some cash payments) are being replaced by electronic payments (*e.g.,* debit card payments, credit card payments, and automated clearing house (ACH) payments).

[6] The numbers in this discussion are derived from the 2010 Federal Reserve Payments Study, available at *http://www.frbservices.org/files/communications/pdf/press/2010_payments_study.pdf.* Accordingly, these figures may vary from those discussed in connection with the Board's survey of covered issuers and payment card networks.

[7] Third-party debits are those debits initiated to pay parties other than the cardholder. These third-party debit numbers are derived from the 2010 Federal Reserve Payments Study. The Study reported that a total of 108.9 billion noncash payments were made in 2009, 35 percent of which were debit card payments. For purposes of determining the proportion of noncash payments that were third-party debits to accounts, ATM cash withdrawals and prepaid card transactions are excluded from the calculation.

[8] Board staff projects that debit card transactions will total about 50 billion in 2011.

[9] These prepaid numbers are based on the 2010 Federal Reserve Payments Study, which gathered information on both general-use and private-label prepaid cards. According to that study, of the reported 6.0 billion prepaid card transactions in 2009, 1.3 billion were general-use prepaid card transactions, valued at $40 billion, and 4.7 billion were private-label prepaid card and electronic benefit transfer (''EBT'') card transactions, valued at $90 billion. Combined, in 2009, debit and prepaid cards accounted for 43.9 billion transactions or 40 percent of noncash payment transactions. Debit and prepaid card transaction volume of 37.6 billion reported by networks in the Board's interchange survey differed from the transaction volume of 39.2 billion (excluding private-label prepaid and EBT card transactions) reported in the Federal Reserve Payments Study because some networks reported different volumes in the two surveys.

[10] Increasingly, however, cardholders authorize ''signature'' debit transactions without a signature and, sometimes, may authorize a ''PIN'' debit transaction without a PIN. PIN-based and signature-based debit also may be referred to as ''PIN debit'' and ''signature debit.''

[11] ''Covered issuers'' are those issuers that, together with affiliates, have assets of $10 billion or more.

[12] Industry participants sometimes refer to four-party systems as ''open loop'' systems and three-party systems as ''closed loop'' systems.

[13] Throughout this rule, the term ''bank'' may be used to refer to any depository institution.

[14] The term ''four-party system'' is something of a misnomer because the network is, in fact, a fifth party involved in a transaction.

enters a PIN. An electronic authorization request for a specific dollar amount, along with the cardholder's account information, is sent from the merchant to the acquirer to the network, which sends the request to the appropriate card-issuing institution.[15] The issuer verifies, among other things, that the cardholder's account has sufficient funds to cover the transaction amount and that the card was not reported as lost or stolen. A message approving or declining the transaction is returned to the merchant via the reverse path, usually within seconds of the authorization request.

The clearing of a debit card transaction is effected through the authorization message (for PIN debit systems) or a subsequent message (for signature debit systems). The issuer posts the debits to the cardholder's account based on these clearing messages. Based on all clearing messages received in one day, the network calculates and communicates to each issuer and acquirer its net debit or credit position for settlement. The interbank settlement generally is effected through a settlement account at a commercial bank, or through ACH transfers. The acquirer credits the merchant's account for the value of its transactions, less the merchant discount, as discussed below. The timing of this crediting is determined by the merchant-acquirer agreement and/or ACH operator rules. In some circumstances, an acquirer that is also the issuer with respect to a particular transaction may authorize and settle that transaction internally.

Various fees are associated with debit card transactions. The interchange fee is set by the relevant network and paid by the acquirer to the issuer; the network accounts for the interchange fee in determining each issuer's and acquirer's net settlement position. Switch fees are charged by the network to acquirers and issuers to compensate the network for its role in processing the transaction.[16] The acquirer charges the merchant a merchant discount—the difference between the face value of a transaction and the amount the acquirer transfers to the merchant—that includes the interchange fee, network switch fees charged to the acquirer, other acquirer costs, and an acquirer markup. The interchange fee typically comprises a large fraction of the merchant discount for a card transaction.[17]

When first introduced, some PIN debit networks structured interchange fees in a manner similar to ATM interchange fees.[18] For ATM transactions, the cardholder's bank generally pays the ATM operator an interchange fee to compensate the ATM operator for the costs of deploying and maintaining the ATM and providing the service. Similarly, some PIN debit networks initially structured interchange fees to flow from the cardholder's bank to the merchant's bank to compensate merchants for the costs of installing PIN terminals and making necessary system changes to accept PIN debit at the point of sale. In the mid-1990s, these PIN debit networks began to shift the direction in which PIN debit interchange fees flowed. By the end of the decade, interchange fees for all PIN debit transactions in the United States were paid by acquirers to card issuers.[19]

During the 1990s, most PIN debit networks employed fixed per-transaction interchange fees. Beginning around 2000, many PIN debit networks incorporated an *ad valorem (i.e.,* percentage of the value of a transaction) component to their interchange fees, with a cap on the total amount of the fee for each transaction. In addition, PIN debit networks expanded the number of interchange fee categories in their fee schedules. For example, many networks created categories based on merchant type (*e.g.,* supermarkets) and began to segregate merchants into different categories based on transaction volume (*e.g.,* transaction tiers). Over the course of the 2000s, most PIN debit networks raised the levels of the fixed and *ad valorem* components of fees, in addition to raising the caps on overall fees. By 2010, some networks had removed per-transaction caps on many interchange fees.

In general, interchange fees for signature debit networks, like those of credit card networks, combine an *ad valorem* component with a fixed fee component. Unlike some PIN debit networks, interchange fees for signature debit networks generally do not include a per-transaction cap. Beginning in the early 1990s, signature debit networks also began creating separate categories for merchants in certain market segments (*e.g.,* supermarkets and card-not-present transactions) to gain increased acceptance in those markets.[20] Until 2003, interchange fee levels for signature debit transactions were generally similar to those for credit card transactions and significantly higher than those for PIN debit card transactions. However, PIN debit fees began to increase in the early 2000s, as noted above, while signature debit fees declined in late 2003 and early 2004.[21] More recently, both PIN and signature debit fees have increased, although PIN debit fees have increased at a faster pace.

In addition to setting the structure and level of interchange fees and other fees to support network operations, each card network specifies operating rules that govern the relationships between network participants. Although network rules generally apply to issuers and acquirers, merchants and processors also may be required to comply with a network's rules or risk losing access to that network. Network operating rules cover a broad range of activities, including merchant card acceptance practices, technological specifications for cards and terminals, risk management, and determination of transaction routing when multiple networks are available for a given transaction.

B. Summary Information About Interchange Fees and Transaction Costs

In September 2010, the Board surveyed issuers that would be subject to the interchange fee standards and payment card networks to gather information to assist the Board in developing its proposed rule.[22]

[15] Specialized payment processors may carry out some functions between the merchant and the network or between the network and the issuer.

[16] A variety of other network fees, such as membership fees and licensing fees, may be collected by the network from the issuer or acquirer.

[17] Merchant discounts generally follow two forms: interchange-plus pricing and blended. If an acquirer is charging an interchange-plus merchant discount, the acquirer passes through the exact amount of the interchange fee for each transaction. If an acquirer is charging a blended merchant discount, the acquirer charges the same discount regardless of the interchange fee that applies to each transaction.

[18] In the late 1970s, bank consortiums formed numerous regional electronic funds transfer (''EFT'') networks to enable their customers to withdraw funds from ATMs owned by a variety of different banks. The EFT networks were first used to handle PIN debit purchases at retailers in the early 1980s. It was not until the mid-1990s, however, that PIN debit became a popular method of payment for consumers to purchase goods and services at retail stores.

[19] *Debit Card Directory* (1995–1999). *See also,* Fumiko Hayashi, Richard Sullivan, & Stuart E. Weiner, ''A Guide to the ATM and Debit Card Industry'' (Federal Reserve Bank of Kansas City 2003).

[20] Card-not-present transactions occur when the card is not physically presented to the merchant at the time of authorization. Examples include Internet, phone, and mail-order purchases.

[21] This decline followed the settlement of litigation surrounding signature debit cards. *See In re: Visa Check/MasterMoney Antitrust Litigation,* 192 F.R.D. 68 (E.D.N.Y. 2000).

[22] The Board also surveyed the nine largest merchant acquirers, all of which responded to the survey and provided information on the number and volume of debit card transactions that they processed, the number of merchants that accepted

Preliminary summary information was provided in the Board's proposal.[23] An updated and more detailed summary of this information is provided in ''2009 Interchange Revenue, Covered Issuer Costs, and Covered Issuer and Merchant Fraud Losses Related to Debit Card Transactions.''[24] What follows is a brief high-level summary of the survey data responses on interchange fees, issuer costs, and merchant and issuer fraud losses. The data results represent only covered issuers and networks that responded to the survey.[25]

Card use. Payment card networks reported a total of approximately 37.6 billion debit (including prepaid) card purchase transactions in 2009, with an aggregate value of more than $1.4 trillion. Signature-based transactions accounted for 22.5 billion or 60 percent of all purchase transactions, and $837 billion or 59 percent of transaction value. PIN-based debit transactions totaled 13.9 billion or 37 percent of purchase transactions, and $555 billion or 39 percent of transaction value. General-use prepaid card transactions represented 1.2 billion or 3 percent of purchase transactions and $38 billion or 3 percent of purchase transaction value. The average value of all purchase transactions was $38.03, with the average values of signature debit, PIN debit, and prepaid card transactions being $37.15, $40.03, and $31.47, respectively.

Interchange fees. Networks reported that debit card interchange fees totaled $16.2 billion in 2009. Of this interchange-fee revenue, $12.5 billion was for signature debit transactions, $3.2 billion was for PIN debit transactions, and $0.5 billion was for prepaid card transactions. The average interchange fee for all debit card transactions was 44 cents per transaction, or 1.15 percent of the average transaction amount. The average interchange fee for signature debit transactions was 56 cents, or 1.53 percent of the average transaction amount. The average interchange fee for PIN debit transactions was significantly lower, at 23 cents per transaction, or 0.58 percent of the average transaction amount. Prepaid card interchange fees averaged 40 cents per transaction, or 1.28 percent of the average transaction amount.[26]

Issuer processing costs. The Board's survey requested covered issuers to report their total transaction processing costs, including fixed and variable costs and network processing fees associated with authorization, interbank clearing and settlement, and cardholder account posting for routine purchase transactions and non-routine transactions, such as chargebacks and errors. The median per-transaction total processing cost across issuers for all types of debit card transactions was 11 cents per transaction. The 80th percentile of per-transaction total processing cost across issuers for all types of debit card transactions was 19 cents.[27]

Issuer fraud-prevention and data-security costs. The median issuer cost for all debit card-related fraud-prevention activities (excluding data-security costs, which were reported separately) was approximately 1.7 cents and the 80th percentile was 3.1 cents. The most commonly reported fraud-prevention activity was transaction monitoring. The median issuer cost for transaction monitoring was 0.7 cents, and the 80th percentile was 1.2 cents. The remaining costs related to a variety of fraud-prevention activities, including research and development, card activation systems, PIN customization, merchant blocking, and card authentication systems; the per-transaction cost of each individual activity was small, typically less than one-tenth of a cent. The median total data-security cost reported by issuers was approximately 0.1 cents and the 80th percentile was 0.4 cents.

Network Fees and Incentives. The payment card networks reported various network fees that they charge to issuers and acquirers. Total network fees exceeded $4.1 billion. Networks charged issuers more than $2.3 billion in fees and charged acquirers over $1.8 billion in fees. Almost 76 percent of the total fees paid, or $3.1 billion, were charged by signature debit networks. More than $3.4 billion, or 82 percent of total fees paid, were assessed on a per-transaction basis. Networks paid issuers almost $700 million and acquirers more than $300 million in discounts and incentives. Of the total incentives or discounts paid by networks, 81 percent were paid by signature networks.

Fraud losses. The Board estimates that industry-wide fraud losses to all parties of a debit card transaction were approximately $1.34 billion in 2009. About $1.11 billion of these losses arose from signature debit card transactions, about $181 million arose from PIN debit card transactions, and almost $18 million arose from prepaid card transactions.[28] Across all transaction types, the median number of purchase transactions that were fraudulent was about 3 of every 10,000 transactions. The medians for signature, PIN, and prepaid debit card were 4, less than 1, and 1 of every 10,000 transactions, respectively. The median loss per purchase transaction incurred by both issuers and merchants was about 3 cents.[29] The median fraud loss as a percent of purchase transaction value was about 9 basis points. For issuers alone, the median loss per purchase transaction was about 2 cents, and the median fraud loss as a percent of purchase transaction value was approximately 5 basis points.[30]

Across all types of transactions, 62 percent of reported fraud losses were borne by issuers and 38 percent were borne by merchants. The distribution of fraud losses between issuers and merchants differs significantly based on

various types of debit cards, fraud losses, fraud prevention activities and costs, and exclusivity arrangements and routing procedures.

[23] 75 FR 81724–26, 81740–42 (Dec. 28, 2010).

[24] *http://www.federalreserve.gov/paymentsystems/files/debitfees_costs.pdf.*

[25] Most respondents did not provide information for every data element requested in the surveys. As discussed further below under § 235.3, when determining the interchange fee standard, the Board considered only data from issuers that provided information for each included cost.

[26] Some of these numbers differ from those published in the **Federal Register** notice of proposed Regulation II (75 FR 81725 (Dec. 28, 2010)) because several networks subsequently submitted corrections to previously provided data. In one instance, a network corrected the number of prepaid transactions and PIN debit transactions.

[27] For signature debit transactions, the median issuer per-transaction cost was 13 cents and the 80th percentile was 21 cents. For PIN debit transactions, the median and 80th percentile issuer per-transaction costs were 8 cents and 14 cents, respectively. For prepaid card transactions, they were 61 cents and $1.52, respectively.

[28] Revisions in the data plus the inclusion of prepaid card fraud have led to changes to some of the industry-wide fraud loss estimates that were included in the proposal. 75 FR 81740–41 (Dec. 28, 2010). The higher losses for signature debit card transactions result from both a higher rate of fraud and higher transaction volume for signature debit card transactions. The sum of debit card program fraud losses will not equal the industry-wide fraud losses due to different sample sizes and rounding.

[29] Issuers charge back transactions to acquirers that, in turn, typically pass on the chargeback value to the merchant.

[30] For signature debit, the median loss per purchase transaction to both issuers and merchants was 5 cents, and the median fraud loss as a percentage of purchase transaction value was about 12 basis points. This corresponds to a median fraud loss per purchase transaction to issuers of 3 cents and a median fraud loss as a percentage of purchase transaction value of 7 basis points. For PIN debit, the median loss per purchase transaction to both issuers and merchants was 1 cent and the median fraud loss as a percentage of purchase transaction value was about 3 basis points. This corresponds to a median fraud loss per purchase transaction to issuers of 1 cent and a median fraud loss as a percentage of purchase transaction value of 2 basis points. For prepaid, the median loss per purchase transaction to both issuers and merchants was 1 cent, and the median fraud loss as a percentage of purchase transaction value was 3 basis points. This corresponds to a median fraud loss per purchase transaction to issuers of 1 cent and a median fraud loss as a percentage of purchase transaction value of 2 basis points.

the cardholder authentication method used in a debit card transaction. Issuers reported that nearly all the fraud losses associated with PIN debit transactions (96 percent) were borne by issuers. By contrast, reported fraud losses for signature debit and prepaid card transactions were distributed more evenly between issuers and merchants. Specifically, issuers and merchants bore 59 percent and 41 percent of signature debit fraud losses, respectively. Issuers and merchants bore 67 percent and 33 percent of prepaid fraud losses, respectively.

Other debit card program costs. The issuer survey collected information on other costs related to debit card programs, including costs associated with card production and delivery, cardholder inquiries, rewards and other incentives, research and development, nonsufficient funds handling, and compliance. For each issuer that reported these costs, the costs were averaged over the total number of debit card transactions processed by the issuer. The median per transaction cost of production and delivery of cards was 2 cents, cardholder inquiries 3 cents, rewards and other incentives 2 cents, research and development 1 cent, nonsufficient funds handling 1 cent, and compliance less than 0.5 cents.

C. Comparison to Checking Transactions

1. Summary of Proposal and Comments

EFTA Section 920(a)(4)(A) requires the Board to consider, in prescribing standards governing debit interchange fees, the functional similarity between electronic debit transactions and checking transactions that are required to clear at par within the Federal Reserve System. As part of its proposal, the Board described both the similarities and differences between electronic debit transactions and checking transactions. The similarities noted by the Board included the fact that both types of transactions result in a debit to an asset account; both involve electronic processing and, increasingly, deposit; both involve processing fees paid by merchants to banks and other intermediaries; and both have similar settlement timeframes. The differences noted by the Board included the closed nature of debit card systems compared to the open check clearing and collection system; the payment authorization that is an integral part of electronic debit card transactions (but not check transactions), which guarantees that the transaction will not be returned for insufficient funds or certain other reasons (*e.g.*, a closed account); processing and collection costs incurred by the issuer (analogous to the payor's bank) for electronic debit transactions but not for check; par clearance in the check system; restricted routing choice in the debit card environment; and the ability to reverse electronic debit transactions within the normal processing system.[31]

The Board considered the functional similarity between electronic debit transactions and checks in determining which allowable costs to include under its proposal. In part based on this comparison, the Board proposed to include only those costs that are incurred with respect to a particular transaction that are related to authorization, clearance, and settlement of the transaction. The Board noted that a payor's bank in a check transaction (analogous to the issuer in a debit card transaction) would not recoup such costs from the payee's bank (analogous to the merchant acquirer in a debit card transaction), but that these were costs that EFTA Section 920(a) specifically directed the Board to consider in setting standards governing interchange transaction fees.

The Board received several comments from issuers, networks, and merchants on the functional similarities and differences between electronic debit transactions and check transactions, as well as comments on how the Board should take those similarities and differences into consideration. Merchants and their trade groups suggested that the starting point for the comparison to checks should be the cost savings that issuers receive from processing a debit card transaction rather than a check.

By contrast, numerous issuers and networks asserted that the Board's interchange fee standards should reflect not only the similarities between checks and debit cards, but also the differences between checks and debit cards. As a result, these commenters believed that the comparison to checks would expand the scope of allowable costs. Several issuers and networks argued that, by tying the amount of an interchange fee to the cost of an electronic debit transaction, Congress recognized that the debit card pricing system should be different from the check pricing system. These commenters argued that the Board should consider all costs that issuers incur for electronic debit transactions, regardless of whether the payor's bank would be able to recoup similar costs from the payee's bank in a check transaction.

Many issuers and networks suggested that the Board's interchange fee standards should account for the benefits merchants receive from accepting debit cards instead of checks. The benefits of debit cards to merchants that were cited include the payment guarantee; the avoidance of fees and other costs of handling checks;[32] faster availability of funds; faster check-out at the point-of-sale; increased sales value and volume; the ability to engage in certain types of transactions where checks are not practical (*e.g.*, Internet); and resolution of disputes through network rules and mediation rather than through the legal system.[33]

Some issuer and network commenters suggested that the Board also consider the benefits to consumers of using debit cards instead of checks. Such benefits cited by the commenters included wide acceptance of debit cards by merchants, ease of use, and speed of transactions. More generally, some commenters noted that the increase in debit card use and decline in check use are indicative of greater value from debit cards to all parties. One network stated that interchange fee revenue has given issuers an incentive to innovate, allowing them to provide to merchants a product that is superior to checks.

One difference between electronic debit transactions and check transactions that commenters highlighted is the payment guarantee for electronic debit transactions. Numerous issuers and networks stated that, unlike checks, debit card transactions are guaranteed by issuers against insufficient funds in an account. These commenters stated that a comparable service for checks costs merchants 1.5 percent of the transaction value. Accordingly, several commenters argued that the Board should compare merchants' debit card acceptance costs to the cost of accepting a guaranteed check. Some commenters contended that failure to compensate issuers for the payment guarantee could decrease its availability.

The Board has considered the comments received and has revised its analysis of the comparison of check and electronic debit transactions, as set out below.

[31] *See* 75 FR 81734 (Dec. 28, 2010) for a more detailed comparison between checks and electronic debit transactions in the Board's proposal.

[32] Cited costs of checks included per-item and batch deposit fees, check return fees, re-clearance fees, and an optional guarantee service.

[33] Some commenters argued that the benefits of debit cards over checks are also benefits of debit cards over cash.

2. Comparison of Check and Electronic Debit Transactions

Typical check transaction.[34] Checks can be collected, presented, returned, and settled through an interbank system or through an intrabank system, in the case of checks deposited and drawn on the same bank (*i.e.,* ''on-us'' checks). A typical check transaction is initiated by the payor (such as a consumer) writing a check drawn on the bank maintaining the payor's account to the order of a payee (such as a merchant). The payee receives as a payment the signed check and deposits the check with its bank for collection. The payee's bank has several choices in directing the presentment of the check to the payor's bank for payment. The payee's bank may (i) present the check for payment directly to the payor's bank, (ii) use a check clearing house, or (iii) use the services of an intermediate collecting bank, such as a Federal Reserve Bank or another correspondent bank.[35] Upon presentment, the payor's bank settles with the presenting bank (either the payee's bank or an intermediate collecting bank) for the amount of the check and debits the amount of the check from the account of the payor. In some cases, the payee's bank may also be the payor's bank, in which case the bank settles the check internally.

Functional similarities. There are a number of similarities between check and debit card payments. Both are payment instructions that result in a debit to the payor's account. Debit card payments are processed electronically, which is increasingly true for checks as well. For both check and debit card payments, merchants pay fees to banks, processors, or intermediaries to process the payments. Interbank settlement times are roughly similar for both payment types, with payments typically settling between banks on the same day, or one day after, the transaction is cleared. Settlement to the payee's account typically occurs within one or two days after the payee deposits the check or submits the debit card transaction to its bank.

Dissimilarities. As noted by many commenters, there are also important functional differences between the check and debit card payment systems. Some commenters argued that the debit card authorization, clearance, and settlement infrastructure has no direct corollary in the check system, and therefore, the comparison between check and debit card payment systems is inappropriate. The Board notes that EFTA Section 920(a)(4)(A) requires the Board to consider the functional similarities between checking transactions and electronic debit transactions. The Board recognizes that there are also important differences between the two types of transactions, including those discussed below.

Closed network versus open system. Debit card systems are ''closed'' systems (relative to check systems) in that both issuing and acquiring banks must join a network in order to accept and make payments. To accept debit cards, a merchant must select an acquirer and make decisions as to the network(s) in which it will participate. Issuers and acquirers that are members of a network must establish a relationship with that network and agree to abide by that network's rules. These network rules include network-defined chargeback and liability allocation rules, network-defined processing and dispute handling requirements, and network fee schedules.[36]

The merchant's choice with regard to routing a debit card transaction is limited to the set of networks whose cards the merchant accepts and that are also enabled to process a transaction on the customer's card. Until the effective date of Regulation II, merchant transaction routing may be further limited if the card issuer or a network has designated network routing preferences on cards that are enabled on multiple networks. These issuer or network routing preferences may result in a transaction being routed to a network that imposes a higher fee on the acquirer (and hence the merchant) than if the payment were processed on another available network.

By contrast, the check system is an open system in which, as a practical matter, a merchant simply needs a banking relationship through which it can collect checks in order to be able to accept check payments from its customers. The payee's bank (*i.e.*, the merchant's bank) need not join a network in order to collect a check. The rules governing checks are established by generally uniform state laws (*e.g.*, the Uniform Commercial Code), the Expedited Funds Availability Act, and the Board's Regulation CC (12 CFR part 229). These laws and rules provide a common legal framework for all check system participants. The participants, however, may vary certain parts of those rules, such as by arranging to accept or send electronic images in place of the paper checks.

The routing of checks for collection is not limited in the same way as the routing of electronic debit transactions. A payee's bank is free to use its least costly option for collecting a check. Intermediary collecting banks generally compete on the basis of price and funds availability. Typically price and availability vary within an intermediate collecting bank's service menu depending on the level of processing the collecting bank is required to do (*e.g.,* whether the payee's bank sends checks in paper form or via electronic image) and depending on the time of day the checks are received. If participants agree to send electronic images instead of the paper checks, the sending bank must have an agreement with the bank to which it is sending the image.

Payment authorization and guarantee. Payment authorization is an integral part of the processing of a transaction on a debit card network. As part of the payment authorization process, at the start of a transaction, a card issuer determines, among other things, whether the card is valid and whether there are sufficient funds to cover the payment. Several commenters (predominantly issuers and their trade associations) emphasized that part of the approval includes a ''payment guarantee,'' which refers to the issuers' agreement to fund a transaction authorized by the issuer regardless of whether customer funds are actually available at the time of the settlement of the transaction, subject to certain predefined chargeback rights. These commenters argued that the cost of this ''guarantee'' is a settlement or authorization cost incurred by issuers when they pay acquirers funds to settle the transaction and the cardholder has insufficient funds in the account to cover the transaction. Many merchant commenters, as well as issuers, stated that a debit card payment is provisional because the transaction may be charged back in certain circumstances, such as when it is later discovered that the transaction was not properly authorized by the customer.

By contrast, payment authorization is not an inherent part of the check collection process, and therefore the acceptance of a check by a merchant for payment does not include any automatic ''guarantee'' that the check

[34] *See* the discussion above providing an overview of the debit card industry for a description of the typical electronic debit transaction.

[35] Check clearing houses generally provide a facility or mechanism for banks to exchange checks for collection and return. The services provided by check clearing houses vary. Some merely provide the capability to exchange checks. Others provide the capability to exchange between banks in electronic form. A check clearing house generally also facilitates settlement of the checks exchanged through it.

[36] In addition to the network rules, the EFTA establishes the basic rights, liabilities, and responsibilities of consumers who use electronic fund transfer services and of financial institutions that offer these services.

will be honored and the payment will be made. Merchants, however, can purchase check verification and guarantee services from various third-party service providers. These service providers offer varying levels of check guarantee and verification services that are structured in various ways. In a check ''guarantee'' service, a check guarantee provider may verify whether currently outstanding returned checks are associated with that payor or the checking account, as well as verify open/closed account status and valid/invalid routing and account numbers, although the service generally cannot verify the amount of funds in the payor's account.[37] If a check meets all of the guarantee service's criteria (such as no known outstanding bad checks drawn by the customer), the service authorizes acceptance by the merchant and accepts the risk of loss on the check.[38] If a check is subsequently returned unpaid, the merchant will be reimbursed by the check guarantee provider for the value of the returned check.

The merchant pays a fee for the check guarantee service. Based on available information, the Board understands that a check guarantee provider typically charges the merchant a percentage of the face value of all checks that are accepted, in addition to various other service charges. The fee structures vary by the service provider and also can vary by merchant type and perceived risk, but one commenter asserted that check guarantee services typically charge between 1.0 percent and 1.5 percent of the face amount of the check and a 25 cent per-check fee, as well as a monthly customer service fee.[39]

Another service offered is a check ''verification'' product, which does not include a guarantee. A check verification service may use database searches similar to a check guarantee service to approve or decline any given check transaction.[40] The check verification service, however, leaves the risk of an unpaid check with the merchant.

Various fees are charged for check verification services, and the fee structure and levels can vary by service provider and merchant. Based on information available to the Board, check verification services may charge a per transaction fee of about 25 cents with a $20 monthly minimum and may charge a monthly service fee.[41] Unlike the check guarantee services, the check verification services do not appear to also charge a fee based on the amount of the check.

Payment of processing and collection costs. In the check system, payments clear at par. When a presenting bank (either the payee's bank or an intermediary collecting bank) presents a check to the payor's bank, the payor's bank pays, and the presenting bank receives, the face value of the check (*i.e.,* ''par clearing''). The presenting bank typically does not pay a fee to the payor's bank in order to receive settlement for the check. In addition, the payor's bank does not pay fees to the presenting bank to receive check presentment unless the payor's bank has agreed to pay a fee to receive presentment electronically.[42] The payee's bank and any subsequent collecting bank incur costs to collect the check. A payor's bank incurs costs to be able to accept presentment of the check, to determine whether or not to pay the check, and to remit funds for settlement. One commenter indicated that these costs exceeded debit card processing costs. The payor's bank recoups some or all of these costs through fees it charges to its customers or the interest it earns on the customer's balances.

By contrast, in the debit card system, the merchant does not receive the full face value of the debit transaction. The merchant pays fees to its acquirer in the form of a discount on the value of each transaction for the services rendered in processing the transaction. The acquirer, in turn, pays an interchange fee to the issuing bank on each debit transaction, which is deducted from the amount of the debit card transaction in the daily net settlement calculations. The acquirer and issuer both pay fees to the network to process electronic debit transactions. As discussed in more detail below, the issuer incurs costs to authorize, clear, and settle debit card transactions, as well as other costs related to debit card programs. Likewise, the acquirer incurs costs to send authorization and clearing messages, as well as for interbank settlement and crediting the merchant's account.

Payee deposit and availability. A debit card transaction is initiated in an electronic format and sent electronically to the acquiring bank; the proceeds are then deposited in the merchant's bank account electronically and made available to the merchant in accordance with the agreement between the merchant and its acquirer.

With respect to paper checks, the check must be physically accepted by the merchant, and deposited in its bank and then sent through the check clearing process to the payor's bank. The proceeds of a typical check generally must be made available to the payee within one or two business days of deposit.[43] Banks may, and sometimes do, make check deposits available for withdrawal faster than the law requires.

Some merchants may take advantage of ''remote deposit capture'' services from their bank wherein a paper check is scanned to create an electronic image that is sent to the merchant's bank electronically for deposit.[44] Remote deposit capture can decrease processing costs and improve customers' access to their deposits.[45] One commenter stated, however, that although some merchants may use remote deposit capture, many do not for a variety of reasons, including inconvenience, lack of eligibility, and cost.[46] Depository institutions charge a variety of fees for remote deposit capture, which may vary by depository institution and customer, but typically include a monthly service fee, a per-item fee, equipment lease/purchase fee, and various other fees. Some banks charge a monthly service fee and a fee for leasing the check scanner, although a customer may purchase a scanner.[47] A

[37] Based on information available to the Board, a check guarantee service requires extra steps at the time of a transaction and is not integrated into check processing the same way that the authorization and guarantee is integrated into the debit card transaction. Each check is entered into the system by inputting the check's MICR information on either a manual or automated basis. The merchant also enters customer identification information, such as the driver's license number. The guarantor then sends a return message to the merchant.

[38] The service provider may have exceptions to its guarantee and these exceptions may vary across service providers.

[39] *See, e.g.,* Comment letter from American Bankers Association, p. 7.

[40] Some check verification services also provide the merchant with a reason for a decline, so the merchant can make a more informed decision as to whether to accept the check on a customer-by-customer basis. *See http://www.ncms-inc.com/check-verification.aspx.*

[41] *See http://www.nobouncedchecks.com/SCAN-check.html*

[42] If both the presenting bank and the payor's bank have voluntarily joined a check clearing house, they may pay fees to the clearing house.

[43] *See* Regulation CC, 12 CFR part 229.

[44] Remote deposit capture was made practicable by the Check Clearing for the 21st Century Act (Check 21 Act), codified at 12 U.S.C. 5001 note.

[45] FFIEC, *Risk Management of Remote Deposit Capture* (Jan. 14, 2009). Certain risks, however, may be elevated with respect to remote deposit capture when compared to paper checks. For example, duplicate deposits, check alteration, and forged or missing indorsements may be more difficult to detect in remote deposit capture. *Id.* p.5.

[46] The elevated fraud risk may cause some banks to offer remote deposit capture only to creditworthy corporate customers with appropriate back office and control environments.

[47] FDIC Supervisory Insights (Summer 2009), *available at http://www.fdic.gov/regulations/examinations/supervisory/insights/sisum09/primer.html*

bank also may charge a per-item fee and a client set-up fee.[48]

Ability to reverse transactions. In the check system, there is a limited amount of time during which the payor's bank may return a check to the payee's bank. Specifically, the payor's bank must initiate the return by its ''midnight deadline,'' which is midnight of the banking day after the check was presented to the payor's bank for payment.[49] After the midnight deadline passes, the payor's bank can no longer return the payment through the check payment system, although it may have legal remedies, such as warranty claims, outside the check collection system.[50] Such legal remedies may be available, for example, if a payor notifies its bank that the check was altered or that the indorsements on the check were forged and does so reasonably promptly if the payor's bank provides statements to the payor.[51]

The debit card system provides a much longer time within which a transaction may be reversed through the payment card network, as opposed to warranty claims outside the payments system. Typically, the time period for initiating resolution of a disputed transaction through the network is around 60 days, but may be longer.[52] Payment card network rules permit certain disputed transactions to be resolved through the payment card network. Specifically, if a transaction was not authorized or is incorrect, payment card network rules generally provide that, depending on the facts and circumstances, (1) the transaction is guaranteed and the amount of the transaction must be absorbed as a fraud loss by the issuer; or (2) the transaction can be charged back to the merchant that accepted the electronic debit transaction.[53]

Acceptance by merchants and consumers. The use of debit cards by consumers is increasing, while the use of checks is decreasing.[54] The increase of electronic payments and the decline of checks can be attributed to technological and financial innovations that influence the payment choices of consumers and businesses. Commenters (predominantly issuers, networks, and consumers) provided other reasons for these trends, such as ease and speed of the debit card transaction and the fact that customers do not need to leave a physical copy of their names and addresses with the merchant after a debit card transaction, as they would with checks. Many issuer and network commenters asserted that merchants also are increasingly accepting debit cards because debit cards increase the amount of money consumers spend at the point of sale.

In addition, debit transactions are used in many situations that do not readily lend themselves to the use of checks, such as purchases made over the Internet or telephone, online recurring payments, vending machine transactions, self-service checkout purchases, and purchases at automated gas pumps. Also, foreign checks are not nearly as widely accepted by U.S. merchants as are debit cards issued by institutions in foreign countries. Consumers generally may use their debit cards at locations beyond their local area, regardless of the location of the card issuer.

As required by EFTA Section 920(a)(4)(A), the Board has taken the similarities between the functionality of electronic debit transactions and check transactions into account in establishing the standards for interchange fees under Section 920(a). The functional similarities between these two types of transactions can be understood only by considering the differences between them as well. Accordingly, the Board has also, in fulfilling the mandate in Section 920(a)(4)(A) and in the exercise of its discretion under Section 920(a), considered the differences between these two types of transactions in establishing standards for assessing whether interchange fees are reasonable and proportional to cost, as discussed below in the interchange fee standards section.

III. Summary of Proposal and Comments

A. Summary of Proposal

The Board requested comment on two alternative standards for determining whether the amount of an interchange transaction fee is reasonable and proportional to the cost incurred by the issuer with respect to the transaction. Under Alternative 1, an issuer could comply with the standard for interchange fees by calculating its allowable costs and ensuring that, unless it accepts the safe harbor as described below, it did not receive through any network any interchange fee in excess of the issuer's allowable costs. An issuer's allowable costs would be those costs that both are attributable to the issuer's role in authorization, clearance, and settlement of the transaction and vary with the number of transactions sent to an issuer within a calendar year (variable costs). The issuer's allowable costs incurred with respect to each transaction would be the sum of the allowable costs of all electronic debit transactions over a calendar year divided by the number of electronic debit transactions on which the issuer received or charged an interchange transaction fee in that year. The issuer-specific determination in Alternative 1 would be subject to a cap of 12 cents per transaction, regardless of the issuer's allowable cost calculation. Alternative 1 also would permit an issuer to comply with the regulatory standard for interchange fees by receiving or charging interchange fees that do not exceed the safe harbor amount of 7 cents per transaction, in which case the issuer would not need to determine its allowable costs.

Under Alternative 2, an issuer would comply with the standard for interchange fees as long as it does not receive or charge a fee above the cap, which would be set at an initial level of 12 cents per transaction. Each payment card network would have to set interchange fees such that issuers do not receive or charge any interchange fee in excess of the cap amount.

The Board requested comment on two general approaches to the fraud-prevention adjustment framework and asked several questions related to the two alternatives. One approach focused on implementation of major innovations that would likely result in substantial reductions in total, industry-wide fraud losses. The second approach focused on reasonably necessary steps for an issuer to maintain an effective fraud-prevention program, but would not prescribe specific technologies that must be employed as part of the program. The Board did not propose a specific amount as an adjustment to the amount of an interchange fee for an issuer's fraud-prevention costs.

As provided in EFTA Section 920, the Board proposed to exempt from the interchange fee restrictions issuers that, together with affiliates, have assets of less than $10 billion, and electronic

[48] *See, e.g., http://www.firstbankak.com/home/bs/remotedepositcapture/rdc_faq#15.*

[49] UCC 4–104(a)(10) (definition of ''midnight deadline'').

[50] UCC 4–301 and 4–302. The payor's bank may have a warranty claim for a forged indorsement or a material alteration, but, except in limited circumstances, would not have a claim based on insufficient funds or forged drawer's signature.

[51] UCC 4–406.

[52] The Board's Regulation E (implementing other provisions of the EFTA) states that a consumer has 60 days to dispute the transaction as unauthorized or incorrect from the date that the consumer's depository institution posts an electronic debit transaction to the consumer's account and sends a statement to the consumer. 12 CFR 205.11(b).

[53] Morrison & Foerster comment letter, p.10.

[54] Between 2006 and 2009, check transactions decreased by an average of 7.1% annually and debit card transactions increased by an average of 14.8% annually. *See* The 2010 Federal Reserve Payments Study.

debit transactions made using either debit cards issued under certain government-administered programs or certain reloadable prepaid cards.

In order to prevent circumvention or evasion of the limits on the amount of interchange fee that issuers may receive or charge with respect to electronic debit transactions, the Board proposed to prohibit an issuer from receiving net compensation from a network for debit card transactions, excluding interchange transaction fees. For example, the total amount of compensation provided by the network to the issuer, such as per-transaction rebates, incentives, or payments, could not exceed the total amount of fees paid by the issuer to the network.

The Board requested comment on two alternative approaches to implementing the statute's required rules that prohibit network exclusivity. Under Alternative A, an issuer or payment card network may not restrict the number of payment card networks over which an electronic debit transaction may be processed to fewer than two unaffiliated networks. Under this alternative, it would be sufficient for an issuer to issue a debit card that can be processed over one signature-based network and one PIN-based network, provided the networks are not affiliated. Under Alternative B, an issuer or payment card network may not restrict the number of payment card networks over which an electronic debit transaction may be processed to fewer than two unaffiliated networks for each method of authentication the cardholder may select. Under this alternative, an issuer that used both signature- and PIN-based authentication would have to enable its debit cards with two unaffiliated signature networks and two unaffiliated PIN networks.

The Board proposed to prohibit issuers and payment card networks from restricting the ability of a merchant to direct the routing of electronic debit transactions over any of the networks that an issuer has enabled to process the electronic debit transactions. For example, issuers and payment card networks may not set routing priorities that override a merchant's routing choice. The merchant's choice, however, would be limited to those networks enabled on a debit card. In keeping with EFTA Section 920, no exemption was provided from the network exclusivity and routing provisions for small issuers or for debit cards issued pursuant to certain government-administered programs or certain reloadable general-use prepaid cards.

B. Summary of Comments

The Board received comments on the proposed rule from approximately 11,570 commenters. Of these commenters, approximately 7,080 were depository institutions or represented depository institutions (including trade groups, outside counsel, and consultants), approximately 3,020 were merchants or represented merchants (including trade groups, outside counsel, and consultants), 9 were payment card networks, 23 were payment processors, approximately 1,340 were individual consumers or represented consumer groups, 35 were members of Congress or represented government agencies, and 54 were other interested parties. Approximately 8,300 of the commenters submitted one of 17 form letters, and one letter was submitted on behalf of over 1,600 merchant commenters.

1. Overview of Comments Received

Merchants, their trade groups, and some consumers supported the Board's proposal and argued that the proposal would lower the current interchange fees (the savings of which could be passed on to consumers as lower retail prices), increase transparency in the system, and increase competition by prohibiting exclusivity arrangements and enabling merchant-routing choice. By contrast, issuers, their trade groups, payment card networks, and some consumers opposed the proposal for a range of reasons, including concern that it would decrease revenue to issuing banks; result in increased cardholder fees or decreased availability of debit card services; reduce benefits to merchants when compared to other forms of payment; not provide a workable exemption for small issuers; and stifle innovation in the payment system, among other things.

Interchange fee standards. As between proposed Alternative 1 and proposed Alternative 2, merchants supported the more issuer-specific Alternative 1, arguing that issuer-specific fees would be a proxy for fees in a competitive issuer market place and that many covered issuers had per-transaction authorization, clearance, and settlement costs significantly below the proposed 12-cent cap. Likewise, merchants supported lowering the cap, some suggesting 4 cents (*i.e.,* the average per-transaction allowable costs across all transactions and issuers). Merchants argued that the proposed cap would allow some issuers to receive an interchange fee significantly higher than the proposed allowable costs of authorization, clearance, and settlement. Merchants overwhelmingly supported the Board's proposal to limit allowable costs to the variable costs of authorization, clearance, and settlement.

Issuers and networks urged the Board to adopt a more flexible approach to the standards by prescribing guidelines rather than a cap. Issuers typically favored the stand-alone cap in Alternative 2 over Alternative 1. Issuers suggested raising the safe harbor up to a level that permits a ''substantial majority'' of issuers to avail themselves of it. Issuers and networks supported raising the cap and safe harbor by expanding the allowable cost base to include such costs as the payment guarantee costs, fraud losses, network processing fees, customer service costs, the costs of rewards, fixed costs, and a return on investment.

Fraud-prevention adjustment. Although there was not agreement on which approach to pursue, commenters generally agreed that the Board should not mandate use of specific technologies. Merchants generally favored the paradigm-shifting approach.[55] By contrast, issuers of all sizes and payment card networks preferred the non-prescriptive approach that would allow issuers to have the flexibility to tailor their fraud-prevention activities to address most effectively the risks they faced and changing fraud patterns. Among commenters, there was a general consensus that the fraud-prevention adjustment should be effective at the same time as the interchange fee standard—either on July 21, 2011, or at a later date as suggested by some commenters. This issue is addressed in the companion notice adopting an interim final rule providing a fraud-prevention adjustment.[56]

Exemptions. Many issuers were concerned that the exemptions, and in particular the small-issuer exemption, would not be effective because all networks might not institute a two-tier fee structure or might not be able to implement such a structure by July 21, 2011. Additionally, issuers argued that, even if networks institute a two-tier fee structure, market forces and merchant routing choice would place downward pressure on interchange fees over time. Some issuers suggested the Board require that networks implement a two-tier fee structure. Other commenters suggested the Board initially monitor

[55] Merchants proposed a framework where an issuer receives an adjustment only if both the merchant and issuer use an eligible low-fraud technology (*i.e.,* one that reduces fraud losses below PIN debit levels).

[56] *See* companion interim final rule published separately in the **Federal Register.**

implementation of two-tier fee structures (perhaps by requiring networks to report to the Board on whether and how they have implemented an interchange fee differential).

Additionally, some issuers and prepaid industry commenters supported exempting Health Savings Account (HSA), Flexible Spending Account (FSA), Health Reimbursement Account (HRA), and Qualified Transportation Benefit (QT) cards from the interchange fee standard because they believe Congress did not intend to cover such cards. By contrast, some merchant groups argued that HSA, FSA, HRA, or QT cards do not qualify for the exemption for reloadable prepaid cards because such cards typically are not reloadable and the funds are held in employer accounts for the benefit of the employee or held by the cardholder him or herself.

Circumvention and evasion. Issuers generally agreed that circumvention or evasion should be determined on a case-by-case basis based on the facts and circumstances. Issuers believed that the proposed net compensation approach was overly broad because it considered compensation for ''debit card-related activities,'' rather than merely debit card transactions. Merchants, however, supported the consideration of compensation for non-debit card programs when the compensation is tied to debit card activities and chargebacks. Merchants also urged the Board to prevent forms of circumvention or evasion other than net compensation, such as increasing merchant network fees concurrently with decreases in issuer network fees and issuers' adjusting their products to avoid the final rule's interchange fee limits.

Network exclusivity and routing provisions. Issuer and network commenters preferred the proposal to require two unaffiliated networks for processing without regard to the method of authentication (Alternative A) because the commenters believed that Alternative A was most consistent with the statutory language. These commenters also argued that Alternative B, which would require at least two processing alternatives for each authentication method, would impose significant operational burdens with little consumer benefit. In particular, issuers and networks asserted that Alternative B, when coupled with merchant routing choice, would cause consumer confusion and/or decrease consumer benefits. Moreover, these commenters asserted that Alternative B could stifle innovation, as networks and issuers would have less incentive to develop new authentication technologies, which they would have to ensure could be implemented on at least two networks.

Merchants preferred Alternative B because they believed that Alternative B is consistent with the statute and would provide the most routing choice and the most market discipline on interchange and network fees. They noted that, under Alternative A, once the consumer has chosen the method of authentication, the merchant may not have a choice over which network to route the transaction. Merchants also believed that Alternative B would promote competition for signature debit, whether from PIN networks or other new entrants.

Several commenters suggested that the Board invoke EFTA Section 904(c) to exempt small issuers and prepaid cards from the network exclusivity and routing rules. Several prepaid issuers and a processor commented that, if a prepaid card is not enabled for both signature and PIN, such cards should not be required to have two signature networks, which would require substantial operational restructuring by various debit card participants to accomplish. Several issuers and prepaid industry group commenters stated that because of restricted functionality of HSA, FSA, HRA, and QT cards, such cards cannot be used on a PIN network without significant cost and operational changes, partly because satisfying certain Internal Revenue Service (IRS) requirements is currently possible only over signature networks. Additionally, commenters noted that enabling two signature networks may not be operationally practical at this time.

Scope. The Board received comments on the application of the proposed rule to three-party systems, ATM transactions, and emerging payment technologies. The majority of commenters recognized that three-party systems do not charge explicit interchange fees (rather, they charge a merchant discount), but were concerned that exempting three-party systems from the interchange fee standards would create an uneven playing field. Even commenters favoring coverage of three-party systems recognized, however, the circuitous routing that would result from subjecting these systems to the network exclusivity and routing provisions. A three-party system urged the Board to exempt such systems from the exclusivity and routing provisions.

With respect to ATM transactions, almost all comments received on the issue agreed that interchange fees on ATM transactions should not be covered because they flow from the issuer to the ATM operator. Although representatives of ATM operators supported applying the network exclusivity and routing rules to ATM transactions, issuers and networks opposed applying the network exclusivity and routing rules to ATM transactions because of different economic incentives for ATM transactions.

Issuer, network, and merchant commenters generally supported including emerging payments technologies under both the interchange fee standards and network exclusivity and routing rules so as to not create an unfair benefit for emerging payments networks. Some networks and issuers were concerned that applying the interchange fee restrictions and network exclusivity and routing provisions to emerging payment systems and means of authentication would stifle innovation, leading to reduced competition in the payments market. Other commenters suggested exempting emerging payment systems either during their pilot stage or for a specified period after they begin processing transactions. Other commenters were concerned that some ''emerging payments systems'' were not truly emerging, and therefore exempting them would create an uneven playing field.

2. Other General Comments

The Board received numerous comments that related to the proposed rule and EFTA Section 920 more generally. Numerous commenters opposed any government regulation of interchange fees (and prices generally) and stated that the free market should determine interchange fee levels. Some of these commenters argued that price and quality competition in the debit card market currently is strong, as well as transparent. These commenters believed that the government should impose price controls only where a market is monopolized or is otherwise demonstrably not functioning properly. Many of these commenters stressed the potential negative or unintended consequences of government price controls. Many commenters were further concerned that government price controls would prevent lower-cost providers from entering the market.

Numerous commenters requested that the Board either take more time to consider the issue or not adopt interchange fee restrictions. These commenters thought that further study and debate were needed because of the lack of study and debate by Congress prior to passing EFTA Section 920. Several commenters stated that the Board should have conducted hearings, debates, and impact analyses prior to proposing a rule, and encouraged the Board to further study the issue rather than adopting a final rule. One commenter did not believe the statute provided the Board with sufficiently intelligible standards to promulgate rules; rather, the commenter argued that several policy judgments remained for Congress to make. Other commenters did not believe that government intervention was required at this time. Rather, a few commenters believed that market competition from alternative payment forms (*e.g.,* mobile) would put downward pressure on interchange fees. Another commenter did not believe any interchange fee regulation would be necessary if there were no network-imposed restraints on merchant-customer interactions.[57]

3. Consultation with Other Agencies

EFTA Section 920(a)(4)(C) directs the Board to consult, as appropriate, with the Comptroller of the Currency, the Board of Directors of the Federal Deposit Insurance Corporation, the Director of the Office of Thrift Supervision, the National Credit Union Administration Board, the Administrator of Small Business Administration, and the Director of the Bureau of Consumer Financial Protection in the development of the interchange fee standards. Board staff consulted with the staff of these agencies throughout the rulemaking process on all aspects of the proposed rule including the interchange fee standards, the role of supervisors in determining compliance with these standards, the small-issuer exemption, the potential effects on consumers (both banked and unbanked) and merchants (both small and large), the two proposed approaches to a fraud-prevention adjustment, possible means of circumvention and evasion of the interchange fee standards (through network fees, compensation, change in account structure, or otherwise), and the possible impact of the prohibitions against network exclusivity arrangements and routing restrictions. Many of these agencies submitted formal comment letters, raising many of the same issues addressed by other commenters and discussed above.

IV. Summary of Final Rule

The Board has considered all comments received and has adopted Regulation II (Debit Card Interchange Fees and Routing).

[57] Other commenters suggested that the government supply payment card network services or that the Board reform money transmitter laws rather than regulating interchange fees.

For the interchange fee standard (set forth in § 235.3), the final rule adopts a modified version of proposed Alternative 2 (stand-alone cap) and provides that an issuer may not receive or charge an interchange transaction fee in excess of the sum of a 21-cent base component and 5 basis points of the transaction's value (the *ad valorem* component). The interchange fee standard is based on certain costs incurred by the issuer to effect an electronic debit transaction (''allowable costs'' or ''included costs''). The standard is based on data collected by the Board through its survey of covered issuers and reflects comments received from many parties. Issuer costs that are incurred to effect a transaction include the following costs related to authorization, clearance, and settlement of a transaction: network connectivity; software, hardware, equipment, and associated labor; network processing fees; and transaction monitoring. Several other costs that may be incurred in effecting a transaction, such as costs related to customer inquiries and the costs related to rewards programs, were not included for various reasons explained below. As noted above, an allowance for fraud losses is also included as an issuer cost incurred to effect a transaction. The Board did not include other costs not incurred to effect a particular transaction. Issuer costs that are not incurred in effecting a transaction include costs of corporate overhead (such as senior executive compensation); establishing the account relationship; card production and delivery; marketing; research and development; and network membership fees.

With respect to the fraud-prevention adjustment, the interim final rule (published separately in the **Federal Register**) adopts the more general, less prescriptive approach to standards regarding the eligibility of an issuer to receive the adjustment and sets the adjustment at 1 cent per transaction.

The final rule prohibits circumvention and evasion of the interchange fee standard, as well as an issuer receiving net compensation from a payment card network.

The final rule exempts from the interchange fee standard issuers that, together with affiliates, have assets less than $10 billion, debit cards issued pursuant to certain government-administered programs, and certain reloadable general-use prepaid cards. The final rule provides that the Board will publish a list annually of institutions above and below the small issuer exemption asset threshold to facilitate the identification of exempt institutions. In addition, the Board will annually collect and publish information regarding interchange fees collected by networks and received by exempt and non-exempt issuers and transactions to allow monitoring of the effectiveness of the exemption for small issuers.

With respect to network exclusivity, the final rule adopts Alternative A (*i.e.,* two unaffiliated networks for each transaction). The final rule also adopts the prohibitions on routing restrictions in the proposed rule.

The final rule's definition of ''payment card network'' excludes three-party systems because they are not payment card networks that route transactions within the terms of the statute. The final rule's definition of ''account'' excludes accounts established pursuant to *bona fide* trust arrangements.

Various modifications throughout the rule were made in response to comments and additional information available to the Board. The final rule and the modifications adopted are explained more fully below.

Section-By-Section Analysis

I. Authority and Purpose

The Board proposed to set forth the authority and purpose of Regulation II in § 235.1. The Board received no comments on proposed § 235.1. The Board, however, made two revisions to that section. First, the Board has revised the authority citation in proposed § 235.1(a) to reflect the section of the United States Code in which EFTA Section 920 is codified. Second, the Board has revised § 235.1(b) to state that Regulation II also implements standards for receiving a fraud-prevention adjustment.[58]

II. Definitions

A. Section 235.2(a)—Account

The Board proposed to define ''account'' to mean ''a transaction, savings, or other asset account (other than an occasional or incidental credit balance in a credit plan) established for any purpose and that is located in the United States.'' The proposed definition included both consumer and business accounts, as well as accounts held pursuant to a *bona fide* trust arrangement.

1. Summary of Comments

The Board received comments on its proposed definition of ''account'' related to the proposed inclusion of

[58] *See* the companion interim final rule published separately in the **Federal Register.**

business-purpose accounts and *bona fide* trust arrangements. A few commenters suggested that the Board exclude business accounts from the definition of ''account'' because the EFTA applies only to consumer accounts. These commenters contended that the Board should not infer congressional intent to include business debit cards from the parenthetical in EFTA Section 920(c)(2) (definition of ''debit card''), which states that the purpose of the account being debited is irrelevant. In support of this argument, one commenter noted that business accounts and consumer accounts differ both in the nature of purchases and the account structure (*e.g.,* business accounts may have multiple employees on a single account). Other commenters stated that the Board has not previously expanded the definition of ''account'' in its Regulation E; these commenters saw no reason to expand the term's scope at this time.[59]

A few commenters urged the Board to exclude *bona fide* trust arrangements from the definition of ''account'' because EFTA Section 903(2) excludes *bona fide* trusts from the definition of ''account.'' These commenters asserted that a *bona fide* trust arrangement is not a ''purpose'' of the account; therefore, the parenthetical in Section 920(c)(2) does not affect the EFTA's general exclusion of *bona fide* trust arrangements. Additionally, a few commenters expressed concern that including *bona fide* trust arrangements in the definition of ''account'' could result in different treatment of health savings accounts (HSAs) and other similar accounts that are structured as *bona fide* trusts (proposed to be subject to the fee standards) and those that are structured as reloadable, general-use prepaid cards (which would be exempt), which could, a commenter contended, create confusion for cards that access both types of HSAs and similar accounts. Finally, one commenter suggested that payroll cards be excluded from the definition of ''account.''

2. Analysis and Final Rule

EFTA Section 903(2) defines the term ''account'' to mean ''a demand deposit, savings, deposit, or other asset account (other than an occasional or incidental credit balance in an open credit plan as defined in section 103(i) of [the EFTA]), as described in regulations of the Board, established primarily for personal, family, or household purposes, but such term does not include an account held by a financial institution pursuant to a *bona fide* trust agreement.''[60] Section 920(c)(2) of the EFTA, however, defines the term ''debit card'' to mean a card that may be used ''to debit an asset account *(regardless of the purpose for which the account is established).* * * *''[61] Some commenters encouraged the Board to disregard the parenthetical in Section 920(c)(2) as inconsistent with Section 903(2)'s definition that applies throughout the EFTA. Doing so, however, would render the parenthetical mere surplusage, contrary to principles of statutory construction. The Board notes that Regulation E and this rule have different scopes because Section 920 has differing definitions and scope of coverage than the rest of the EFTA.

The Board interprets the parenthetical as removing the limitation in EFTA Section 903(2) that applies the ''account'' definition only to accounts used for consumer purposes. Thus, the Board has adopted its proposal to include accounts used for business purposes as ''accounts'' under Section 920. Accordingly, § 235.2(a) will continue to include transaction, savings, and other asset accounts, regardless of the purpose for which the account was established.This definition of ''account'' is limited to this part and does not extend to other rules that implement other provisions of the EFTA.

The Board agrees with the commenters that a trust is a type of account structure rather than a purpose (such as a business purpose or personal purpose) for which the account is held. Therefore, the Board has revised its proposed definition of ''account'' to exclude *bona fide* trusts, consistent with EFTA Section 903(2). For purposes of Regulation E, the Board has stated that whether an agreement is a *bona fide* trust agreement is a question of state or other applicable law.[62] The Board believes a similar approach is warranted under this rule. In general, *bona fide* agreements or arrangements are those done in good faith and not merely a device to evade a law.[63] Accordingly, the Board has revised the definition of ''account'' to exclude accounts held under *bona fide* trust agreements that are excluded from the definition of ''account'' under EFTA Section 903(2) and rules prescribed thereunder. The Board has added comment 2(a)–2 to clarify that whether a trust arrangement is *bona fide* is a matter of state or other applicable law and that accounts held under custodial agreements that qualify as trusts under the Internal Revenue Code are considered to be held in trust arrangements.

With respect to excluding HSAs and similar accounts, many commenters pointed to statements by members of Congress regarding their intent that cards used in connection with flexible spending accounts (FSAs), HSAs, and health reimbursement accounts (HRAs) not be subject to either the interchange fee standards or the network exclusivity and routing provisions.[64] Other commenters stated that HSAs and other similar accounts are not ''asset accounts,'' but are employer-sponsored and administered arrangements under which employees have an unsecured right to reimbursement for certain health-care-related purchases. The commenters explained that the employer in such arrangements is not required to keep funds for the reimbursements or to fund any specified account. Some commenters stated that HSAs and other similar accounts often are structured as *bona fide* trusts.

The language in EFTA Section 920 does not provide for any exceptions to the section's provisions based on the purpose for which an account was established; moreover, Section 920(c)(2) defines ''debit card'' as including cards that may be used to debit an account ''regardless of the purposes for which the account was established.'' Therefore, the Board does not believe that the statute exempts debit cards that access HSAs and other similar accounts solely because such accounts are established for health care-related purposes. Such cards and accounts, however, may be otherwise exempt from the Board's interchange fee standards if they qualify for another exemption. For example, as commenters noted, some HSAs and other similar accounts are structured as *bona fide* trust arrangements. Cards that access these HSAs would be exempt from the requirements of this part because they do not access ''accounts,'' as the term is defined in § 235.2(a). In addition, some cards that access HSAs and other similar accounts are structured like prepaid cards where funds are held in an omnibus account (which is considered an ''account'' under § 235.2(a)) and the employee may

[59] These commenters stated that the purpose of both the EFTA and the Dodd-Frank Act was consumer protection and that including business accounts under the scope of rule was contrary to the purpose behind EFTA Section 920.

[60] 15 U.S.C. 1693a(2).

[61] 15 U.S.C. 1693o–2(c)(2) (emphasis added).

[62] 12 CFR part 205, Supplement I, par. 2(b)(2). An account held under a custodial agreement that qualifies as a trust under the Internal Revenue Code is considered to be a trust agreement for purposes of Regulation E.

[63] *See, e.g.,* 44B Am. Jur. 2d. Interest and Usury § 14.

[64] *See* 156 Cong. Rec. S5927 (statements of Sen. Dodd) (2010); 156 Cong. Rec. H5225–26 (statements of Rep. Larson and Rep. Frank) (2010).

access the funds using a prepaid card. Provided these cards are structured in such a way that qualifies them for the reloadable, general-use prepaid card exemption in the statute, these cards used to access HSAs and similar accounts will be exempt from the rule's interchange fee standards. *See* discussion of § 235.5(c). These cards, however, will be subject to the rule's network exclusivity and routing provisions. *See* discussion of delayed effective date related to § 235.7.

Finally, the Board has adopted a definition of ''account'' that restricts the term to those accounts located in the United States. The Board received no comment on this part of the proposal. The Board, however, has made clarifying revisions to proposed comment 2(a)–2, now designated as 2(a)–3.

B. Section 235.2(b)—Acquirer

The Board proposed to define ''acquirer'' to mean ''a person that contracts directly or indirectly with a merchant to provide settlement for the merchant's electronic debit transactions over a payment card network.'' The Board proposed to exclude processors from the definition of ''acquirer.'' The Board received one comment on the proposed definition. This commenter supported a definition that limited acquirers to those entities that move money, and excluded processors, gateways, and independent sales organizations (''ISOs'').[65]

The Board has determined to adopt § 235.2(b) as proposed, but has made minor revisions to proposed comment 2(b)–1 to clarify that an acquirer settles for the transaction with the issuer, rather than with the network itself. Although the network calculates net settlement amounts for issuers and acquirers, settlement occurs between the issuer and acquirer. The Board also revised comment 2(b)–1 to clarify that in some circumstances, processors may be considered payment card networks. *See* discussion of §§ 235.2(m) and 235.2(o).

C. Section 235.2(c)—Affiliate

The Board proposed to define the term ''affiliate'' to mean ''any company that controls, is controlled by, or is under common control with another company.'' The proposed definition incorporated the definition of ''affiliate'' in EFTA Section 920(c)(1). The term ''affiliate'' is relevant for two purposes in this part: determining which issuers are considered ''small'' for purposes of the small-issuer exemption, and determining which prepaid cards are considered ''general-use.''[66] In proposed comment 2(f)–5, the Board explained that ''two or more merchants are affiliated if they are related by either common ownership or by common corporate control,'' and that, for purposes of this rule, the Board considered franchises to be under common corporate control ''if they are subject to a common set of corporate policies or practices under the terms of their franchise licenses.''

The Board received one comment suggesting that the Board use a consistent definition of ''affiliate'' for both the small issuer exemption and for general-use prepaid cards, expressing a preference for the control test set forth in the proposed definition of ''control.'' This commenter expressed concern that requiring only common ownership, and not common control, could result in the exclusion of closed-loop cards accepted at merchants that are not truly affiliated.

The Board has considered the comment and does not believe that ''affiliate'' is defined inconsistently in the small-issuer and general-use prepaid card contexts. First, proposed comment 2(f)–5 is consistent with the measure for ''control'' in proposed § 235.2(e)(3): ''[t]he power to exercise, directly or indirectly, a controlling influence over the management or policies of the company, as the Board determines.'' Second, the acceptance of a ''closed-loop'' card is not sufficient to cause merchants to be affiliated as the term is defined in this rule. For example, closed-loop cards may be accepted at a group of merchants that are not subject to a common controlling influence over their management and policies. Such cards are considered ''general-use prepaid cards'' (*see* discussion of § 235.2(i)) and would not be subject to the interchange fee standards if they satisfied the criteria for exemption in § 235.5(c). These closed-loop cards, however, would not be excluded from the network exclusivity and routing provisions as would cards accepted only at affiliated merchants. If the merchants were affiliated, the prepaid card would not be considered ''general-use'' and would be excluded from Section 920's definition of ''debit card.''

Both the EFTA's definition and the proposed definition of ''affiliate'' were silent as to whether affiliated companies included companies located outside the United States. One commenter suggested that the term be limited to U.S. affiliates. The statutory language is silent on this point, and the Board believes it is appropriate to consider the total resources available to an issuer when determining whether it is ''small.''[67] Accordingly, the Board has adopted the definition of ''affiliate'' in proposed § 235.2(c). The Board has added language to comment 2(c)–1 to clarify that the term ''affiliate'' includes any U.S. and foreign affiliate.

D. Section 235.2(d)—Cardholder

The Board proposed to define ''cardholder'' to mean ''the person to whom a debit card is issued.'' The Board did not receive any comments on the proposed definition of ''cardholder'' and has adopted § 235.2(d) as proposed.

E. Section 235.2(e)—Control

The Board proposed to define ''control'' as it is defined in existing Board regulations.[68] The Board did not receive any comments specifically on the proposed definition of ''control,'' although the Board received comments on the definition of ''affiliate,'' discussed above. The Board has adopted § 235.2(e) as proposed.

F. Section 235.2(f)—Debit card

1. Summary of Proposal and Comments

EFTA Section 920(c)(2) defines the term ''debit card'' as ''any card, or other payment code or device, issued or approved for use through a payment card network to debit an asset account (regardless of the purpose for which the account is established), whether authorization is based on signature, PIN,

[65] A gateway is an entity that connects multiple networks. Merchants may sign-up with a gateway to enable them to accept debit cards and the gateway acts as a switch for the merchants to access multiple networks. ISOs provide merchant- and cardholder-acquisition services, including deploying point-of-sale (''POS'') terminals.

[66] Under EFTA Section 920(a)(6), an issuer is considered ''small'' if it, together with its affiliates, has assets of less than $10 billion. 15 U.S.C. 1693o–2(a)(6). EFTA Section 920 incorporates the definition of ''general-use prepaid cards'' from the Credit CARD Act of 2009, which defines ''general-use prepaid cards'' as those cards that, among other things, are redeemable at multiple, unaffiliated merchants. 15 U.S.C. 1693l–1(a)(2)(A).

[67] The Board considered the assets of both U.S. and non-U.S. affiliates when determining which issuers to survey. The Board computed assets using the Consolidated Financial Statements for Bank Holding Companies (FR Y–9C; OMB No. 7100–0128), the Consolidated Reports of Condition and Income (Call Reports) for independent commercial banks (FFIEC 031 & 041; OMB No. 7100–0036) and for U.S. branches and agencies of foreign banks (FFIEC 002; OMB No. 7100–0032), the Thrift Financial Reports (OTS 1313; OMB No. 1550–0023) for thrift holding companies and thrift institutions, and the Credit Union Reports of Condition and Income (NCUA 5300/5300S; OMB No. 3133–0004) for credit unions. The ownership structure of banking organizations was established using the FFIEC's National Information Center structure database.

[68] *See* Regulation Y (Bank Holding Companies and Change in Bank Control), 12 CFR 225.2(e) and Regulation P (Privacy of Consumer Financial Information), 12 CFR 216.3(g).

or other means'' and as including general-use prepaid cards (as defined in EFTA Section 915(a)(2)(A)) but excluding paper checks. The proposed definition incorporated the statutory definition with some clarifying changes.

The proposed definition of ''debit card'' had three parts. First, the proposed definition included ''any card, or other payment code or device, issued or approved for use through a payment card network to debit an account, regardless of whether authorization is based on signature, personal identification number (PIN), or other means, and regardless of whether the issuer holds the account.'' Second, the proposed definition included ''any general-use prepaid card.''[69] Finally, the proposed definition excluded (1) any cards, or other payment codes or devices, that are redeemable only at a single merchant or an affiliated group of merchants; (2) checks, drafts, or similar paper instruments, or electronic representations thereof; and (3) account numbers when used to initiate an ACH transaction to debit a person's account. Additionally, the proposed commentary explained that the term ''debit card'' included deferred debit cards (where the transaction is posted to the cardholder's account but not debited for a specified period of time) and decoupled debit cards (where the issuer does not hold the account being debited). The Board received several comments about which cards, or other payment codes or devices, should or should not be considered debit cards under this part. Many of these comments related to the proposed commentary and are summarized and analyzed below.

2. Card, or Other Payment Code or Device

Proposed comment 2(f)–1 explained that the phrase ''card, or other payment code or device'' includes cards, codes, and devices in physical and non-physical (*i.e.,* electronic) form. The Board received three comments regarding which ''payment codes'' should be included or excluded from the definition of debit card. One issuer requested that the Board clarify that ''payment code'' does not include one-time passwords (or other numbers) generated for purposes of authenticating the cardholder, provided such passwords/numbers are not used in lieu of an account number. The Board does not believe that a one-time password or other number used for purposes of authentication and in addition to the card, or other payment code or device, is itself a ''payment code or device.'' In that case, the passwords/numbers function like PINs or signatures. Therefore, the Board has revised proposed comment 2(f)–1 to clarify that cards, or other payment codes or devices, are not debit cards if used for purposes of authenticating the cardholder and used in addition to a card, or other payment code or device.

One commenter requested that the Board exclude account numbers from the definition of debit card if the account numbers are used to access underlying funds held in a pooled account, but where the underlying funds do not move (*i.e.,* the transaction is a general ledger entry). By contrast, another commenter suggested that such use of account numbers be included in the definition of debit card because the account numbers are used to debit ''asset accounts.'' As discussed in greater detail below in relation to § 235.2(m), account numbers, or other payment codes or devices, that are used only to initiate general ledger transactions are not issued or approved for use through a payment card network because the entity receiving the transaction information and data is not routing the information to an unaffiliated entity. Accordingly, even if the account number is used to debit an ''account,'' the account number is not a debit card because it was not issued or approved for use through a payment card network.

3. Deferred Debit Cards

Proposed comment 2(f)–2 explained that deferred debit cards are included within the proposed definition of ''debit card.'' Like other debit cards, deferred debit cards can be used to initiate direct debits to the cardholder's account, but the issuer may not debit the funds until after a pre-arranged period of time (*e.g.,* two weeks) after posting the transaction to the cardholder's account. During this time period, the funds typically are unavailable to the cardholder for other purposes, although the cardholder may accrue interest on the funds until the issuer debits the account.

The Board did not receive any comments opposed to including deferred debit cards within its definition of ''debit card,'' but did receive a few comments on the proposed deferral time period, as well as comments seeking clarification as to which cards qualified as deferred debit cards. Two commenters suggested that the Board exclude from the definition of ''debit card'' any cards where settlement to the cardholder's account is deferred 14 days or more after the transaction because a 2003 network/merchant settlement treats such cards as charge or credit cards.[70] The Board has considered these comments and determined not to revise proposed comment 2(f)–2 to limit deferred debit cards to those cards where the issuer settles the transaction with the cardholder within 14 days of the transaction.

The fact that the cardholder initiates transactions that debit an account, as the term is defined in § 235.2(a), is the characteristic of deferred debit cards that distinguishes such cards from charge cards and credit cards for purposes of EFTA Section 920. In the case of charge cards and credit cards, the transactions post to lines of credit rather than accounts. Excluding cards that debit an account based on the time period within which the account is debited creates significant potential for evasion and circumvention of Section 920's provisions, as implemented by this rule. The Board notes that the EFTA and Regulation E limit the ability of an issuer to structure deferred debit cards to be more like charge cards or credit cards. The EFTA and Regulation E prohibit any person from conditioning the extension of credit to a consumer on such consumer's repayment by means of preauthorized electronic fund transfers.[71]

Two commenters requested clarification as to the types of products that qualify as ''deferred debit cards,'' particularly as to the deferral period. Deferred debit cards may have different deferral periods specified in the cardholder agreement; however, the deferral period and when the hold is applied are not necessary to determining whether a card is a ''debit card'' as defined in § 235.2(f). The Board has revised proposed comment 2(f)–2 to clarify that, in the case of deferred debit cards, the issuer-cardholder agreement governs the period of time for which the issuer will hold the funds in the cardholder's account after the debit card transaction and before debiting the cardholder's account.

The Board is not at this time providing more examples of debit cards that are considered ''deferred debit cards.'' The deferred debit cards of which the Board is aware use the framework described in comment 2(f)–2. The Board is removing the proposed examples regarding the timing of merchants sending electronic debit transactions to acquirers as unnecessary

[69] See discussion of § 235.2(i) for a discussion of the term ''general-use prepaid card.'' Comment 2(i)–7 explains that store cards are not included in the term ''debit card'' under this rule.

[70] *See* MasterCard comment letter, Appendix C.

[71] 15 U.S.C. 1693k(1); 12 CFR 205.10(e)(1).

to describe whether a debit card is a deferred debit card.

4. Decoupled Debit Cards

Proposed comment 2(f)–3 explained that the term ''debit card'' included decoupled debit cards. As explained in the proposed comment, decoupled debit cards are issued by an entity other than the entity holding the cardholder's account, and the issuer settles for the transaction with the acquirer and with the cardholder through an ACH transaction that debits the cardholder's account.

The Board received a few comments opposed to including decoupled debit cards under the rule's definition of ''debit card,'' and no comments explicitly supporting their inclusion. One commenter contended that including decoupled debit cards within the definition of ''debit cards'' is inconsistent with the exclusion of ACH transactions, because decoupled debit cards are used to initiate ACH debits to the account. Other commenters suggested the Board exclude decoupled debit cards issued by merchants because including them would be inconsistent with statutory intent to reduce merchant debit card expense. One commenter requested clarification as to the types of products that qualified as ''decoupled debit cards.'' Another commenter stated that treating the location of the asset account as irrelevant for defining ''debit card,'' but relevant for purposes of the small issuer exemption, is inconsistent.

The Board has considered the comments received and has determined to include decoupled debit cards that process transactions over payment card networks within the definition of ''debit card'' as proposed with minor clarifying revisions to the commentary. Cardholders use decoupled debit cards to initiate debits to their accounts. The Board is aware of two types of decoupled debit card transactions. The first type, described in proposed comment 2(f)–3, is where the transaction is processed over a payment card network, and the issuer settles the transaction with the acquirer using the normal network procedures, but settles with the cardholder via an ACH transaction. In this type of transaction, the cardholder preauthorizes the ACH transaction, and the issuer initiates the ACH transaction shortly after authorizing the transaction and settling for the transaction with the acquirer through the payment card network. The second type is a transaction initiated with a card issued by the merchant, and the merchant's processor initiates an ACH debit to the cardholder's account. This second type of decoupled debit card transaction is processed solely through an ACH operator and not through a payment card network. Decoupled debit cards that are used to initiate ACH transactions at the point of sale that are not processed over a payment card network for any part of the transaction (*i.e.,* the second type) are not debit cards under this part.

By contrast, if the card holder initiates a decoupled debit card transaction, part of which is processed over a payment card network, the decoupled debit card is a debit card for purposes of this part. Unlike decoupled debit cards that directly initiate ACH transactions, merchants cannot distinguish these decoupled debit cards from other debit card transactions that would be subject to interchange fees and network rules. Accordingly, the Board does not believe it is inconsistent to include in the definition of ''debit card'' decoupled debit cards that initiate transactions processed over payment card networks, while simultaneously excluding ACH transactions initiated at the point of sale.

Inclusion of decoupled debit cards that initiate transactions processed over payment card networks is consistent with the provisions in EFTA Section 920, which are intended to reduce merchant costs of accepting debit cards, even if merchants are the issuers of such cards (although the Board believes that transactions initiated with merchant-issued decoupled debit cards generally would be processed through the ACH). Section 920 is designed to achieve cost-reduction through limitations on interchange transaction fees and prohibitions on network exclusivity and merchant routing restrictions, rather than by excluding certain cards that may be lower-cost to merchant issuers.

In addition, any inconsistency between the requirement that an issuer hold the account in order to be eligible for the small issuer exemption and the lack of relevance for purposes of defining ''debit card'' is statutory. Section 920(c)(9) defines the term ''issuer'' for general purposes of the section as the person who issues the debit card, or agent of such person. For purposes of the small issuer exemption, Section 920(a)(6) limits the term ''issuer'' to the entity holding the cardholder's account.

A few commenters requested that the Board provide more specific examples of decoupled debit cards. The decoupled debit cards of which the Board is aware use the framework described in comment 2(f)–3.

5. Hybrid Cards and Virtual Wallets

The Board requested comment on whether additional guidance was necessary to clarify whether products with ''credit-like'' features are considered debit cards for purposes of this rule. The Board noted that if an issuer offers a product that allows the cardholder to choose at the time of the transaction when the cardholder's account will be debited for the transaction, any attempt to classify such a product as a credit card would be limited by the prohibition against compulsory use under the EFTA and Regulation E.

A few issuers, networks, and processors suggested that the Board exclude cards used to access or obtain payment from a credit account (*i.e.,* cards subject to the Truth in Lending Act and Regulation Z), regardless of whether the consumer chooses to repay the credit account using an asset account. These commenters indicated that such cards could include cards that enable the customer to pre-designate the types of transactions to be paid from a preauthorized debit to the asset account more frequently than the monthly billing cycle. Additionally, these commenters urged the Board to distinguish between credit cards that require repayment using preauthorized transfers and cards that permit repayment using preauthorized transfers, stating that the latter would not run afoul of the prohibition against compulsory use.

The Board is aware of two general categories of cards with both credit- and debit-like features (so-called ''hybrid cards''). The first category includes those cards, or other payment codes or devices, used to initiate transactions that access and post to credit accounts, but that the cardholder repays through a preauthorized debit to an asset account. The second category of hybrid cards includes those cards, or other payment codes or devices, that may be used to access multiple accounts (including both credit and other accounts) (often referred to as ''virtual wallets'' or ''mobile wallets''). Cards used to initiate transactions that access and post to credit accounts are not considered debit cards for purposes of this rule because such cards are not used to debit an account, as the term is defined in § 235.2(a). Further, cards that access credit accounts are not considered debit cards regardless of whether the cardholder pays the credit balance through preauthorized transfers from an account.

For example, a card may be used to initiate transactions that access and post to credit accounts, but the issuer enables the cardholder to preselect transactions for immediate repayment (or repayment prior to the monthly billing cycle) from the cardholder's asset account. The issuer, then, may initiate a preauthorized ACH debit to the cardholder's account in the amount of the preselected transactions. Such products, due to their classification as credit cards, may not condition the extension of credit on a consumer's repayment by means of preauthorized electronic fund transfers.[72] An issuer may permit a cardholder to opt in to preauthorization of some or all transactions made using the credit or charge card. The Board, however, recognizes the potential for issuers to restructure existing debit cards like these hybrid cards in order to circumvent and evade this rule. Therefore, such cards will be considered debit cards for purposes of this part if the issuer conditions a cardholder's ability to preselect transactions for early repayment on the cardholder maintaining an asset account at the issuer. *See* comment 2(f)–4.ii.

The Board has added comment 2(f)–4.i to clarify that hybrid cards that permit some transactions to be posted directly to an account as defined in § 235.2(a), rather than posting first to a credit account, are considered debit cards for purposes of this part. Only those transactions that post directly to the account, however, will be considered electronic debit transactions.

The second category of hybrid cards consists of virtual or mobile wallets, which store several different virtual cards that each accesses a different account. The Board has added comment 2(f)–5 to clarify the treatment of virtual wallets under this rule. As explained in the commentary, the payment codes or devices (''virtual cards'') stored in a virtual wallet may each access a different account, which may be credit accounts or accounts as defined in § 235.2(a). For example, a mobile phone may store credentials (the payment codes) for accessing four different accounts or lines of credit, which the cardholder can view on the phone's screen. At the point of sale, the cardholder selects which virtual card to use (*e.g.,* by selecting the icon for the issuer whose card the cardholder wishes to use). If at least one virtual card within the virtual wallet may be used to debit an account under § 235.2(a), then that virtual card is a debit card for purposes of this part, notwithstanding the fact that other cards in the virtual wallet may not be debit cards for purposes of this part. The entire virtual wallet is not considered to be the card, or other payment code or device.

6. Checks and Similar Instruments

One commenter supported the Board's exclusion of electronic images and representations of checks and similar instruments. The Board has retained the exclusion in § 235.2(f), as well as the exclusions for checks, drafts, and similar instruments.

7. ACH Transactions

The Board received a few comments on its proposed exclusion of account numbers when used to initiate an automated clearinghouse (ACH) transaction to debit an account. One commenter thought the Board should consider account numbers used to initiate ACH transactions to be ''payment codes'' in order to create a level playing field between debit cards and ACH transactions. One issuer suggested that the Board broaden the ACH exclusion to include intrabank transfers initiated using an account number.

The Board has considered these comments and has determined that account numbers used to initiate ACH transactions should be excluded from the definition of ''debit card.'' An ACH transaction is processed through an ACH operator, such as EPN or FedACH®. As explained below in relation to § 235.2(m), ACH operators are not ''payment card networks'' under EFTA Section 920. Therefore, an account number used to initiate an ACH transaction is not ''issued or approved'' for use through a payment card network and, therefore, is not a ''debit card'' for purposes of this rule. Payment information used to initiate intrabank transactions using an account number are not processed through either ACH operators or payment card networks and, therefore, are not debit cards under EFTA Section 920.

Even if ACH transactions were subject to this part, they already would comply with the provisions of this part. Currently, ACH operators do not establish, and receiving and originating banks do not charge, fees that are comparable to interchange fees. If a merchant were to use the ACH to clear its customers' purchase transactions, its bank chooses the ACH operator through which it will originate transactions.

The Board believes retaining an explicit exclusion from the definition of ''debit card'' in § 235.2(f) is unnecessary but has retained commentary to explain the exclusion (proposed comment 2(f)–7 is now designated comment 2(f)–9). This comment is useful in distinguishing decoupled debit cards (discussed above) from cardholder-initiated ACH transactions. The Board has made minor revisions to the proposed comment to clarify that an account number used to initiate an ACH transaction is not a debit card where the person initiating the ACH transaction is the same person whose account is being debited and to clarify the distinction between decoupled debit cards and cardholder-initiated ACH transactions.

G. Section 235.2(g)—Designated Automated Teller Machine (ATM) Network

Section 235.2(g) of the proposed rule incorporated the statutory definition (EFTA Section 920(a)(7)(C)) of ''designated automated teller machine network.'' The proposed definition included (1) all ATMs identified in the name of the issuer; or (2) any network of ATMs identified by the issuer that provides reasonable and convenient access to the issuer's customers. The Board did not receive any comments on the proposed definition, and § 235.2(g) is adopted as proposed, with the exception of minor technical changes.

The Board also proposed comment 2(g)–1 to clarify the meaning of ''reasonable and convenient access,'' as that term is used in § 235.2(g)(2). Under proposed comment 2(g)–1, an issuer would provide reasonable and convenient access, for example, if, for each person to whom a card is issued, the issuer provided access to one ATM within the metropolitan statistical area (MSA) in which the last known address of the person to whom the card is issued is located or, if the address is not known, where the card was first purchased or issued.

Several consumer group commenters recommended that the Board delete proposed comment 2(g)–1. These commenters noted that certain MSAs are very large and that requiring only one ATM within the same MSA as a cardholder's last known address (or, if unknown, the card's place of purchase or issuance) could potentially be burdensome for certain cardholders when an MSA covers a sizeable area. Another industry commenter suggested that for a payroll card, an ATM available at a cardholder's workplace should be considered to provide reasonable and convenient access.

As discussed in the proposal, the proposed comment was intended to ensure that cardholders do not have to travel a substantial distance for ATM access. The Board agrees that certain MSAs are very large and, for those MSAs, providing access to one ATM may not be reasonable or convenient for

[72] 15 U.S.C. 1693k(1); 12 CFR 205.10(e)(1).

many cardholders. Moreover, a network that provides ATM access that is reasonable and convenient to a cardholder's home or work address also should be considered to provide reasonable and convenient for purposes of § 235.2(g)(2). Accordingly, the Board has adopted a revised comment 2(g)–1 to provide that whether a network provides reasonable and convenient access depends on the facts and circumstances, including the distance between ATMs in the designated network and each cardholder's last known home or work address or, if a home or work address is not known, where the card was first issued.

H. Section 235.2(h)—Electronic Debit Transaction

EFTA Section 920(c)(5) defines ''electronic debit transaction'' as ''a transaction in which a person uses a debit card.'' The Board proposed to define ''electronic debit transaction'' to mean ''the use of a debit card by a person as a form of payment in the United States'' in order to incorporate the concept of ''payment'' already included in the statutory definition of ''payment card network'' and to limit application of the rule to domestic transactions.[73] As discussed above in relation to § 235.2(f), some debit cards may be used to access both accounts as defined in § 235.2(a) and lines of credit. The Board has revised the definition of ''electronic debit transaction'' to specify that a transaction is an electronic debit transaction only if the debit card is used to debit an account. The Board has added comment 2(h)–1 to clarify that the account debited could be, for example, the cardholder's asset account or the omnibus account that holds the funds used to settle prepaid card transactions.

A few commenters requested clarification on whether the rule would apply to Internet transactions. Section 235.2(h) does not limit the term ''electronic debit transaction'' to transactions initiated at brick-and-mortar store locations; the term also includes purchases made online or by telephone or mail. Accordingly, electronic debit card transactions initiated over the Internet are within the scope of this part.

One commenter suggested that the definition of ''electronic debit transaction'' not be limited to use as a ''form of payment'' because many POS networks also function as ATM networks. This commenter suggested the Board expand the definition of ''electronic debit transaction'' to include ATM transactions. For the reasons discussed below in relation to § 235.2(m), the Board is not revising its proposed definition of ''electronic debit transaction'' to include ATM transactions, but is adding comment 2(h)–2 to clarify that payment may be made in exchange for goods or services, as a charitable contribution, to satisfy an obligation, or for other purposes.

As explained in the proposed commentary, the term would include use of a debit card for subsequent transactions connected with the initial transaction and would include cash withdrawal at the point of sale (provided the cardholder has also made a purchase). The Board has revised proposed comment 2(h)–1 (now designated as comment 2(h)–3) to clarify that a transaction, such as a return transaction, is an electronic debit transaction if the transaction results in a debit to the merchant's account and a credit to the cardholder's account.

The Board has also adopted its proposed comments clarifying that ''electronic debit transaction'' includes cash withdrawals at the point of sale (comment 2(h)–4) and that transactions using a debit card at a merchant located outside of the United States are not subject to this rule (comment 2(h)–5), with minor conforming and clarifying changes.

I. Section 235.2(i)—General-Use Prepaid Card

EFTA Section 920(c)(2) defines the term ''debit card'' as including ''a general-use prepaid card, as that term is defined in section 915(a)(2)(A).'' EFTA Section 915(a)(2)(A), in turn, defines ''general-use prepaid card'' as those cards, or other payment codes or devices, that (1) are redeemable at multiple, unaffiliated merchants or service providers, or ATMs; (2) issued in a requested amount, whether or not such amount may be increased or reloaded; (3) purchased on a prepaid basis; and (4) honored upon presentation for goods and services.[74] The Board proposed to adopt the statutory definition with some revisions. The Board proposed to define ''general-use prepaid card'' to mean a card, or other payment code or device that is (1) issued on a prepaid basis in a specified amount, whether or not that amount may be increased or reloaded, in exchange for payment; and (2) redeemable upon presentation at multiple, unaffiliated merchants or service providers for goods or services, or usable at ATMs. The proposed definition included cards that a group of unaffiliated merchants agrees to accept via the rules of a payment card network and cards that a select group of unaffiliated merchants agrees to accept, whether issued by a program manager, financial institution, or network (referred to as ''selective authorization cards''). The Board requested comment on whether selective authorization cards that do not carry a network brand should be included within the definition of ''general-use prepaid card.'' The Board received several comments on its proposed definition, primarily concerning the exclusions from the definition of ''general-use prepaid card'' and selective authorization cards.

For the reasons discussed in relation to §§ 235.2(h), (l), and (m), ATM transactions are not electronic debit transactions for purposes of this rule because cash withdrawals are not ''payments.'' Accordingly, the Board has revised the proposed definition to eliminate the unnecessary reference to prepaid cards' usability at ATMs.

1. Credit CARD Act Exclusions

Several commenters urged the Board to incorporate the exclusions to the definition of ''general-use prepaid card'' in the Credit CARD Act of 2009 (CARD Act) into the definition of ''general-use prepaid card.'' These exclusions include telephone cards; cards not marketed or labeled as gift cards; loyalty, award, or promotional gift cards; cards not marketed to the general public; cards issued only in paper form; and cards redeemable solely for admission to events or venues (or purchases of goods and services at the events or venues) at a particular location or affiliated locations.[75]

The proposed definition generally tracked the definition of ''general-use prepaid card,'' set forth above, in EFTA Section 915(a)(2)(A). EFTA Section 915(a)(2)(D) enumerates exclusions from the term ''general-use prepaid card'' as defined in Section 915(a)(2)(A). In light of the explicit reference to Section 915(a)(2)(A) and the absence of a reference to Section 915(a)(2)(D), the Board has determined not to exclude the CARD Act's exclusions from the definition of ''general-use prepaid card.''[76] Moreover, one of the

[73] EFTA Section 920(c)(11) defines ''payment card network,'' in part, as an entity ''that a person uses in order to accept as a form of payment a brand of debit card.'' See discussion related to § 235.2(q) (definition of ''United States'') regarding the application of the rule to only domestic transactions.

[74] 15 U.S.C. 1693l–1.

[75] 15 U.S.C. 1693l–1(a)(2)(D).

[76] The Board also notes that EFTA Section 920(c)(2) does not refer to Section 915(a)(2) more broadly.

enumerated exclusions in Section 920(a)(7)(A)(ii) is for cards ''reloadable and not marketed or labeled as a gift card or gift certificate.'' If such cards were already excluded from Section 920's definition of ''debit card'' by virtue of their exclusion from the term ''general-use prepaid card'' in the CARD Act, Section 920(a)(7)(A)(ii)'s express exemption of such cards would be superfluous. Therefore, the Board is adopting the definition of ''general-use prepaid card'' as proposed (with the exception of removing the unnecessary ATM reference). The cards excluded from the CARD Act's definition of general-use prepaid card may otherwise be excluded from the definition of ''debit card'' (*i.e.,* if they are not redeemable at multiple, unaffiliated merchants) or exempt from the interchange fee standards (*e.g.,* if they are reloadable).

2. Selective Authorization Cards

Several commenters requested that the Board exclude ''selective authorization cards'' from the definition of ''general-use prepaid cards.'' These commenters asserted that selective authorization cards more closely resemble cards that are accepted at only one merchant or affiliated merchants. Many of these commenters argued that selective authorization cards provide consumers with more shopping options than cards accepted at only one merchant, thus providing the consumer with more protection in the event of a merchant's bankruptcy. Some commenters suggested excluding only those cards that do not carry a network brand.

The Board has considered the comments and has determined to include selective authorization cards within the definition of ''general-use prepaid card.'' Selective authorization cards provide benefits to the merchants or business districts wishing to promote their business, as well as to consumers wishing to mitigate their exposure in the event of a merchant's bankruptcy. Nonetheless, one characteristic of general-use prepaid cards is that they are redeemable at multiple, unaffiliated merchants. Two or more merchants are affiliated if they are related either by common ownership or by common corporate control.[77] Two or more merchants are not ''affiliated'' within the rule's meaning of the term merely because they agree to accept the same selective authorization card. Therefore, selective authorization cards are redeemable at multiple, unaffiliated merchants. This is true regardless of whether or not the card carries the mark, logo, or brand of a network. In fact, the Board understands that transactions using some selective authorization cards that do not display a network brand logo on the card itself are processed over ''brands'' of payment card networks, including the major networks or smaller networks. Accordingly, there is not a basis for distinguishing network-branded selective authorization cards from non-network branded selective authorization cards.[78] Selective authorization cards, however, like other general-use prepaid cards, may not be subject to certain provisions of this part. For example, if the selective authorization card satisfies the requirements in § 235.5(c) (*e.g.,* the card is reloadable and not marketed as a gift card), the card would not be subject to the interchange fee standards.

Proposed comment 2(i)–2 explained that ''mall cards'' are considered general-use prepaid cards because the cards are accepted at multiple, unaffiliated merchants. The Board is aware, however, that selective authorization cards are used outside the shopping mall environment. Selected groups of merchants within the same business district or located near a university also may accept selective authorization cards. Accordingly, the Board has expanded the scope of the proposed comment to include selective authorization cards used in all contexts.

3. Other Comments

The Board received one comment requesting clarification as to whether ''gift cards'' are included under the definition of ''general-use prepaid cards.'' Prepaid gift cards that are redeemable at a single merchant or a group of affiliated merchants are not included within the definition of ''general-use prepaid cards.'' By contrast, if the gift card is redeemable at multiple, unaffiliated merchants, then the gift card is a ''general-use prepaid card.'' Gift cards that are general-use prepaid cards are not exempt from the interchange fee standards.

J. Section 235.2(j)—Interchange Transaction Fee

1. Summary of Proposal and Comments

EFTA Section 920(c)(8) defines ''interchange transaction fee'' as ''any fee established, charged, or received by a payment card network for the purpose of compensating an issuer for its involvement in an electronic debit transaction.'' The Board proposed to define ''interchange transaction fee'' to mean ''any fee established, charged, or received by a payment card network and paid by a merchant or acquirer for the purpose of compensating an issuer for its involvement in an electronic debit transaction.''

2. Paid by a Merchant or an Acquirer

The Board proposed to add the phrase ''and paid by a merchant or acquirer'' as a clarification of current market practice.[79] One commenter expressed concern that, by adding ''and paid by a merchant or acquirer'' to the statutory definition, the Board was opening up the possibility that an acquirer would contract with a middleman to pay the fee on the acquirer's behalf, which would result in circumvention or evasion of the rule. The Board does not believe that the phrase would enable such a practice. Under principles of agency (governed by state law), if an acquirer contracts with a third party to pay an interchange transaction fee on behalf of an acquirer, the fee is considered to be paid by the acquirer and would be subject to the same restrictions as if the fee were in fact paid by the acquirer. Although the Board understands that, today, acquirers pay interchange transaction fees to issuers through settlement effected by a payment card network (and then pass the fee on to merchants), the Board has retained the proposed addition, noting that the interchange transaction fee can be paid either by a merchant or acquirer. The Board also has made minor revisions to comment 2(j)–2 to clarify that the fees payment card networks charge to acquirers for network services are not considered ''interchange transaction fees.''

3. Established, Charged, or Received

Merchant commenters voiced concerns that issuers may attempt to circumvent the interchange fee standards (applicable to those fees ''established, charged, or received'' by a network) by collectively setting fees and imposing those collectively set fees on acquirers, and ultimately merchants, through the networks' honor-all-cards rules. For example, the largest issuers may collectively determine to charge interchange transaction fees above the cap and effect this decision by dictating to each network the agreed upon amount. The network, then, would permit each issuer to charge that amount, and because merchants would

[77] See the discussion on the definition of ''affiliate'' (§ 235.2(c)), above, in this notice.

[78] For the same reason, the Board is revising its proposed comment 2(i)–2 to clarify that a general-use prepaid card is not required to display the network brand, mark, or logo in order to come within the definition of ''general-use prepaid card.''

[79] 75 FR 81722, 81731, and 81755 (Dec. 28, 2010).

be required to accept all the network's cards, merchants would pay the amount determined by the issuers.

Section 920(c)(8) of the EFTA defines the term ''interchange transaction fee'' to mean ''any fee established, charged, or received by a payment card network * * * for the purpose of compensating an issuer for its involvement in an electronic debit transaction.'' Accordingly, interchange transaction fees are not limited to those fees set by payment card networks. The term also includes any fee set by an issuer, but charged to acquirers (and effectively merchants) by virtue of the network determining each participant's settlement position. In determining each participant's settlement position, the network ''charges'' the fee, although the fee ultimately is received by the issuer. An issuer, however, would be permitted to enter into arrangements with individual merchants or groups of merchants to charge fees, provided that any such fee is not established, charged, or received by a payment card network. The Board has added paragraph 2(j)–3 to the commentary to explain that fees set by an issuer, but charged by a payment card network are considered interchange transaction fees for purposes of this part. The Board plans to monitor whether collective fee setting is occurring and whether it is necessary to address collective fee setting or similar practices through the Board's anti-circumvention and evasion authority.

One commenter urged the Board to adopt a definition of ''interchange transaction fee'' that covers both the fee flowing from merchant to network and the fee flowing from network to issuer so as to require that the two amounts be equal. This commenter was concerned that, otherwise, networks with widespread acceptance would be able to engage in price discrimination. Networks may charge lower fees to acquirers than they pass through to the issuers in order to compete for transaction volume in certain market segments, while charging higher fees to acquirers than they are passing through to the issuers in other market segments, although today these amounts are the same. The Board, however, has determined not to revise its proposed definition of ''interchange transaction fee'' to cover both the fee flowing from merchant to network and the fee flowing from network to issuer so as to require that two amounts be equal. By statute, an interchange transaction fee is a fee established, charged, or received by a payment card network for the purpose of compensating an issuer and Section 920(a) limits the amount that the issuer may receive. By contrast, Section 920(a) does not prohibit networks from charging other fees to merchants or acquirers that are not passed to the issuer and does not require that the network pass through to the issuer the same amount charged to the acquirer. The Board plans to monitor whether networks are charging other fees that are being passed to the issuer and determine whether it is necessary to address network fees through the Board's anti-circumvention and evasion authority.

K. Section 235.2(k)—Issuer

1. Summary of Proposal and Comments

EFTA Section 920(c)(9) defines the term ''issuer'' to mean ''any person who issues a debit card, or credit card, or the agent of such person with respect to such card.'' The Board proposed to define ''issuer'' to mean ''any person that issues a debit card.'' Proposed comments 2(k)–2 through 2(k)–5 provided examples of which entity was considered the issuer in a variety of debit card arrangements. As described in the proposed commentary, the issuer in four-party systems is the bank holding the cardholder's account, and the issuer in three-party systems is the entity acting as issuer and system operator (and typically acquirer as well). The issuer in debit card BIN-sponsor arrangements is the bank holding the cardholder's account, and the issuer in prepaid card BIN-sponsorship arrangements is the BIN sponsor holding the omnibus account.[80] Finally, the issuer of a decoupled debit card is the entity providing the card to the cardholder, not the bank holding the cardholder's account.

The Board received several comments on its proposed definition of ''issuer,'' one of which generally supported the proposed definition. Many of the comments received addressed the proposed removal of the phrase ''or agent of such person'' from the statutory definition. Two commenters suggested that Board exclude third-party agents as proposed, because unlike credit cards, debit card issuers typically do not use third-party agents. One commenter argued that the agent of an issuer should only be considered the issuer when the agent has a level of control such that the role of the issuer is subordinated to that of its agent. A few other commenters requested that the Board clarify the effect on the interchange fee restrictions of eliminating ''or agent of the issuer'' and further study the issue.

The Board also received a few comments requesting clarification on whether an issuer that outsources processing functions is responsible for complying with the requirements, or whether the third-party processor must comply with the requirements. One commenter specifically expressed concern about a covered issuer being able to contract with a small issuer for issuance of the card and having the small issuer receive and pass back the higher interchange fees. The Board also received a comment requesting clarification on which party is considered the issuer under a variety of mobile payments arrangements.

2. Analysis and Final Rule

The Board has considered the comments and has determined to revise its definition of ''issuer'' to clarify the meaning of ''issue.'' In general, the proposed commentary explained which entity is the issuer in terms of which entity has the underlying contractual agreement with the cardholder. Although the underlying contractual agreement with the cardholder is one of the defining characteristic of issuing debit cards, the Board believes that it is clearer and more precise to explain the underlying agreement in terms of authorizing the use of the card to perform electronic debit transactions. The entity that authorizes use of the card may also be the entity that arranges for the cardholder to obtain the card. The revisions to the commentary describe this component of issuing in terms of ''authorizing'' the cardholder to use the card to perform electronic debit transactions, rather than the more general term ''provide'' as proposed. Therefore, the identity of the issuer is not determined by which entity performs issuer processing, but rather by which entity authorized the cardholder to use the card to perform electronic debit transactions.

The Board has revised comment 2(k)–1 to provide more guidance on which entity is the issuer for purposes of this part. Comment 2(k)–1 explains that a person issues a debit card by authorizing a cardholder to use the debit card to perform electronic debit transactions. That person may provide the card directly or indirectly to the cardholder. For example, a person may use a third-party processor to distribute

[80] As explained in the proposed commentary, payment card networks assign Bank Identification Numbers (''BINs'') to member institutions for purposes of issuing cards, authorization, clearance, settlement, and other processes. In exchange for a fee or other financial considerations, some member institutions permit other entities to issue debit cards using the member-institution's BIN. The entity permitting the use of its BIN is referred to as the ''BIN sponsor'' and the entity that uses the BIN to issue cards is often referred to as the ''affiliate member.'' BIN-sponsor arrangements are done for debit cards (including prepaid cards).

a plastic card to the cardholder, or may use a phone network or manufacturer to distribute a chip or other device as part of a phone. The entity that distributes the card, or other payment code or device, is not the issuer with respect to the card unless that entity also is the one authorizing the cardholder to use the card, or other payment code or device, to perform electronic debit transactions.

Proposed comments 2(k)–2 and 2(k)–3 discussed the identity of the issuer in four-party and three-party systems, respectively. In light of the changes discussed below in relation to § 235.2(m), which clarify that three-party systems are not payment card networks for purposes of this rule, the Board has deleted the proposed commentary language that discusses three-party systems and is making other clarifying changes for consistency in other commentary provisions. *See* comment 2(k)–2.

Proposed comment 2(k)–4 described which entity was the issuer under two different types of BIN-sponsor arrangements: the sponsored debit card model and the prepaid card model. Proposed comment 2(k)–4.i stated that the issuer in a sponsored debit card arrangement was the community bank or credit union providing debit cards to its account holders using a BIN of another institution (the ''BIN sponsor''). The Board has revised the proposed comment to explain that the community bank or credit union is an issuer if it authorizes its account holders to use the debit cards to access funds through electronic debit transactions. The community bank or credit union may provide debit cards directly or indirectly (*e.g.,* through its BIN sponsor) to cardholders. The BIN sponsor is not considered the issuer for purposes of this part because the BIN sponsor does not enter into an agreement with the cardholder authorizing the cardholder to use the card to perform electronic debit transactions to access funds. The Board also has revised the comment to refer consistently to the ''bank or credit union'' throughout the comment. *See* comment 2(k)–3.i.

Proposed comment 2(k)–4.ii stated that the issuer in the second type of BIN-sponsor model—the prepaid card model—is the BIN sponsor holding the funds underlying the prepaid cards. The Board has revised the proposed comment to clarify that, under these arrangements, the BIN sponsor typically uses a program manager to distribute cards to cardholders, and the BIN sponsor typically holds the funds in an omnibus or pooled account. Under these arrangements, either the BIN sponsor or the program manager may track the amount of underlying funds on each card. The revised comment explains that the BIN sponsor is the issuer because it is the entity authorizing the cardholder to use the card to perform electronic debit transactions to access the funds held by the BIN sponsor and also has the contractual relationship with the cardholder. *See* comment 2(k)–3.ii. The Board also has revised this comment, as well as other comments, to refer to ''member institutions'' rather than ''member-financial institutions'' for consistency throughout the commentary.

Proposed comment 2(k)–5 explained that the issuer with respect to decoupled debit card arrangements is the entity that provides the debit card to the cardholder and initiates a preauthorized ACH debit to the cardholder's account at a separate institution. The Board has revised proposed comment 2(k)–5 (now designated as 2(k)–4) to clarify that the bank or other entity holding the cardholder's funds is not the entity authorizing the cardholder to use the decoupled debit card to perform electronic debit transactions. Rather, the bank or other entity holding the cardholder's funds has authorized access to the funds through ACH debits in general, but not specifically through the decoupled debit card. The Board has deleted the statement in proposed comment 2(k)–5 that the account-holding institution does not have a relationship with the cardholder with respect to the card because the statement is unnecessary to explain the identity of the issuer of the card.

The Board has not provided examples in the commentary that are specific to mobile devices and mobile payments. A mobile device, such as a chip in or on a telephone or a software application on the telephone, is one type of payment code or device that may be used to access underlying funds. If the cardholder's bank authorizes the cardholder to use a device connected with the phone and arranges for the cardholder to obtain the device through the phone network or manufacturer, or other party, the cardholder's bank is the issuer with respect to the mobile device. By contrast, if the mobile device is more like a decoupled debit card where the mobile device is used to initiate debits to an account, but those debits settle through a preauthorized ACH transaction, the cardholder's bank is not the issuer. Rather, the entity that provided the mobile device to the cardholder to ultimately access the underlying funds is the issuer. Depending on the debit card arrangement, this entity may be either the phone network, phone manufacturer, or other entity.

As explained in the proposal, as a matter of law, agents are held to the same restrictions with respect to the agency relationships as their principals. In other words, a third-party processor cannot act on behalf of an issuer and receive higher interchange fees than are permissible for the issuer to receive under this rule. For example, if an issuer uses a third-party processor to authorize, clear, or settle transactions on its behalf, the third-party processor may not receive interchange fees in excess of the issuer's permissible amount. Therefore, the Board does not believe that removing the clause ''or agent of such person'' will have a substantive effect on either the interchange fee restrictions or the network exclusivity and routing provisions. In assessing compliance, any interchange transaction fee received by the agent of the issuer will be deemed to be an interchange transaction fee received by the issuer.

L. Section 235.2(l)—Merchant

EFTA Section 920 does not define the term ''merchant.'' [81] The Board proposed to define ''merchant'' to mean ''any person that accepts debit cards as payment for goods or services.'' The Board did not receive comments specifically on the proposed definition; however, a few commenters suggested that ATM operators be included in the definition of ''merchant.'' As discussed below in relation to § 235.2(m), ATM operators do not accept payment in exchange for goods or services. Rather, ATM operators facilitate cardholders' access to their own funds. The Board has revised § 235.2(l) so as to not limit the purposes for which a person accepts payment to being in exchange for goods or services. *See* § 235.2(h) and comment 2(h)–2. This expansion does not include ATM operators within the definition of ''merchant.''

M. Section 235.2(m)—Payment Card Network

EFTA Section 920(c)(11) defines ''payment card network'' as ''an entity that directly, or through licensed members, processors or agents, provides the proprietary services, infrastructure, and software that route information and data to conduct debit card or credit card transaction authorization, clearance, and settlement, and that a person uses in order to accept as a form of payment a brand of debit card, credit card or

[81] Section 920(c)(11)'s definition of ''payment card network'' refers to ''an entity * * * that a person uses in order to accept as a form of payment a brand of debit card.''

other device that may be used to carry out debit or credit transactions.'' The Board proposed a modified version of the statutory definition as defining the term ''payment card network'' to mean an entity that (1) directly or indirectly provides the services, infrastructure, and software for the authorization, clearance, and settlement of electronic debit transactions and (2) establishes the standards, rules, or procedures that govern the rights and obligations of issuers and acquirers involved in processing electronic debit transactions through the network. Proposed commentary 2(m)–1 further explained the proposed criteria that only those entities that establish rules governing issuers and acquirers be considered payment card networks. The Board received several comments on its proposed definition of ''payment card network.'' A few commenters generally supported the Board's proposed definition.

A few commenters supported the Board's proposed exclusion of issuers, acquirers, and processors from the definition of ''payment card network.'' These commenters argued that including these entities in the definition was beyond the intent of EFTA Section 920 and would have unintended consequences. By contrast, other commenters argued that the statutory definition of ''payment card network'' was broad enough to include processors and gateways, among other entities. One commenter suggested that the Board consider third-party intermediaries to be ''payment card networks'' if a network contracts with them to perform functions traditionally performed by a network.

1. Standards, Rules, or Procedures Governing Issuers and Acquirers

One commenter expressed concern that adding the ''standards, rules, or procedures'' criteria would reduce the Board's flexibility to cover emerging payment systems under the rule. A few commenters also suggested that the Board impose substantive requirements on the rules that entities establish in order to be considered ''payment card networks'' for purposes of this rule. In particular, these commenters suggested the Board require the ''standards, rules, or procedures'' to include consumer chargeback rights.

The Board has considered the comments received and has determined to revise the final rule to eliminate the ''standards, rules, or procedures'' criteria. This recognizes that processors and gateways may be ''payment card networks'' with respect to electronic debit transactions depending on their role (discussed below in connection with this defined term). To be considered a payment card network for purposes of this rule an entity must do more in relation to a transaction than provide proprietary services, infrastructure, and software to route the transaction information to conduct authorization, clearance, and settlement. The Board continues to believe that an entity that acts solely as an issuer, acquirer, or processor with respect to an electronic debit transaction is not covered by the definition of ''payment card network,'' because such entities do not route information and data between an acquirer and an issuer with respect to the transaction. In order to make this clear, the final rule provides that an entity is considered a payment card network only if the entity routes electronic debit transaction information and data between an acquirer and issuer.[82]

Processors and gateways may take on different roles depending on the transaction. For example, for a given transaction, an entity may act as processor to both the acquirer and the issuer. The acquirer and issuer may wish to bypass the network for such a transaction and may themselves establish standards, rules, or procedures for so doing, while relying on the processor or gateway to process the electronic debit transaction and charge and pay fees between the acquirer and issuer. In that case, the Board believes the processor is acting as a payment card network and should be considered a ''payment card network'' with respect to the transaction for purposes of the rule. Accordingly, the Board has revised the commentary to the definition of ''payment card network'' to explain that an entity that acts as processor between issuers and merchants without routing the transaction through an intervening payment card network would be considered a payment card network with respect to those transactions. *See* comment 2(m)–3.

Some emerging payment systems may resemble payment card networks, while others may resemble acquirers or acquirer processors. Like existing entities, if the emerging payment system routes transaction information and data between acquirers and issuers, and not to an intervening payment card network, the system will be considered a payment card network for purposes of those transactions, provided the entity satisfies the other criteria in § 235.2(m). If a payment card network contracts with another entity to perform network-like functions on behalf of the payment card network, the other entity is considered the agent of the payment card network.

2. Proprietary Services and Brands of Payment Cards

The proposal did not include the statutory text that a payment card network provides ''proprietary'' services, infrastructure, and software provided for authorization, clearance, and settlement and that those services enable a person to accept ''a brand of debit card.'' The Board received one comment suggesting the Board retain the statutory concept that a payment card network provides ''proprietary'' services that a person uses to accept ''a brand of debit card.'' In light of the other transaction types that resemble electronic debit transactions (*e.g.,* ACH transactions), specifically incorporating the concept of payment card networks providing proprietary services that a person uses to accept ''a brand of payment card'' (although not necessarily the brand of the entity providing the services, infrastructure, and software) is a meaningful way of distinguishing between the networks traditionally thought of as ''payment card networks'' and other entities that provide services, infrastructure, and software that provide debits and credits to accounts on their own books. Accordingly, the final rule adopts the more complete statutory language rather than the truncated proposed language.

The proposed definition of ''debit card'' excluded account numbers used to initiate an ACH transaction. As noted above in the discussion of § 235.2(f), retaining an explicit exclusion within the definition of ''debit card'' is no longer necessary because an account number used to initiate ACH transactions is not a ''brand'' of debit card or other device, as the account number is not associated with a ''brand'' of ACH network. An ACH transaction is processed through an ACH operator, either EPN or FedACH®. Merchants use account numbers or other information to initiate a particular type of transaction (*i.e.,* ACH), but these account numbers are not ''brands'' of cards, or other payment codes or devices. Therefore, ACH operators should not be considered ''payment card networks'' for purposes of the rule. The Board has added comment 2(m)–4 that explains that ACH operators are not considered ''payment card networks'' under this part.

[82] The Board is not adopting the guidelines, rules, or procedures requirement and, therefore, it is not necessary to address the comments regarding substantive requirements of such standards, rules, or procedures.

3. Credit Cards

The Board proposed to remove the reference to ''credit cards'' from the definition of ''payment card network'' as unnecessary in light of the fact that the Board's rule would apply only to debit card-related interchange fees and routing restrictions. One commenter suggested the Board retain the references to ''credit card'' because removing the reference would have an impact on the application of EFTA Sections 920(b)(2) and (b)(3), as well as for the application to hybrid credit-debit cards. Removing the reference to ''credit card'' in the definition of payment card network will not affect the application of Section 920(b)(2) (discounts at the point of sale) or Section 920(b)(3) (transaction minimums and maximums). Section 920(b)(2) is not dependent on any Board rulemaking, and Section 920(b)(3) authorizes the Board to increase the level of the minimum transaction value merchants may impose. The Board, however, did not request comment on an increase and is not at this time adopting provisions in this part pursuant to Section 920(b)(3). If the Board determines to increase the minimum dollar value in Section 920(b)(3), the Board at that time will consider whether revisions to the definition of payment card network are necessary for that purpose. Therefore, the Board has not retained the statutory reference to ''credit card'' in the definition of payment card network.

4. Routing Transaction Information and Three-Party Systems

The proposed definition of payment card network did not incorporate the statutory concept of providing services, infrastructure, and software ''to route information and data to conduct'' debit card transactions. Rather, the Board proposed to shorten the definition to include the provision of services, infrastructure, and software ''for'' authorization, clearance, and settlement. The Board did not receive comments specifically on this proposed change from the definition in EFTA Section 920(c)(11). The Board did, however, receive comments on the inclusion of three-party systems within the scope of the rule.

a. Summary of Proposal

The Board proposed that its rule cover three-party systems as well as four-party systems. The Board noted, however, the practical difficulties in applying the interchange fee standards to three-party systems, which charge only a merchant discount and no explicit interchange fee. Specifically, a three-party system could apportion its entire merchant discount to its role as network or acquirer, rendering the interchange fee zero, in effect, and EFTA Section 920 does not restrict fees an acquirer charges a merchant. Therefore, the Board requested comment on the appropriate application of the interchange fee standards to electronic debit transactions processed over three-party systems.

In addition, the Board requested comment on how the network exclusivity and routing provisions should be applied to three-party systems, including alternatives that could minimize the compliance burden on such systems. If those provisions were applied to a three-party system, debit cards issued by the network must be capable of routing transactions through at least one unaffiliated payment card network, in addition to the network issuing the card, and the network may not inhibit a merchant's ability to route a transaction to any other unaffiliated network(s) enabled on a debit card. The Board recognized that the nature of a three-party system could be significantly altered by any requirement to add one or more unaffiliated payment card networks capable of carrying electronic debit transactions involving the network's cards.

b. Summary of Comments

The Board received comments regarding the application of both the interchange fee standards and the network exclusivity and routing provisions to three-party systems. In general, almost all of these comments recognized that three-party systems do not charge explicit interchange fees, but many of the commenters (particularly issuers and four-party systems) were concerned that exempting three-party systems from the interchange fee standards would create an uneven playing field. Some of these commenters were concerned that excluding three-party systems would prompt current four-party systems to vertically integrate and become three-party systems, which they believed could be considered circumvention or evasion of the rule. Other commenters recommended that, if covering three-party systems was not feasible, the Board should at least examine whether excluding three-party systems places four-party systems at a competitive disadvantage.

One commenter suggested the Board require three-party systems to provide the Board with an allocation of the merchant discount that explicitly identifies an ''interchange fee.'' Other commenters that favored applying the interchange fee standards to three-party systems also suggested that the Board prohibit a three-party system from allocating fees away from the issuer side and to the acquirer side. Other commenters suggested that the Board deem three-party systems to be in compliance if the merchant discount charged by three-party systems was similar to merchant discounts charged in four-party systems.

Other issuers and three-party systems supported excluding three-party systems from the interchange fee standards, noting that such systems currently do not establish or charge a fee similar in concept to an ''interchange fee.'' These commenters also stated that the Board had no authority under EFTA Section 920 to regulate merchant discounts. Moreover, some of these commenters claimed that developing a framework and method for calculating an implicit merchant discount would be unworkable and arbitrary. Commenters (including some representing merchants) contended that three-party systems do not raise the same centralized price-setting concerns as four-party systems because merchants negotiate directly with the three-party system setting the merchant discount.

With respect to the network exclusivity and routing provisions, the Board received comments from issuers and networks, some of which supported applying the provisions to three-party systems, whereas others did not. Almost all of these commenters recognized the circuitous routing that would result if three-party systems were subject to the network exclusivity and routing provisions (because all transactions on cards issued for three-party systems ultimately would need to be routed back to the system operator/issuer for authorization, clearance, and settlement), but, similar to the application of the interchange fee standards, commenters believed that exempting three-party systems would create an uneven playing field.[83] By contrast, several commenters supported excluding three-party systems from the network exclusivity and routing provisions' coverage because, by definition, three-party systems operate on a single ''network.'' Therefore, the commenters contended, application of the rules to three-party systems would have a detrimental effect on the three-party business model. One three-party

[83] If a three-party system were to enable its cards for transaction processing over a second network, the authorization, clearance, and settlement would be done by the three-party system. Therefore, the transaction would go outside the system only to be sent back to the system for authorization, clearance, and settlement.

system stated that the Board should invoke EFTA Section 904(c) to exempt three-party systems.[84] This commenter asserted that three-party systems do not ''restrict'' the networks over which an electronic debit transaction may be processed ''by contract, requirement, condition, penalty,'' or other similar method.[85] Rather, according to the commenter, the closed-loop characteristic is intrinsic to three-party systems. The commenter concluded that the network exclusivity and routing provisions were ambiguous as applied to three-party systems.

The Board also received a few comments on its characterization of three-party systems in its proposed rule. One commenter asserted that the Board's characterization ignores the fact that some ''three-party systems'' provide network and issuing functions but not acquiring functions. This commenter suggested that the Board should characterize three-party systems as those where the network is also the issuer, regardless of whether the entity acquires transactions, because the rules are primarily focused on network-issuer relationship. Similarly, another commenter stated that ''three-party systems'' may have the ability to route transactions outside the system, and that, in such cases, the network exclusivity and routing provisions should apply to the ''three-party system.'' A few commenters requested that the Board provide more examples of three-party systems.

c. Analysis and Final Rule

In a three-party payment system, the same entity serves as the issuer and system operator, and typically the acquirer.[86] For debit card transactions in three-party systems, the merchant sends the authorization request, as well as any other information necessary to settle a transaction, typically to one entity. By contrast to four-party systems, the system operator that receives the transaction information and data does not direct the information and data to another party. Rather, that entity uses the transaction information and data to approve or decline the transaction, as well as to settle the transaction with both the merchant and the cardholder. If the three-party system involves separate acquirers, the issuer/system operator will remit funds to the acquirer through whatever settlement method the parties agreed to.

A merchant must send the transaction information and data to the issuer (or issuer's processor) for authorization, as well as clearance and settlement. In a four-party system, the information and data are sent to a network that, in turn, sends the information and data to an issuer (or the issuer's processor). Network entities in four-party systems provide services, infrastructure, and software that receive transaction information and data from the merchant side of the transaction and send the information and data to the designated issuer. By contrast, in a three-party system, a single entity operates the system and holds the cardholder's account. Typically that entity holds the merchant's account as well, but may permit other entities to acquire transactions. Once the system operator receives the transaction information and data, the operator does not send the information and data on to another point. Rather, all authorization and settlement decisions and actions occur within that entity. Therefore, three-party systems provide services for merchants to send and receive transaction information and data, but not to ''route'' transaction information and data. Merchants are able to protect themselves from excessive fees in three-party systems by negotiating directly with the issuer-system operator, unlike in the case of four-party systems, where a network intervenes between the issuer and merchant.

EFTA Section 920(c)(11) defines ''payment card network'' as ''an entity that directly, or through licensed members, processors, or agents, provides the proprietary services, infrastructure, and software, that route information and data to conduct debit card or credit card transaction authorization, clearance, and settlement * * *''[87] The Board's proposal did not include the statutory text that a payment card network provide the services, infrastructure, and software that ''route information and data to conduct'' electronic debit transaction authorization, clearance, and settlement. The statute does not define the term ''route.'' The term ''route'' is commonly defined as ''to send by a certain [or selected] route'' or ''to divert in a specified direction.''[88] In other words, routing suggests involvement other than merely receiving and using information and data; specifically, routing suggests sending the information and data to another point or destination.[89] Connecting numerous different points, in this case numerous merchants and issuers, is a fundamental element of any network. The final rule modifies the proposal to incorporate this statutory reference to routing in the definition of payment card network.

Accordingly, three-party systems are not ''payment card networks'' for purposes of the rule because they do not ''provide[] the proprietary services, infrastructure, and software that route information and data to an issuer from an acquirer to conduct the authorization, clearance, and settlement of electronic debit transactions.''[90] Because three-party systems are not payment card networks, they are not subject to the interchange fee standards (as there is no payment card network establishing, charging, or receiving a fee) or to the network exclusivity or routing provisions (as there is no payment card network to which an issuer could restrict the processing of transactions).[91]

The Board has made conforming changes to its proposed commentary. First, the third sentence in proposed comment 2(m)–1 that stated that three-party systems are considered payment card networks has been removed. Second, commentary to explain the routing component of the definition and the definition's application to three-party systems has been added. Comment 2(m)–1 has been revised to state that an entity that authorizes and settles an electronic debit transaction without routing information to another entity generally is not considered a payment card network. New comment 2(m)–2 has been added to explain that three-party systems are not ''payment card networks'' for purposes of the rule. Comment 2(m)–2 clarifies that ''routing'' transaction information and data involves sending such information and data to an entity other than the entity that initially receives the information and data, and does not include merely receiving information and data. *See* comment 2(p).

[84] See discussion in connection with § 235.5 regarding the Board's authority under EFTA Section 904(c) as applied to this rulemaking.

[85] This commenter argued that the Board should interpret ''or otherwise'' to mean by devices or mechanisms similar to those specifically listed.

[86] In addition, under a three-party system, outside processors may provide some processing services to the merchant, but are not authorized to acquire transactions. The other parties to a three-party system are the cardholder and the merchant.

[87] EFTA Section 920(c)(11).

[88] *See, e.g., Webster's New World Dictionary and Thesaurus* at 558 (2d ed. 2002); *Merriam Webster's Collegiate Dictionary* at 1021 (10th ed. 1993).

[89] See discussion below in connection with § 235.2(p).

[90] Transactions through three-party systems are similar to other ''on-us'' transactions that can be authorized, cleared, and settled using a book-entry rather than sending information to another point.

[91] Because three-party systems are not payment card networks for purposes of this rule, it is not necessary to address the comments regarding calculating an implicit interchange fee for three-party systems.

5. ATM Transactions and Networks

a. Summary of Proposal and Comments

The Board requested comment on whether ATM transactions and networks should be included within the scope of the rule. The Board also requested comment on how to implement the network exclusivity provision if ATM transactions and networks are included within the scope of the rule. The Board noted that the interchange fee standards would not apply to ATM interchange fees, which currently flow from the issuer to the ATM operator, and therefore do not meet the statutory definition of ''interchange transaction fee.''

The network-exclusivity prohibition and routing provisions, however, would directly affect the operations of ATM networks if these provisions were applied to such networks. Issuers would be required to offer ATM cards that can be accepted on at least two unaffiliated networks, and the ATM operator would have the ability to choose the network through which transactions would be routed. The proposal explained that covering ATM networks under the rule may result in very different economic incentives than coverage of point-of-sale debit card networks because the party receiving the interchange fee would be able to control the transaction routing.

The Board received comments in support of excluding ATM transactions from the scope of the rule and in support of including ATM transactions within the scope of the rule. Those commenters that opposed including ATM transactions within the scope of the rule argued that ATM withdrawals are not a payment for goods or services. Rather, these commenters argued that the customer is accessing his or her own funds. By contrast, commenters in support of including ATM transactions within the scope of the rule asserted that ATM operators are ''merchants'' selling convenient access to cash and that ATM transactions debit accounts.

Both the commenters in support of and opposed to including ATM transactions supported the Board's interpretation that interchange fees for ATM transactions would be excluded from the rule's coverage (even if ATM transactions were otherwise included) because issuers do not receive or charge interchange fees for ATM transactions. A few commenters believed ATM transactions to be outside the scope of EFTA Section 920 because merchants are not charged for ATM transactions. Furthermore, commenters stated that, unlike for debit card transactions, ATM networks currently have incentives to lower interchange fees in the ATM industry in order to compete among issuers, who are paying interchange fees. Commenters also contended that applying the interchange fee standards to ATM interchange fees could render ATM terminals cost-prohibitive, emphasizing the extent to which ATM operators rely on interchange to cover operational costs. Moreover, one commenter asserted that the Board did not have sufficient information about ATM interchange fees and costs to set standards for such interchange fees.

The commenters supporting application of the network exclusivity and routing provisions to ATM transactions generally were ATM operators or acquirers. These commenters argued that including ATM transactions within the scope of the network exclusivity and routing provisions would increase competition in the ATM industry and enable ATM operators to route transactions to the network with the lowest network fees. More generally, these commenters claimed that eliminating network exclusivity and routing practices in the ATM industry would benefit consumers through reduced ATM convenience fees, help small issuers relying on nonbank ATMs, and ensure that cash remains a viable alternative to debit cards. One commenter suggested that issuers be able to satisfy any requirement for multiple networks by enabling debit networks that also function as ATM networks.

By contrast, the commenters that opposed applying the network exclusivity and routing provisions to ATM transactions were generally issuers and payment card networks. These commenters argued that including ATM transactions under the rule would enable the party receiving the interchange fee to direct the routing of the transaction, a practice prohibited by the network routing provisions in the point-of-sale environment. Commenters also expressed concern that, if the network exclusivity provision applied to ATM cards and networks, the establishment of settlement arrangements with multiple networks would create a large burden on issuers, which could result in higher consumer fees. One issuer that was opposed to applying the network exclusivity provisions to ATM cards argued that doing so was unnecessary because many issuers currently have at least two unaffiliated network options on their cards.[92]

[92] The Board also received comments requesting that the Board permit ATM operators to impose differential surcharges based on the network the transaction is routed over. This suggestion is outside the scope of the rule.

b. Analysis and Final Rule

The Board has considered the comments and has determined that ATM transactions are not subject to either the interchange fee standards or the network exclusivity and routing provisions. The statute does not expressly include ATM transactions within its scope, but ATM cards, similar to debit cards, are used to debit accounts, as the term is defined in § 235.2(a). The terms ''debit cards'' and ''electronic debit transaction'' are both connected to EFTA Section 920(c)(11)'s definition of ''payment card network,'' which is limited to those networks a person uses to accept a debit card ''as a form of payment.'' ''Payment'' generally is thought of as exchanging money for goods or services or other purposes (*e.g.,* satisfying an obligation or a making a charitable contribution), rather than changing the form of a person's money (*e.g.,* from a balance in an account to cash).[93] In an ATM transaction, a person is using the card to access his or her money. Similarly, a cardholder may use an ATM to transfer money from one account to another. Withdrawing money from one's own account is not a payment to an ATM operator in exchange for goods or services, to satisfy an obligation, or for other purposes.[94] Therefore, a network providing only ATM services is not a payment card network. Consequently, a card is not a ''debit card'' by virtue of its being issued or approved for use through an ATM network, which, in turn, means that the ATM transaction is not an ''electronic debit transaction'' as those terms are defined in EFTA Section 920. Therefore, ATM networks and transactions are not within the scope of either the interchange fee standards or the network exclusivity and routing provisions. The Board has added comment 2(m)–5, which clarifies that ATM networks are not payment card networks for purposes of this part.

One commenter suggested the Board address the treatment of ATM transactions within the rule text. As discussed above in connection with § 235.2(h), the Board has not explicitly excluded ''transactions initiated at an automated teller machine (ATM), including cash withdrawals and balance transfers initiated at an ATM'' in the definition of ''electronic debit transaction.''

[93] *See Black's Law Dictionary* at 950 (abridged 8th Ed.); *Merriam Webster's Collegiate Dictionary* at 963 (10th ed. 1993).

[94] To the extent the cardholder is paying for the service of being able to access his or her money, the amount paid for that service is the convenience fee charged by the ATM operator.

Even if ATM transactions were included within the scope of the rule, interchange fees received on ATM transactions are not ''interchange transaction fees'' as defined in EFTA Section 920(c)(8) because ATM interchange fees do not compensate an issuer. Additionally, applying the network exclusivity and routing provisions to ATM transactions would provide incentives to the party directing the routing to select the network that maximizes interchange fees, although also one that minimizes network fees.

6. Non-traditional and Emerging Payments Systems

a. Summary of Proposal and Comments

The Board requested comment on whether non-traditional or emerging payment systems should be covered by the definition of ''payment card network.'' In its request for comment, the Board provided examples of non-traditional or emerging payment systems, which included systems in which a consumer uses a mobile phone to purchase goods or services with the payment amount billed to the mobile phone account or debited directly from the consumer's bank account, or systems such as PayPal, in which a consumer may use a third-party payment intermediary and use funds that may be held either by the intermediary or in the consumer's account held at a different financial institution.[95] The Board stated that these non-traditional and emerging payment systems arguably satisfied the proposed criteria for payment card networks, and requested comment on how it would distinguish these payment systems from traditional debit card payment systems in the event commenters believed such non-traditional and emerging payment systems should not be covered.

The Board received numerous comments on whether emerging payment networks should be considered ''payment card networks'' under the rule, and as groups, both issuers and networks were divided as to their views. The Board received comments from issuers, networks, and merchants that supported including emerging payment systems and more generally, any entity that satisfied the criteria of a ''payment card network'' under the proposed definition. These commenters argued that excluding emerging payments technologies would create an unfair benefit to the emerging payment systems.[96] In addition, some commenters believed that emerging payment systems should be built for multiple routing options and that the Board should encourage the interoperability of systems and technologies.

The Board also received comments from networks, issuers, and emerging payments technology providers that supported excluding emerging payment systems from the definition of ''payment card network.'' These commenters argued that including emerging payments technologies would hinder development and innovation of new technologies because networks, issuers, and other processors would be less likely to innovate if they must share new technology with at least one other network under the network exclusivity provisions. Commenters asserted that inclusion often would not be practical because alternative form factors initially may not be capable of being processed on more than one unaffiliated network. Moreover, one commenter asserted that innovation could be hindered if a competing payment card network blocked adoption of technology by refusing to use it, and thereby prevented the technology from being processed over more than one network. One commenter further contended that such a barrier would exacerbate the already significant barriers to entry in the payments industry. A few of these commenters asserted that non-traditional payment systems offer a competitive alternative to the traditional payment card networks. One commenter argued that the emerging payments technologies should be excluded because merchant adoption of technology is voluntary. Another commenter suggested that the Board initially exclude emerging payment systems, but continue to monitor whether such systems continue to be ''emerging.''

A few commenters (typically merchants and emerging payment card networks) suggested that emerging payment systems be subject to the rule, but not while the emerging payment system is deployed on a limited, pilot basis. Similarly, one commenter suggested that emerging payment technologies be included, but that an issuer be able to rebut the presumption of inclusion by demonstrating that processing over two networks is not technologically possible or cannot be deployed in a cost-effective manner.

b. Non-traditional Payment Systems

Non-traditional and emerging payment technologies generally fall into three categories: those that facilitate payments but do not come within the scope of the definition of ''payment card network,'' emerging devices or authentication methods used to access existing payment card networks, and new payment card networks. In general, non-traditional payment systems should not be excluded from coverage merely because the payment systems are ''non-traditional.'' Excluding these systems solely because they are ''non-traditional'' would not result in a rule that is flexible to accommodate future developments in the industry. Rather, the application of the rule to non-traditional payment systems is determined by whether the characteristics of the entity with respect to transactions make the entity a payment card network, issuer, or acquirer as those terms are defined in the rule.

Some non-traditional payment systems perform functions similar to traditional payment card networks, but are structured such that these entities are not ''payment card networks'' as the term is defined in the rule. For example, an entity may provide services that enable merchants to accept payments from customers by permitting customers to prefund accounts with the entity. Similar to prepaid cards, such accounts could be prefunded with ACH transfers or by a debit or credit card transaction that debits the customer's account at an issuer. Later, a customer may use his or her account information to initiate a debit to her account with the entity in order to pay the merchant for goods or services. If the customer and merchant both hold accounts with the entity, similar to three-party systems, the entity does not route the transaction information and data. Rather, the entity uses the information to make a debit entry to the customer's account and a credit entry to the merchant's account. Therefore, an entity is not a ''payment card network'' for purposes of this rule when the entity does not send the transaction information and data to another point and instead merely makes book-keeping entries.

Like other three-party systems, a non-traditional payments system that is not a ''payment card network'' with respect to some transactions may be a payment card network, issuer, or acquirer with respect to other transactions. For example, in addition to permitting its customers to debit accounts to pay merchants that also have accounts with the entity, the entity may issue debit

[95] A few commenters stated that PayPal should no longer be considered an ''emerging'' payment system due to its broad adoption and that PayPal operates like a three-party system.

[96] One of these commenters stated that asymmetric regulation would distort innovation and market evolution.

cards to account-holding customers or merchants that may be used outside the entity/system and the transactions of which are processed over four-party systems. Under these circumstances, the entity is an issuer with respect to electronic debit transactions that are initiated using the debit card. If the entity, together with its affiliates, has assets of $10 billion or more, then the interchange fee restrictions apply to the entity. The network exclusivity and routing provisions will apply regardless of the entity's asset size.

c. Emerging Technologies That Access Existing Networks

Another category of emerging payments technology is new access devices used to initiate debit card transactions processed over existing payment card networks. For example, many networks have approved the use of contactless devices to initiate transactions processed over their networks. These contactless devices may be issued as a separate card or included on or accessible through a mobile phone. The Board received comments both supporting and opposing application of the Board's rule to such new devices. The Board has considered the comments and has determined that new or emerging access devices are included within the scope of the proposed rule if they are issued or approved for use through a payment card network and otherwise meet the criteria for being a debit card as the term is defined in this rule (*e.g.,* the card, code, or device debits the cardholder's account or a general-use prepaid card). New and emerging access devices are discussed more fully in the context of § 235.2(f)'s definition of ''debit card'' and the network exclusivity and routing provisions in § 235.7.

N. Section 235.2(n)—Person

The Board proposed to define ''person'' to mean ''a natural person or an organization, including a corporation, government agency, estate, trust, partnership, proprietorship, cooperative, or association.'' The Board received no comments on its proposed definition of ''person'' and has adopted the definition as proposed.

O. Section 235.2(o)—Processor

The Board proposed to define the term ''processor'' to mean ''a person that processes or routes electronic debit transactions for issuers, acquirers, or merchants.'' One commenter suggested that the definition of processor be expanded to include processors that process on behalf of ATM operators. The Board does not consider ATM operators to be merchants for purposes of this rule. Additionally, ATM networks and transactions are not ''payment card networks'' or ''electronic debit transactions,'' respectively, for purposes of this rule. Therefore, the Board has not expanded the definition of ''processor'' to include those processors that process on behalf of ATM operators. The Board has adopted the definition of ''processor'' as proposed and its associated commentary with minor clarifying revisions.

P. Section 235.2(p)—Route

The Board did not propose to define the term ''route.'' One commenter suggested the Board define the term ''network routing'' to mean ''the act of routing a transaction from the point of sale to point of authorization,'' but to exclude from the meaning of ''network routing'' any settlement or dispute handling functions unless the network and the gateway is the same entity. The Board is unaware of whether payment card networks currently permit entities to handle settlement and disputes through different entities than those through which the transaction was initially routed. Under § 235.7 of the final rule, such a rule would not be prohibited.

The Board is adding a definition of the term ''route'' in § 235.2(p). EFTA Section 920 uses the term ''route'' in the definition of ''payment card network'' and requires the Board to prescribe regulations that prohibit issuers and networks from inhibiting the ability of merchants to ''direct the routing'' of electronic debit transactions. EFTA Section 920 does not define ''route'' or ''routing.'' The Board also is not aware of other statutes that use those terms in similar contexts.

As discussed above in connection with § 235.2(m), the term ''route'' is commonly defined as ''to send by a certain [or selected] route'' or ''to divert in a specified direction.''[97] In other words, routing suggests involvement other than merely receiving and using information and data; specifically, it involves sending the information and data to another point or destination. These definitions apply to the term ''route'' in the context of electronic debit transactions.

In a four-party system, when a merchant accepts a debit card as a form of payment, the merchant sends the transaction information to its acquirer or processor. The acquirer or processor uses the transaction information to determine the network(s) over which it may send the transaction. For example, for signature-based transactions, the acquirer or processor looks to the first number in the BIN and directs the transaction to the appropriate network. The network then directs the transaction to the appropriate issuer. For PIN-based transactions, the acquirer or processor usually compares the information received from the merchant to ''BIN tables,'' which the acquirer or processor uses to determine the networks over which transactions initiated by cards with various BINs may be routed. The acquirer or processor then sends the transaction over the appropriate network, which, in turn, sends the information to the appropriate issuer. Each party that receives the information must select the path the information will take to reach the entity to which it is sending the information and data.

Therefore, the Board has defined the term ''route'' in § 235.2(p) to mean ''to direct and send information and data to an unaffiliated entity or to an affiliated entity acting on behalf of the unaffiliated entity.'' Comment 2(p)–1 explains that the point to which a party directs or sends the information may be a payment card network or processor (if the entity directing or sending the information is an acquirer), or an issuer or processor acting on behalf of the issuer (if the entity directing and sending the information is a payment card network). As a result, an entity does not route information and data if the entity merely sends the information and data to affiliated book-keeping entities within itself.

As stated in the discussion on the scope of this part, three-party systems are not payment card networks because they do not ''route'' information to another point. Rather, a three-party system receives the transaction information and processes the information internally in order to authorize and settle the transaction.

Q. Section 235.2(q)—United States

The Board proposed to define ''United States'' to mean ''the States, territories, and possessions of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any political subdivision of any of the foregoing.'' One network-commenter suggested that the Board limit its definition of ''United States'' to the 50 states plus the District of Columbia in order to minimize the costs associated with reprogramming. This commenter also noted that if the Board includes U.S. territories, the Board should survey

[97] *See, e.g., Webster's New World Dictionary and Thesaurus* at 558 (2d ed. 2002); *Merriam Webster's Collegiate Dictionary* at 1021 (10th ed. 1993).

issuers in those territories regarding their costs.[98]

The Board proposed a definition of the term ''United States'' that is consistent with the EFTA's definition of ''State.'' [99] The definition of ''account'' in § 235.2(a) is limited to accounts that are held in the United States and the definition of ''electronic debit transaction'' to those transactions accepted as a form of payment in the United States because the EFTA provides no indication (such as a conflicts of law provision) that Congress intended for Section 920 to apply to international transactions (*i.e.,* those where the merchant or account debited is located in a foreign country).[100] Accordingly, limiting the scope of this part to transactions initiated at United States merchants to debit accounts in the United States avoids both extraterritorial application of this part as well as conflicts of laws. By contrast, including the Commonwealth of Puerto Rico and other territories or possessions of the United States does not implicate the same extraterritorial application concerns because the EFTA already applies to these jurisdictions. Therefore, the Board has not revised its definition of ''United States,'' now designated as § 235.2(q).

III. Section 235.3 Reasonable and Proportional Interchange Transaction Fees

Section 235.3 sets forth a standard for assessing whether the amount of any interchange transaction fee that an issuer receives or charges with respect to an electronic debit transaction is reasonable and proportional to the cost incurred by the issuer with respect to the transaction for purposes of EFTA Section 920(a)(2). Under § 235.3(b), an issuer may not charge or receive any interchange transaction fee that exceeds the sum of 21 cents plus 5 basis points of the transaction's value.

A. Summary of Proposal and Comments

The Board requested comment on two alternative standards for determining whether the amount of an interchange transaction fee is reasonable and proportional to the cost incurred by the issuer with respect to the transaction. Under proposed Alternative 1, an issuer could comply with the standard for interchange fees by calculating its allowable costs and receiving an interchange fee that does not exceed its per-transaction allowable costs, up to a cap of 12 cents per transaction. An issuer's allowable costs with respect to each transaction would be the sum of those costs that are attributable to the issuer's role in authorization, clearance, and settlement of an electronic debit transaction and that vary with the number of transactions sent to the issuer within a calendar year (variable costs) divided by the number of electronic debit transactions on which the issuer received or charged an interchange transaction fee during that year (average variable cost). The proposal defined the issuer's role in authorization, clearance, and settlement as receiving and processing authorization requests (including voice authorization and referral inquiries); receiving and processing presentments and representments; initiating, receiving, and processing chargebacks, adjustments, and similar transactions; transmitting and receiving funds for interbank settlement; and posting electronic debit transactions to cardholders' accounts. Alternative 1 also would permit an issuer to receive or charge an interchange fee that does not exceed a safe harbor amount of 7 cents per transaction without demonstrating costs. Under Alternative 2, an issuer would comply with the standard for interchange fees as long as it does not receive or charge an interchange fee in excess of 12 cents per transaction. All of the proposed amounts were based on cost data for issuers responding to a Board survey in which those issuers reported information related to their transaction costs.

The Board received numerous comments on all aspects of its proposed interchange fee standards. Merchants and their trade groups overwhelmingly supported adoption of the framework in Alternative 1 because that proposed standard would result in the greatest reduction from the current interchange fees (the savings of which could potentially be passed on to consumers as lower retail prices).[101] A few individual commenters supported the position of merchants and their trade groups. Issuers, many consumers, and payment card networks, on the other hand, opposed both proposed interchange fee standards for a variety of reasons, arguing that the limits in the proposals were not compelled by statute and expressing concerns that either of the proposed alternatives would decrease revenue to issuing banks, result in increased cardholder fees or decreased availability of debit card services, reduce benefits to merchants when compared to other forms of payment, and stifle innovation in the payment system, among other things.

The Board received numerous comments, primarily from issuers and networks, on its proposed interpretation of the meaning of ''reasonable'' and ''proportional'' to cost in Section 920(a)(2).[102] Issuers and networks asserted that the Board was bound by, or at least should look to, the jurisprudence surrounding the phrase, ''just and reasonable,'' used in connection with ratemaking for public utilities or other regulated entities. These commenters argued that, by referring to fees that are ''reasonable'' and ''proportional'' to cost, Congress intended the Board to follow ratemaking jurisprudence that requires full recovery of costs (including depreciation) and a reasonable return on the rate base (asserted by the commenters to be the entire debit card program cost). These commenters argued that an interchange fee standard must be adopted in accordance with the ratemaking jurisprudence in order to avoid a violation of the takings prohibition in the Fifth Amendment to the U.S. Constitution. Issuers and networks believed that the failure to consider the recovery of all types of costs plus a reasonable profit for all issuers (including those with allowable costs above the level of the proposed cap), as well as the Board's proposed consideration of an issuer's ability to recover costs from consumers, were inconsistent with the ratemaking jurisprudence. More generally, these issuers and networks objected to any cap that would not permit each covered issuer to recover the entire amount of its allowable costs.

[98] Based on information available to the Board, the Board distributed surveys to an institution that, together with its affiliates, had assets of more than $10 billion and that filed one of the following reports: The Consolidated Financial Statements for Bank Holding Companies (FR Y–9C; OMB No. 7100–0128), the Consolidated Reports of Condition and Income (Call Reports) for independent commercial banks (FFIEC 031 & 041; OMB No. 7100–0036), the Reports of Assets and Liabilities of and for U.S. branches and agencies of foreign banks (FFIEC 002; OMB No. 7100–0032), the Thrift Financial Reports (OTS 1313; OMB No. 1550–0023) for thrift holding companies and thrift institutions, and the Credit Union Reports of Condition and Income (NCUA 5300/5300S; OMB No. 3133–0004) for credit unions.

[99] 15 U.S.C. 1693a(10).

[100] Interchange fees for electronic debit transactions initiated in a foreign country also may be subject to restrictions imposed by that country.

[101] Several merchant-commenters stated that they saw no need for any interchange fees and that debit card transactions should clear at par like check transactions.

[102] In general, unlike issuers and networks, merchants and their representatives did not comment in detail about the meaning of the phrase ''reasonable'' and ''proportional'' to the cost.

By contrast, merchants and their trade groups argued that debit cards are only one part of a checking account product, that issuers do not need to obtain full cost recovery from merchants through interchange fees, and that robust debit card markets exist in other countries that have low or no interchange fees. Therefore, merchants and their representatives supported the proposal to limit allowable costs to a narrow group of costs associated mainly with authorization, clearance, and settlement of a transaction and to establish a cap at a level that does not permit 100 percent of covered issuers to recover allowable costs through interchange fees.

Other issuers and networks suggested that the Board should not follow the ratemaking jurisprudence because, unlike public utilities, no natural monopoly exists for issuers, which eliminates the risks of excessive profits and charges (as issuers do not have captive customers). Some of these commenters suggested how the Board should interpret the phrase ''reasonable and proportional to the cost incurred by the issuer'' independent from ratemaking jurisprudence. Many of these commenters read EFTA Section 920(a)(2) as requiring interchange fees that are in ''reasonable proportion'' to the issuer's cost of the transaction. Several issuers and networks contended that an interchange fee was not ''reasonable'' unless the fee included profit or a mark-up on cost. A few commenters argued that Congress demonstrated its intent that issuers be permitted to receive or charge interchange transaction fees that exceeded their costs by using the phrase ''proportional to'' rather than ''equal to.'' One commenter contended that the ''reasonableness'' of a fee should vary based on the scope of allowable costs. For example, reasonableness may be a different standard when compared to total cost than when compared to average variable cost. Other commenters viewed reasonableness independently from proportionality and suggested that the ''reasonableness'' of a fee take into consideration the benefits (or value) of debit cards to consumers and merchants (particularly through the analogy to checks).

Numerous issuers, networks, depository institution trade organizations, and individuals objected to fee limits as inconsistent with the directive that the Board establish ''standards for assessing'' whether the amount of an interchange fee is reasonable and proportional to cost. These commenters objected to the establishment of both the safe harbor and the cap because both involved numerical limits rather than subjective or flexible standards for assessing whether a fee was reasonable and proportional to cost. Few of these commenters provided specific suggestions about structuring the more flexible standards (other than eliminating the proposed cap). One issuer suggested that the Board specify the allowable costs and then specify how interchange fees may be structured to account for the variation in risk associated with different types of transactions. This commenter suggested that the Board specify how to determine a reasonable rate of return and that each network could gather cost information from each covered issuer in order to determine permissible interchange fees. A few commenters suggested the Board follow the approach used in its Regulation Z to interpret similar language in section 149 of the Truth in Lending Act (TILA), which did not set specific numerical limits, but did include safe harbor fee levels.[103]

Merchants supported a cap as necessary to prevent interchange fees from becoming excessively high, but objected to a safe harbor as inconsistent with the statutory language, which they viewed as requiring a connection to each issuer's specific costs. Some commenters argued that a cap involves an arbitrary limit on interchange fees and would be an unauthorized assessment of the reasonableness of the level of costs rather than of interchange fees. Other commenters contended that a single cap creates a variable relationship between interchange fees and costs across issuers, rather than a uniform proportional relationship.

A few commenters contended that the Board had no statutory basis for considering incentives to reduce costs. These commenters argued that issuers always have such incentives, and therefore a cap was not necessary to create such incentives. A few commenters also argued that any cap on cost recovery would ultimately reduce efficiency gains by discouraging firms from investing capital needed to achieve efficiency gains if those investments were not recovered under the cap.

One commenter argued that a cap was unnecessary in light of the network exclusivity and routing restrictions and believed that a cap would distort the market outcome of those provisions. By contrast, some merchants did not believe that the network exclusivity and routing provisions would result in significant downward pressure on interchange fee levels under proposed Alternative A.

Many of the commenters opposed to a cap and/or safe harbor, however, recognized the appeal of a cap or a safe harbor from the perspective of transparency and administrative simplicity and stated that a pure issuer-specific standard would be difficult to implement operationally and difficult to enforce. Merchants and one acquirer/processor acknowledged that having either a cap or a safe harbor would make the interchange fee structure simpler for merchants to understand, which could increase transparency and reduce operational risks. One network asserted that an issuer-specific approach would result in unpredictable interchange fees for merchants because merchants would not know in advance the issuers of their customers' debit cards.

As between proposed Alternative 1 and 2, most issuers viewed Alternative 2 as the better alternative due to its ease of compliance, but preferred a higher cap. Other issuers supported a variant of Alternative 1—issuer-specific standards with a higher safe harbor and no cap. Issuers supported raising the cap and/or safe harbor to ensure recovery of costs such as the payment ''guarantee,'' network processing fees, customer service costs, rewards programs, fixed costs, and a return on investment.[104] A few issuers suggested that any inclusion of the payment guarantee and fraud losses be done on an *ad valorem* basis and vary by merchant type.

Merchants and their representatives generally supported the more issuer-specific Alternative 1 as most consistent with the statute and reflective of the actual costs of most covered issuers, which they asserted are significantly below both the proposed 12-cent cap and 7-cent safe harbor.[105] Some acquirers and merchant processors acknowledged that Alternative 2 would be the easier alternative to implement, but objected to a safe harbor as inconsistent with the statute. Many of these commenters encouraged the Board

[103] *See* 12 CFR 226.52(b)(1) (an issuer may impose a fee that ''represents a reasonable proportion of the total costs incurred by the card issuer for that type of violation'').

[104] Allowable costs are discussed in more detail later in this section. Many issuers, both covered by and exempt from the interchange fee standards, provided information in their comment letters about their estimated costs of debit card transactions, derived from internal accounting or industry studies. These costs generally ranged from 14 cents per transaction to 63 cents per transaction. A few commenters provided information about the cost components of these estimates.

[105] Several merchant commenters referenced a 2004 industry study (STAR CHEK Direct Product Overview study; First Annapolis Consulting) that found the per-transaction costs to be 0.33 cents for PIN debit and 1.36 cents for signature debit, but the study was not provided with the comments.

to revise any safe harbor to base it on the mean cost across transactions rather than the median issuer cost in order to provide a greater link between costs and fees for most transactions, as well as greater incentives to lower costs. One commenter asserted that the average-cost measurement is more ''economically meaningful'' than the median. Most merchants objected to an *ad valorem* component.

B. Final Interchange Fee Standard

1. Description of Final Rule

The Board has considered all of the comments it has received and has determined to adopt in the final rule a modified version of the approach in proposed Alternative 2. Under the final rule, each issuer could receive interchange fees that do not exceed the sum of the permissible base component and the permissible *ad valorem* component. The standard's base amount per transaction is 21 cents, which corresponds to the per-transaction allowable cost, excluding fraud losses, of the issuer at the 80th percentile, based on data collected by the Board in a survey of covered issuers. The *ad valorem* amount is 5 basis points of the transaction's value, which corresponds to the average per-transaction fraud losses of the median issuer, based on the same survey data. Each issuer's supervisor is responsible for verifying that an issuer does not receive interchange fee revenue in excess of that permitted. *See* § 235.9. The Board recognizes that issuers' costs may change over time, and the Board anticipates that it will periodically conduct surveys of covered issuers in order to reexamine and potentially reset the fee standard.

2. Reasonable and Proportional to Cost

EFTA Section 920(a)(2) does not clearly require either transaction-specific or issuer-specific standards. Section 920(a)(2) provides that ''the amount of any interchange transaction fee that an issuer may receive or charge with respect to an electronic debit transaction shall be reasonable and proportional to the cost incurred by the issuer with respect to the transaction.'' Some commenters interpreted this language as limiting the permissible interchange fee amount for a particular issuer to a proportion of the allowable costs incurred by that issuer. Other commenters interpreted this language as permitting the permissible interchange fee amount to be set in accordance with the allowable costs of the average issuer or an issuer at a reasonable ranking among issuers. Nearly all commenters appear to believe the language did not require computing the actual allowable cost of each specific transaction; none argued for such a calculation. Instead, commenters generally interpreted Section 920(a)(2) as referring to the cost of an average electronic debit transaction or type of electronic debit transaction (*e.g.,* PIN vs. signature) or some other categorization of the transaction (*e.g.,* card-present vs. card-non-present).

The two proposals offered for comment by the Board covered both interpretations. Alternative 1 included an issuer-specific measurement of costs and fees. Alternative 2 was based on the average costs incurred by an issuer at the 80th percentile of allowable costs, based on certain survey data. As noted above, after consideration of the language and purpose of the statute and the practical results of various interpretations of the statute, the Board is adopting in the final rule a variant of the approach proposed as Alternative 2. Under this approach, an issuer may not receive an interchange fee that exceeds the sum of a base component, corresponding to the per-transaction allowable costs of the issuer at the 80th percentile as reported on the Board's survey, and an *ad valorem* component, corresponding to the per-transaction fraud loss of the median issuer as reported on the Board's survey.

As an initial matter, the Board believes this approach is consistent with the language in Section 920(a)(2). Section 920(a)(2) refers to ''an issuer'' and ''an electronic debit transaction;'' in other words, to a representative issuer and transaction. Section 920(a)(2)'s subsequent use of ''the issuer'' and ''the transaction'' is reasonably read as a reference back to the original representative use of each term (*i.e.,* an issuer receiving an interchange fee and a transaction for which a fee is received). This reading fulfills the purposes of the provision by allowing a standard to be set that ensures that interchange transaction fees are reasonable and are proportional to allowable costs without imposing undue compliance burdens on issuers or networks. This approach also provides transparency to issuers, networks, acquirers, merchants, and supervisors that will result in the most effective monitoring and enforcement of compliance.

The Board considered an alternative interpretation of Section 920(a)(2) under which the section would require that each interchange fee that a particular covered issuer receives be reasonable and proportional to the cost incurred by that issuer for the particular transaction for which the issuer is receiving the interchange fee. This reading, however, would result in a statutory requirement that is virtually impossible to implement. First, interchange fees are computed at the time of the transaction, and an issuer's costs for a specific transaction cannot be ascertained at the time the issuer receives the interchange fee. The cost of each transaction varies based on a variety of factors, including factors that may not be known to the issuer at the time it charges or receives the interchange fee. For example, the cost of network fees for a transaction may vary based on the volume of transactions that the issuer processes through a given network. The issuer cannot precisely control or know the volume of transactions at any given moment when a particular transaction occurs, because that volume depends largely on customer usage of their debit cards and merchant routing decisions; for example, lower transaction volume may result in higher network fees for each transaction.

Second, even assuming an issuer could calculate the cost of each transaction, transaction-specific interchange fees would result in an exceedingly complex matrix of interchange fees. Each issuer would be required to provide each network with data reflecting that issuer's actual cost per transaction, and each network would then be required to ensure that no more than the allowable portion of these actual costs would be covered by an interchange fee. These calculations would be required for tens of billions of electronic debit transactions and a large and growing number of covered issuers.[106] This would introduce tremendous complexity and administrative costs for issuers, networks, acquirers, and merchants, as well as difficulty in monitoring and enforcing compliance. Thus, interpreting Section 920(a)(2) as requiring interchange fees to be calculated based on the cost of each transaction for which an interchange fee is charged or received would be an absurd result the Board does not believe Congress intended.[107]

[106] According to the Board's survey, there were 37.6 billion electronic debit transactions in 2009. The Board sent the survey to 131 covered financial organizations (some of which represented multiple affiliated issuers). The issuers responding to the survey, which does not cover the universe of covered issuers, accounted for about 60 percent of these transactions—roughly 22.6 billion transactions.

[107] In general, statutes should be interpreted to avoid an absurd result. *See Harrison v. Benchmark Elecs. Huntsville, Inc.,* 593 F.3d 1206, 1212 (11th Cir. 2010).

This impractical result is not compelled by the words of Section 920(a)(2). As explained above, Section 920(a)(2) may be reasonably read to limit interchange fees based on the allowable costs for a representative issuer in a representative electronic debit transaction.

Some commenters urged adoption of an interpretation of Section 920(a)(2) that focuses on the costs incurred by a specific issuer in connection with a representative electronic debit transaction. This view, however, does not represent a consistent reading of the words of Section 920(a)(2). As noted above, Section 920(a)(2) refers to ''an issuer'' and ''an electronic debit transaction'' when identifying the amount of a fee that shall be restricted. Later, Section 920(a)(2) refers to both the cost incurred by ''the issuer'' and the cost of ''the transaction.'' If ''the issuer'' in this second location is interpreted not as a reference to the original representative issuer, but instead as a reference to a specific issuer, then the same interpretation would seem to be required by the identical and parallel references to ''a transaction'' and ''the transaction'' in that same sentence. As explained above, this leads to an extraordinarily complex and burdensome result. Commenters recognized this in supporting an interpretation of ''a transaction'' and ''the transaction'' as both referring to a representative electronic debit transaction, distinguishing electronic debit transactions and the costs related to those transactions from the costs related to other types of transactions, such as credit card transactions. In the same way, the parallel use of the same construction in referencing ''an issuer'' and ''the issuer'' in the same sentence supports the interpretation of those references as references to a representative issuer of debit cards.

Moreover, establishing issuer-specific interchange fee standards would significantly increase the burden on supervisors to assess compliance and make it impossible for networks, acquirers, and merchants to know whether issuers were in compliance with the standards under Section 920. Under any issuer-specific framework, each supervisor would need to determine for each transaction whether an issuer is receiving an interchange fee that does not exceed its allowable costs. Further, in contrast to the adopted approach that includes a publicly known maximum permissible fee, an issuer-specific approach would introduce uncertainty for networks and merchants, neither of which would know whether interchange fees received or charged by a given issuer were in compliance with the statutory standard. In addition, this approach would not create the incentive to reduce costs that is created by an approach like Alternative 2.

Section 920(a)(2) raises a second definitional matter. Section 920(a)(2) requires that the amount of any interchange fee be ''reasonable'' and ''proportional to the cost incurred by the issuer,'' without defining either ''reasonable'' or ''proportional.'' Instead, Section 920(a)(3) requires the Board to give meaning to those terms through its standards. For purposes of establishing standards for assessing whether the amount of any interchange fee is ''reasonable'' and ''proportional'' to cost, the Board has established a reasonable limit on the highest amount of an interchange fee that an issuer may receive and has based that limit on the average per-transaction allowable costs incurred by issuers with respect to electronic debit transactions.

This approach gives meaning and effect to both terms. The statute's use of the term ''reasonable'' implies that, above some amount, an interchange fee is not reasonable. The term ''reasonable'' commonly is defined as meaning ''fair, proper, or moderate'' or ''not excessive,'' and what is ''reasonable'' generally depends on the facts and circumstances.[108] Section 920(a) does not specify whether reasonableness is assessed from the merchant's or issuer's perspective or from another perspective. The use of the term ''proportional'' requires a relationship between the interchange fee and costs incurred; however, it does not require equality of fees and costs or demand that the relationship be constant across all quantities. The term ''proportional'' has a variety of meanings, including ''forming a relationship with other parts or quantities'' or ''corresponding in degree, size, or intensity.''[109] The final rule adopts a standard for both terms: a cap that delineates a separation between a ''reasonable'' fee and a fee that is not reasonable; and a requirement that the relationship between the amount of an interchange fee that may be received by an issuer and the cost of the transaction be set by reference to the allowable costs of electronic debit transactions.

In establishing this standard, the Board rejected a more mathematical interpretation of the word ''proportional'' that would require a constant proportion between costs and fees. As explained above, that reading is not required to give meaning to the term ''proportional'' in the statute. As interpreted by the Board, the term eliminates quantities that do not have the required relationship—in this case, excluding costs that are not related to electronic debit transactions. Moreover, the term ''proportional'' is a meaningful and descriptive alternative to ''equal to.'' In this way, Congress indicated that interchange fees must have a relationship to related costs, but need not be equal to those costs. Had Congress intended a fixed proportion between an issuer's transaction cost and the amount of an interchange fee, Congress could have required an interchange fee to have a ''given proportion to,'' ''be equal to,'' or have a ''fixed proportion to'' cost.

Several commenters suggested the Board follow an approach similar to the rules prescribed under Section 149 of the Truth in Lending Act, which uses language similar to EFTA Section 920(a)(2) and requires that penalty fees assessed by credit card issuers be reasonable and proportional to the omission with respect to, or violation of, the cardholder agreement.[110] Section 149 of TILA required the Board to consider the costs incurred by issuers as a result of credit card violations in addition to other factors, which included the need to deter violations. Under the Board's TILA rule, a penalty fee is reasonable and proportional to the omission or violation if the penalty fee is a reasonable proportion of the creditor's total cost of addressing that type of omission or violation for all consumers, which ensures that no individual consumer bears an unreasonable or disproportionate share of the creditor's costs of the type of violation. That rule establishes a safe harbor for compliance with the Board's standards, but does not establish a cap on the amount of penalty fees.[111]

The Board believes the context and usage of the terms ''reasonable'' and ''proportional'' in Section 149 of TILA and Section 920 of the EFTA allow for different approaches to effectuate the specific purposes of each section. The reference in TILA incorporates a subjective determination, relating to the proportionality of a fee to the violations of a contract, while the reference in Section 920 relates to the proportionality of a fee to a numerical cost. In the Board's TILA standards, ''a

[108] *Black's Law Dictionary* at 1272 (7th ed. 1999) (defining ''reasonable''); *Webster's New World Dictionary & Thesaurus* at 529 (2nd Ed. 2002) (defining ''reasonable'').

[109] *American Heritage Dictionary* at 1049 (1976); *Merriam Webster's Collegiate Dictionary* at 936 (10th ed. 1995) (defining ''proportional'').

[110] 15 U.S.C. 1665d.

[111] 12 CFR 226.52; 75 FR 37527 (June 29, 2010).

reasonable proportion'' is based on a creditor's total cost of all violations of that type, and is readily set based on the costs to the creditor and monitored by supervisors, with variation across creditors reinforcing competition to the benefit of consumers. In the case of penalty fees regulated by TILA, the consumer paying the fee may stop its relationship with the creditor charging the fee.

Although that approach may be permissible under Section 920, the Board believes for the reasons discussed above that a single cap is a more appropriate approach in the context of interchange fees. In particular, practical implementation concerns, constraints on the data currently available to the Board, lack of competition in interchange fees, more effective and consistent monitoring, and other factors justify a different approach than the interpretation under TILA. Accordingly, the Board does not believe interpreting ''proportional to'' the same way in both the interchange fee context and the credit card penalty fee contexts is appropriate.

Based on the interpretations discussed above, the standard set in the final rule assesses whether an interchange fee is reasonable and proportional to costs by reference to certain average per-transaction costs directly related to particular electronic debit transactions of covered issuers. As explained below, in setting the cap, the Board relied on data that were available to it through its survey, and the Board included only certain issuer costs directly related to effecting particular electronic debit transactions. The Board did not consider any costs of processing credit card transactions, ACH transactions, or other transactions that access a cardholder's account (but did consider a pro rata portion of certain costs that are joint between debit cards and credit cards, or between debit card and other transactions that access a cardholder's account). Similarly, the Board did not consider corporate overhead or other costs, whether or not related to debit cards, that are not related to particular electronic debit transactions (such as advertising and marketing costs for debit card programs). By so limiting the considerations, the Board ensures that the amount of an interchange fee is related to issuers' costs of effecting the electronic debit transaction and not to other factors.

3. Cost Considerations

EFTA Section 920(a)(4)(A) requires the Board to consider the ''functional similarity'' between electronic debit transactions and checking transactions that are required within the Federal Reserve System to clear at par. Section 920(a)(4)(B) requires the Board to distinguish between ''the incremental cost incurred by an issuer for the role of the issuer in the authorization, clearance, or settlement of a particular electronic debit transaction,'' and ''other costs incurred by an issuer which are not specific to a particular electronic debit transaction.'' The statute directs the Board to consider the former costs in establishing an interchange fee standard, and prohibits it from considering the latter costs. The Board interprets the prohibition in Section 920(a)(4)(B)(ii) on considering certain costs as prohibiting inclusion of these costs in the standards set under Section 920(a)(3), and not as a prohibition on the Board collecting information about and determining the scope of these costs.

Beyond these instructions, as explained below, Section 920 does not restrict the factors the Board may consider in establishing standards for assessing whether interchange transaction fees are reasonable and proportional to cost, such as costs that are specific to a particular electronic debit transaction but are not incremental or are not related to the issuer's role in authorization, clearance, and settlement. As explained below, the Board carefully evaluated the costs that could be considered under Section 920(a)(4) as well as the data available regarding these costs in establishing a standard for determining whether an interchange fee is reasonable and proportional to cost, and did not include costs prohibited by Section 920(a)(4)(B)(ii) in establishing the interchange fee standard.

a. Summary of proposal

The Board proposed standards for interchange fees that are based on the per-transaction costs an issuer incurs only for authorization, clearance, and settlement and that vary with the number of transactions within the reporting period (*i.e.,* average variable cost). The proposal excluded network processing fees, as well as other costs not related to authorization, clearance, and settlement that varied with the number of transactions. The proposal also excluded all costs that did not vary with changes in transaction volumes up to capacity limits within a calendar year. *See* proposed comment 3(c)-3.i. Under the proposal, an issuer could allocate a pro rata share of debit card costs included among variable costs of authorization, clearance, and settlement that were shared with credit card or other programs.

The Board based both of its fee standard alternatives on an issuer's per-transaction variable costs of authorization, clearance, and settlement. The regulatory text for Alternative 1, which incorporated an issuer-specific cost component, included a detailed description of allowable costs. Proposed § 235.3(c)(1) described the exclusive list of allowable costs as including the costs that are attributable to receiving and processing authorization requests; receiving and processing presentments and representments; initiating, receiving, and processing chargebacks, adjustments, and similar transactions; transmitting and receiving funds for interbank settlement; and posting electronic debit transactions to cardholders' accounts. Proposed § 235.3(c)(2) stated that fees paid to a network were not an allowable cost. Proposed comment 3(c)–2.i clarified that, with respect to authorization, an issuer's allowable costs included costs for activities such as data processing, voice authorization and referral inquiries, and did not include the costs of pre-authorization activities with the primary purpose of fraud prevention (*e.g.,* transactions monitoring). Proposed comment 3(c)–2.ii explained that an issuer's clearance costs included costs for activities such as data processing and reconciling the clearing message. With respect to non-routine transactions, proposed comment 3(c)–2.iii explained that an issuer's costs included data processing to prepare and send the chargeback, or other similar message and reconciliation expenses specific to non-routine transactions, but allowable costs did not include the costs of receiving cardholder inquiries about particular transactions. Finally, proposed comment 3(c)–2.iv explained that an issuer's settlement costs, for purposes of determining allowable costs, included fees for settling through a net settlement service, ACH, or Fedwire®, as well as data processing costs incurred for account posting.

b. Summary of comments

Merchants overwhelmingly supported the proposal to interpret the first consideration in Section 920(a)(4)(B) as limiting allowable costs to only the incremental costs of authorization, clearance, and settlement. One merchant trade group expressed a preference for including only authorization costs (noting that the statutory requirement to ''consider'' other costs did not require ''inclusion'' of those costs in allowable costs), but concluded that including clearance and settlement costs would also be permissible in light of the statutory mandate to consider those costs.

By contrast, issuers and networks advocated expanding the proposed set of allowable costs, asserting that Section 920(a)(4)(B) does not require that allowable costs be limited to the incremental costs of authorization, clearance, and settlement of a particular transaction. Issuers and networks suggested a variety of ways by which the Board could expand the set of allowable costs, such as by including an expanded definition of activities considered to be part of authorization, clearance, and settlement; including more, or all, costs that are specific to a particular transaction, but not incurred for authorization, clearance, or settlement; including all costs associated with a debit card program; and including all costs associated with deposit accounts or general operations of the bank.[112] As further discussed below, many issuers suggested that other allowable costs could include costs of computer equipment and other capital assets, card production and delivery, customer service, statements, and resolution of billing errors, as well as an allowance for profit.

With respect to authorization, clearance, or settlement costs, many commenters believed that the proposal improperly limited the costs of authorization, clearance, and settlement to the costs of sending the message and funds between parties to a transaction.[113] In general, commenters suggested expanding the interpretation of authorization activities to include the costs of building, updating, and maintaining databases of cardholder information and behavior patterns that are necessary for determining whether the card and account are valid. In addition, numerous issuers suggested including the cost of monitoring transactions to determine whether a particular transaction is fraudulent, which one network noted could involve establishing and maintaining complex algorithms. (Transactions monitoring is discussed separately below.) Many issuers suggested including the network processing fees (*e.g.,* switch fees) they pay for authorizing, clearing, and settling each transaction. Another issuer suggested including, as an authorization cost, the cost of PIN management, but did not elaborate as to what that activity entailed. Numerous issuers suggested that the final rule include the cost or value of the payment guarantee as a cost of authorization. This feature is discussed separately below.

The Board received numerous comments on its proposed interpretation of the incremental cost of a particular transaction. Merchants, as well as a few other commenters, supported the use of average variable costs (*i.e.,* the average value of those costs that vary with the number of transactions sent to an issuer within a calendar year). Issuers and networks generally opposed this interpretation of the incremental cost of a particular transaction, and several commenters offered alternative definitions of ''incremental cost.'' Several commenters stated that ''incremental cost'' had a well-established meaning—the cost saved by a service provider if it did not provide the service, or the cost incurred to provide the service. Many issuers argued that the relevant service was debit card programs and, based on this proposed definition, suggested that all of the program's costs should be considered, including customer service costs, the cost of statements, costs from resolution of billing errors, card production and delivery, capital costs, and an allowance for profit, as well as account set-up costs.[114]

Other commenters argued that the proposal arbitrarily limited the period of time used for determining whether a given cost was ''incremental.'' One commenter suggested that incremental costs include costs that varied over a multi-year period (*e.g.,* 3–5 years). Still others asserted that the costs of debit card transactions can vary based on measures other than time, such as transaction volume (*e.g.,* peak-load volumes); therefore, many in-house costs are variable with changes in transaction volume larger than one transaction. Among the costs commenters argued should be included because they vary over time or over other measures are customer service costs; equipment and other capital costs, labor costs, and overhead costs; network membership and gateway fees; debit program administration costs, including marketing; insurance costs; and research and development costs. These commenters contended that excluding consideration of these costs would encourage issuers to shift transaction processing to third-party processors that would convert all costs into incremental costs that vary with the number of transactions over the short term. Commenters argued that this result would be less efficient in the long run and could lead to higher interchange fees and customer costs. A few commenters argued that a broader reading of incremental costs was necessary to ensure that a cap would further general policy goals of efficiency and innovation, and contended that many efficiency gains and innovations cannot be achieved absent specific upfront investment. A few commenters argued that considering a broader range of costs would minimize barriers to entry and promote competition.

The Board also received numerous comments on the proposed distinction between costs that are specific to a particular transaction and costs that are not specific to a particular transaction for purposes of the considerations in Section 920(a)(4)(B). Commenters disagreed as to which costs were specific to a particular transaction and which costs were not. A few commenters suggested that issuers be permitted to recover certain transaction costs even if the cost is not paid for, charged, or incurred on a per-transaction basis. Costs that commenters suggested as being specific to a particular transaction included costs incurred for chargebacks, transaction-specific customer service inquiries, providing statements, providing rewards (and associated rewards-program administration), and depreciation. One commenter argued that any cost can be allocated to a specific transaction, and therefore the statute does not resolve which costs are specific to a transaction. Several commenters recognized that although any cost could be allocated to any transaction, the relationship of a cost to a particular electronic debit transaction varies.

In addition to the proposed interpretation of individual provisions, the Board received numerous comments about how Section 920(a)(2) and the considerations in Section 920(a)(4)(B) should be interpreted together. Some merchant commenters argued that the Board should interpret Section 920(a)(4)(B)(ii) as prohibiting inclusion of all costs that were not an incremental cost of authorization, clearance, and settlement. Several other commenters asserted that Section 920(a)(4)(B) is silent with respect to non-incremental costs associated with authorization, clearance, and settlement. Specifically, these commenters argued that Section 920(a)(4)(B)(i) addressed the

[112] Several commenters encouraged the Board to view settlement as not complete until after the period during which network rules permit an issuer to charge back a transaction has ended. As discussed in this section, adopting a specific definition of ''authorization,'' ''clearance'' or ''settlement'' is unnecessary.

[113] A few commenters suggested that the Board expand allowable costs to include data processing costs of authorization, clearance, and settlement. The proposal included these costs to the extent the costs varied with the number of transactions sent to the issuer.

[114] These and similar costs are discussed in more detail later in this section.

incremental costs of authorization, clearance, and settlement of a particular transaction, Section 920(a)(4)(B)(ii) addressed costs that are not specific to a particular transaction, but neither paragraph addressed costs that were specific to a particular transaction but were not an incremental cost of authorization, clearance, and settlement. Other commenters argued that Section 920(a)(4)(B)(ii) excludes only costs that are not specific to electronic debit transactions in general, rather than costs that are not specific to a particular electronic debit transaction. Several issuers and networks asserted that Section 920(a)(4)(B) requires the Board only to ''consider'' some costs and that the cost considerations are not binding in the development of fee standards under Section 920(a)(2), which requires that the amount of an interchange fee be reasonable and proportional to ''the cost incurred by the issuer with respect to the transaction.'' One depository institution trade group contended that there is no indication of Congressional intent that issuers not be able to recover all of the substantial costs incurred to provide debit card services.

c. Overview of Costs Considered Under the Final Rule

EFTA Section 920(a)(4)(B) requires the Board to distinguish between two types of costs when establishing standards for determining whether the amount of any interchange fee is reasonable and proportional to the cost incurred with respect to the transaction. In particular, Section 920(a)(4)(B) requires the Board to distinguish between ''the incremental cost incurred by an issuer for the issuer's role in authorization, clearance, or settlement of a particular electronic debit transaction,'' which costs the statute requires the Board to consider, and ''other costs incurred by an issuer which are not specific to a particular electronic debit transaction,'' which the statute prohibits the Board from considering.

Section 920(a)(4)(B) does not define which types of costs are ''not specific to a particular electronic debit transaction.'' Therefore, the Board must define these costs. The Board had proposed to exclude from allowable costs those costs that cannot be attributed to any identified transaction (referred to as ''fixed costs'' in the proposal), even if those costs were specific to effecting debit card transactions as a whole.

Many commenters argued that this reading was not compelled by the statute, excluded costs that could be considered under the statute, and was an unworkable approach in practice. In particular, they argued that identifying whether a particular cost would not be incurred but for one particular transaction is an impractical approach to determining which costs not to consider because of the very large number of transactions many covered issuers process in a day or other time period. This volume makes it virtually impossible to attribute the actual cost of the activity (*e.g.,* receiving messages) to one specific transaction.

Based on a consideration of these and other comments on the scope of the prohibition in Section 920(a)(4)(B)(ii), the Board has revisited its proposed interpretation of Section 920(a)(4)(B). The Board notes that this section is ambiguous and may be read in several ways. An interpretation that Section 920(a)(4)(B) prohibits consideration of all costs that are not able to be specifically identified to a given transaction would appear to exclude almost all costs related to electronic debit transactions because very few costs could be specifically assigned to a given transaction.[115] Moreover, as many commenters noted, operational constraints make the determination of which in-house costs an issuer incurs in executing any particular transaction virtually impossible in practice.

Section 920(a)(4)(B) has another straightforward interpretation that is workable and gives important meaning to this section. This reading would interpret costs that ''are not specific to a particular electronic debit transaction,'' and therefore cannot be considered by the Board, to mean those costs that are not incurred in the course of effecting any electronic debit transaction. The statute allows the Board to consider any cost that is not prohibited—*i.e.,* any cost that *is* incurred in the course of effecting an electronic debit transaction. This interpretation would not require identification of the cost of a given electronic debit transaction. In this way, the interpretation gives life and meaning to the prohibition in Section 920(a)(4)(B)(ii) without creating the tremendous burdens and practical absurdities discussed by commenters and noted above. Examples of the costs the Board is prohibited from considering are discussed below.

As noted above, there exist costs that are not encompassed in either the set of costs the Board must consider under Section 920(a)(4)(B)(i), or the set of costs the Board may not consider under Section 920(a)(4)(B)(ii). These costs, on which the statute is silent, are those that are specific to a particular electronic debit transaction but that are not incremental costs related to the issuer's role in authorization, clearance, and settlement. Although Section 920(a) does not specifically instruct the Board on how these costs should be considered in establishing the debit interchange fee standard, the section does not prohibit their consideration. Indeed, the requirement that one set of costs be considered and another set of costs be excluded suggests that Congress left to the implementing agency discretion to consider costs that fall into neither category to the extent necessary and appropriate to fulfill the purposes of the statute. Had Congress intended otherwise, it would have prohibited consideration of all costs other than those required to be considered, rather than simply prohibiting consideration of a particular set of costs. Moreover, the statutory phrasing of the costs that must be considered and of the costs that may not be considered leaves no doubt that costs that are not within the category of prohibited costs and that are not incremental costs of authorization, clearance, and settlement may still be considered in establishing standards under Section 920(a).[116]

In discussing the costs that the Board is required to consider under Section 920(a)(B)(4)(i), the proposal noted that there is no single generally-accepted definition of the ''incremental cost'' of a particular unit of a service. As a result, the Board proposed to apply a definition to this term. The Board proposed to consider a cost to be an ''incremental cost * * * of a particular transaction'' for purposes of Section 920(a)(4)(B)(i) if the cost varied with the number of transactions sent to an issuer within a year.

Several commenters urged defining ''incremental cost'' as the difference between the cost incurred by a firm if it produces a particular quantity of a good and the cost incurred by the firm if it does not produce the good at all.[117] This definition would include any fixed or variable costs that are specific to the

[115] Network switch fees and issuer-processor per-transaction fees are among the few costs that could be assigned to individual transactions.

[116] The reference in Section 920(a)(4)(B)(i) requiring consideration of the incremental costs incurred in the ''authorization, clearance, or settlement of a particular transaction'' and the reference in Section 920(a)(4)(B)(ii) prohibiting consideration of costs that are ''not specific to a particular electronic debit transaction,'' read together, recognize that there may be costs that are specific to a particular electronic debit transaction that are not incurred in the authorization, clearance, or settlement of that transaction.

[117] Baumol, William J., John C. Panzar, and Robert D. Willig (1982), *Contestable Markets and the Theory of Industry Structure.* New York: Harcourt Brace Jovanovich.

entire production run of the good and would be avoided if the good were not produced at all. Another definition of ''incremental cost'' suggested by commenters was the cost of producing some increment of output greater than a single unit but less than the entire production run.[118] The Board noted in the proposal these definitions do not correspond to a per-transaction measure of incremental cost that could be applied to any particular transaction.

Other commenters urged the Board to interpret ''incremental cost'' as differentiating between ''fixed'' and ''variable'' costs. Although relying on the variable cost incurred by the issuer to authorize, clear, and settle an electronic debit transaction is a way to interpret the incremental cost of authorization, clearance, and settlement of a particular transaction, the meanings of fixed costs and variable costs depend on a variety of factors, and these concepts are difficult to apply in practice. As asserted by many commenters, whether a cost incurred by an issuer for authorization, clearance, and settlement of transactions is thought of as ''fixed'' or ''variable'' depends on the relevant time horizon and volume range. As applied to the proposed interchange fee standards, the same type of cost may appear variable in one year, but fixed in a different year. For example, if an increase in the number of transactions processed from one year to the next requires the acquisition of additional equipment in the second year, hardware costs that would be considered fixed in the first year would be variable in the second year.

Inconsistent treatment of the same type of cost would make tracking costs for purposes of reporting exceedingly difficult for issuers. This difficulty is compounded by the fact that, even if a clear line could be drawn between an issuer's costs that are variable and those that are fixed, issuers' cost-accounting systems are not generally set up to differentiate between fixed and variable costs. Rather, cost-accounting systems typically are used for internal management purposes, and determining which part of total costs is variable and which is fixed often requires a subjective judgment by the issuer. This fact could result in significant variation across issuers as to which costs are allowable and which are not.

Moreover, nearly any cost that could be defined as fixed if incurred by an issuer that performs its transactions processing in-house could be considered as variable if the issuer were to outsource its debit card operations to a third-party processor that charged issuers a per-transaction fee based on its entire cost, including both fixed and variable costs. This makes enforcement of a distinction between fixed and variable costs very difficult and potentially uneven.

Commenters argued that an issuer incurs costs to effect an electronic debit transaction other than the variable authorization, clearance, and settlement costs the Board originally proposed to include as allowable costs. Specifically, issuers incur costs to connect to the network and to purchase and operate the hardware and software used for processing transactions, including associated labor cost. As stated above, these costs are not readily placed in the ''variable'' or ''fixed'' categories because their categorization depends on the relevant range of transactions and the time horizon. However, no electronic debit transaction can occur without incurring these costs, making them costs specific to each and every electronic debit transaction.

Many complexities also exist in attempting to define costs that are or are not ''incurred by an issuer for the role of the issuer in the authorization, clearance, or settlement'' of an electronic debit transaction under Section 920(a)(4)(B)(i). As noted above, many commenters disputed the proposed definition of authorization, clearance, and settlement as arbitrarily excluding costs related to dispute settlement and account set-up because these costs are incurred before or after the transaction has occurred. The Board considered these comments and included additional costs to the extent described below. The Board does not find it necessary to determine whether costs are ''incremental,'' fixed or variable, or incurred in connection with authorization, clearance, and settlement. Under the framework established by the statute, all costs related to a particular transaction may be considered, and some—the incremental costs incurred by the issuer for its role in authorization, clearance, and settlement—must be considered. In determining the interchange fee standard, the Board considered the authorization, clearance, and settlement costs described in the proposal for which data were available. By considering all costs for which it had data other than prohibited costs, the Board has complied with the statutory mandate not to consider costs identified in Section 920(a)(4)(B)(ii), has fulfilled the statutory mandate requiring consideration of the costs identified in Section 920(a)(4)(B)(i), and has chosen to consider other costs specific to particular electronic debit transactions to the extent consistent with the purpose of the statute, in establishing its standard required under Section 920(a)(3)(A).

d. Examples of Costs Not Included in Setting the Standard

On the basis described above, in establishing the standards for implementation of Section 920(a)(2), the Board did not include in the establishment of the interchange fee standard those costs that are not specific to a particular electronic debit transactions.[119] In addition, the Board did not include certain costs that are specific to a particular electronic debit transaction but are not incremental costs incurred by the issuer for its role in the authorization, clearance, and settlement of a particular transaction. The costs the Board did not consider in setting the standards include costs associated with corporate overhead or establishing and maintaining an account relationship; general debit card program costs, such as card production and delivery costs, marketing expenditures, and research and development costs; and costs for non-sufficient funds handling. Although the Board recognizes that all of these costs may in some way be related to debit card programs and transactions, the Board believes that many of these costs are not specific to a particular electronic debit transaction within the meaning of the prohibition in Section 920(a)(4)(B)(ii) and therefore may not be considered by the Board. The Board has also determined not to include the costs resulting from non-sufficient funds, the costs of rewards programs, or costs of handling cardholder inquiries for various reasons discussed below.

Corporate overhead and account relationship costs. Corporate overhead costs incurred by an issuer for its general business operations are shared across all product lines of the issuer and are not specific to a particular electronic debit transaction. In fact, although a portion of these costs could relate to debit card programs, these costs are not specific to any electronic debit transaction because they are not incurred in the course of effecting electronic debit transactions. Corporate

[118] Another interpretation of ''incremental cost'' would be marginal cost, often assumed to be, but not required to be, the additional cost of the last unit produced. The proposal highlighted the practical difficulties of measuring the marginal cost of a transaction. The Board did not receive comments regarding the use of marginal cost.

[119] The Board also did not include a level of profit or a rate of return as an allowable cost in setting its standard. To the extent profit is a ''cost,'' it is not one that is specific to a particular transaction.

overhead costs include, but are not limited to, the costs of compensation for executive management; the costs of support functions such as legal, human resources, and internal audit; and the costs to operate the issuer's branch network.

Some commenters recommended the final rule include the costs of account set-up, including the costs of performing customer due diligence, enrolling the customer in on-line banking, and acquiring customers (*e.g.,* through marketing). Costs that are incurred with respect to the cardholder account relationship are not specific to any electronic debit transaction. Once an account is established, an issuer may incur ongoing costs of maintaining the account and customer relationship, including costs of receiving and resolving certain account-related customer inquiries, account-related regulatory compliance cost (*e.g.,* BSA/AML compliance, Regulation E compliance, and FDIC insurance),[120] and ATM-related costs. These costs are also not incurred in the course of effecting an electronic debit transaction, and, as with cardholder account costs, would be incurred even if the customer engaged in no electronic debit transactions.

Debit card program costs. Many issuers and networks suggested that the final rule include all costs related to debit card programs. As noted above, those commenters urged the Board to read Section 920(a)(4)(B)(ii) to exclude only those costs that are not related to electronic debit transactions or the debit card program.

The Board's interpretation of the statute distinguishes between costs incurred in effecting electronic debit transactions and broader program costs. Card production and delivery costs were excluded because they are not incurred in the course of effecting electronic debit transactions. Although each debit card transaction uses a debit card or information from the debit card, an issuer's card production and delivery costs (*e.g.,* creating plastic cards and alternate devices such as key fobs, and mailing them to cardholders) are incurred without regard to whether, how often, or in what way an electronic debit transaction will occur. For example, a customer may never use the debit card for an electronic debit transaction or may use the card only for ATM transactions (which are not covered by this rule). A customer may also use only the debit card number (as, for example, in Internet or preauthorized recurring electronic debit transactions) and not the card or alternate device provided by the issuer.

Excluding the cost of debit card production and delivery from the interchange fee charged to the acquirer is consistent with another requirement of Section 920(a). Section 920(a)(4)(A) requires the Board to consider the functional similarity between electronic debit transactions and check transactions. In the case of checks, the check-writer or his bank typically bears the cost of producing and obtaining blank checks.

An issuer's marketing costs and costs of research and development to improve its debit card products and programs are not costs that are specific to particular electronic debit transactions within the meaning of the statute. Marketing costs could include, for example, the cost of informing cardholders of the availability of optional debit card products and services, and the cost of advertising campaigns for the issuer's debit card program. Research and development costs could include, for example, costs related to debit card enhancements, process improvements, and debit card product development. In addition to not being costs specific to effecting particular electronic debit transactions, analogous costs incurred by a payor's bank for its check service are not reimbursed by the payee's bank.

Debit card issuers also incur costs in order to comply with Federal, state, or local regulations, including costs of providing account statements. Although the costs of providing statements relate to conducting electronic debit transactions generally, the statement relates to the entire account relationship and the total number of all types of transactions in the cardholder's account and is triggered by the account relationship as opposed to any specific transaction.[121] Moreover, analogous costs incurred by a payor's bank for its check service are not reimbursed by the payee's bank.

As explained below, the Board considered and determined to include network switch fees in establishing standards under Section 920(a). However, the Board did not include the cost of network membership. Although network membership is necessary in order to process transactions over a particular network, membership fees are not incurred each time a cardholder uses a debit card and, in fact, are incurred for activities other than those related to particular electronic debit transactions, such as marketing and research and development.

Payment guarantee and non-sufficient funds handling. If an issuer authorizes an electronic debit transaction, network rules typically require the issuer to pay the transaction, subject to specific chargeback rights provided by network rules. One aspect of the issuer's obligation is the so-called ''payment guarantee,'' which refers to network rules that specify that an issuer that authorizes a transaction may not return that transaction for insufficient funds or an invalid account. Several issuers and networks suggested including the cost of providing the payment guarantee as an authorization or settlement cost. Many of these commenters asserted that the payment guarantee that issuers provide merchants for electronic debit transactions is one of the primary differences between electronic debit transactions and checking transactions.

Commenters both in favor of and opposed to including the cost of the payment guarantee as an allowable cost stated that for check transactions merchants are able to purchase check verification and guarantee services. Commenters that supported including the cost of the payment guarantee as an allowable cost suggested that the Board measure the costs in terms of risk exposure, overdraft losses, or the value to the merchant (by considering the price merchants pay for comparable check verification and guarantee services). A few issuers asserted that if they were not compensated for the payment guarantee, then they should be permitted to return a transaction for insufficient funds.[122] More generally, some commenters noted that networks could change existing chargeback rights if issuers were not reimbursed for their costs incurred as part of the payment guarantee.

By contrast, other commenters (predominantly merchants) opposed including the cost of the payment

[120] Federal, State, or local regulations that are not tied directly to the debit card program include Bank Secrecy Act/anti-money laundering (BSA/AML) regulations. Among other things, BSA/AML requires banks to report suspicious activity that might signify money laundering, tax evasion, or other criminal activities. 12 U.S.C. 1829b and 1951–1959; 31 U.S.C. 5311–5314, 5316–5332; 31 CFR part 1010.

[121] Some issuers argued that enabling a second, unaffiliated network on a debit card was a ''compliance cost'' (created by this rule). To the extent an issuer incurs costs related to enabling an unaffiliated network that are otherwise considered to be incurred in effecting an electronic debit transaction (*e.g.,* network connectivity costs to comply with § 235.7), such costs would be included as a basis for the interchange fee standard.

[122] A few issuers suggested that, if the payment guarantee were not included in the base interchange fee, an issuer should be able to charge separately for the guarantee. However, if an issuer were to charge or receive a fee for a payment guarantee through a network, then such a fee would be an interchange transaction fee for purposes of this rule.

guarantee as an allowable cost because, for check transactions, purchasing the verification or guarantee is optional and not required in order to accept checks. Merchants also stated that network rules permitted issuers to charge back transactions alleged to be fraudulent and therefore, the commenters argued, the payment guarantee was not really a guarantee. Some merchants also noted that they are constrained from taking certain steps to minimize fraud because payment card networks discourage merchants from checking the identification of the cardholders in order to reduce inconvenience associated with use of the card.

The Board has considered the comments received on payment guarantees. The final rule does not include the payment-guarantee cost (including non-sufficient funds handling) within the allowable costs. Losses that result from the payment guarantee are incurred when an issuer authorizes a transaction that overdraws the cardholder's account. However, losses associated with a debit card payment guarantee are largely within the issuer's control. An issuer is usually able to decline transactions for which there are insufficient funds, whereupon the merchant will not complete the transaction using the particular debit card. When an issuer approves an authorization request, it generally places a hold on the cardholder's funds pending settlement. If an issuer approves the transaction knowing there are insufficient funds in the account, or does not place a hold on funds underlying an approved transaction, the issuer is choosing to incur any costs incurred in obtaining funds from the cardholder. The issuer incurs this cost as a service to its cardholders, and generally imposes fees to recover the associated risk that a cardholder may fail to provide subsequent funding for the transaction.[123] Although some issuers argued that the payment guarantee is analogous to check-guarantee services for which the merchant pays, check guarantee services are generally provided by firms that do not hold the customers' accounts. Therefore, these guarantees are made based on less complete information and the fees for these services reflect this incremental risk.

Cardholder rewards. Issuers offer rewards to customers in order to promote use of the issuer's debit cards, and debit card networks develop these rewards programs to be offered by issuers in order to promote the use of the network's cards. The costs of the rewards and associated program administration depend upon the level of rewards the issuer deems desirable to effectively compete for account holders. Although an issuer may give cardholders rewards for each transaction (or value of transactions), this cost is a customer-relationship program cost that the issuer chooses to incur. Thus, rewards costs are more akin to marketing costs designed to attract customers to the issuer and the network than to transaction costs incurred in the course of effecting an electronic debit transaction.

Moreover, rewards programs often benefit a specific group of merchants determined by the debit card network or issuer. Including these costs in interchange fees that are charged to all merchants would amount to a subsidization of selected merchants by all other merchants that do not benefit from the rewards program (including competitor merchants). Although payor's banks typically do not offer rewards programs for the use of checks, an institution that chose to do so would bear the associated costs and would not receive reimbursement for these costs from the payee's bank. The Board has not included the costs of rewards in establishing the fee standard.

Cardholder inquiries. Issuers incur costs for activities necessary to receive and resolve cardholder inquiries before and after transactions. Issuers and networks argued that the costs of handling customer inquiries and disputes should be included because such costs relate to a particular transaction. Moreover, issuers stated that not including these costs would eliminate incentives for issuers to provide anything but the minimum, legally mandated customer service.

Many costs related to cardholder inquiries do not relate to specific transactions. Rather, they relate to balance inquiries, reports of lost or stolen cards, requests for other replacement or additional cards, inquiries about ancillary products and services, and other non-transaction specific inquiries. In addition, issuers often take the opportunity of a cardholder inquiry to engage in marketing activities unrelated to any particular electronic debit transaction (or to debit programs generally).

However, some customer service inquiries relate to particular transactions. Fielding these inquiries is partly a cost of a service required by regulatory and network rule requirements and partly a cost of managing the customer relationship.

Payor's banks bear the costs associated with customer inquiries for check transactions and do not receive reimbursement for these costs from the payee's bank. Moreover, the cost data obtained by the Board in response to its issuer survey does not allow for the separation of the costs of cardholder inquiries related to specific transactions from the costs of inquiries that do not related to particular transactions. Thus, it is not currently possible to accurately separate out and assess cost data for customer inquiries related solely to particular debit transactions. Accordingly, the Board has not included the costs of cardholder inquiries in establishing the fee standard.

e. Costs Included in Setting the Standard

The Board has included in its establishment of the interchange fee standard the following types of costs from its issuer survey: total transactions processing costs (including costs reported as fixed and variable authorization, clearance, and settlement costs, network processing fees (*e.g.,* switch fees), and the costs of processing chargebacks and other non-routine transactions), transactions monitoring, and fraud losses. An issuer may use the same processing platform for its debit card and credit card operations (or debit card and ATM card operations) to take advantage of economies of scope and scale. The costs of these activities and equipment are referred to as ''joint costs'' because they are shared. Joint costs between debit card and credit card programs may include network connectivity used for multiple card program activities; common hardware, software, and associated labor that are shared across card programs; and customer settlement applications used for all transaction account processing. In these cases, in the Board's survey, costs (excluding fraud losses) were allocated to electronic debit transactions on a pro rata basis. The costs the Board included in establishing the fee standard are discussed further below.

Transactions processing. In addition to the proposed allowable costs described in relation to proposed Alternative 1, an issuer must maintain and use network connectivity to effect each transaction because the issuer must be able to receive the particular authorization request, send the particular approval or denial message,

[123] There are some instances in which a transaction is not cleared until after the authorization hold expires (generally after three days), which may result in an overdraft that was not within the control of the issuer. Although this represents a cost to the issuer of the payment guarantee that is not caused by the issuer knowingly authorizing a nonsufficient funds transaction, the data are not available to separate these ''NSF'' costs from all other ''NSF'' costs.

and receive the related clearing and settlement message. Likewise, an issuer must maintain and use computer equipment that can process each authorization request by checking for the validity of the card and account, as well as checking and updating the amount of funds in an account. The issuer must also employ staff to operate and maintain the computer equipment involved in transaction processing. Each transaction uses the equipment, hardware, software and associated labor, and no particular transaction can occur without incurring these costs. Thus, these costs are ''specific to a particular transaction.'' The most reasonable way to measure and allocate these costs on a per-transactions basis is by averaging these costs across the total number of electronic debit transactions that use the resource.[124]

Costs of chargebacks and other non-routine transactions. Transactions are not limited to the initial purchase. An issuer may initiate a chargeback transaction to reverse settlement with both the acquirer and the cardholder, and an acquirer may present the transaction again to the issuer if the acquirer believes the issuer is not entitled to charge back the transaction.[125] The proposal included as allowable costs the costs of ''initiating, receiving, and processing chargebacks, adjustments, and similar transactions'' and the costs of ''receiving and processing representments of electronic debit transactions'' (but not the actual amount of the chargeback, adjustment, or representment. Proposed comment 3(c)–2.iii stated that an issuer's activities associated with non-routine transactions included activities such as data processing to prepare and send the chargeback message and reconciling the chargeback with the cardholder's account, but excluded costs of receiving cardholder inquiries about particular transactions. Several issuers suggested including costs of processing chargebacks, other than the costs proposed (*e.g.,* data processing and sending the message), such as the costs of resolving cardholder inquiries to determine whether the issuer has a chargeback right. One consumer group encouraged including the cost of processing chargebacks in allowable costs in order to encourage issuers to use networks that provide chargeback rights to consumers.[126] A few merchants opposed including the costs of fraud-related chargebacks, arguing such costs should be included as part of the fraud-prevention adjustment, if at all.

Chargebacks and other non-routine transactions are separate transactions that essentially unwind the initial transaction (see discussion of the definition of ''electronic debit transaction,'' § 235.2(h)). The associated costs of processing these transactions are ''specific to a particular transaction.'' The final rule considers the costs of processing chargebacks and other non-routine transactions as a basis for establishing the standard for interchange fees. As implied by the discussion in a companion interim final rule, published separately in the **Federal Register**, the costs of processing chargebacks are not considered for purposes of the fraud-prevention adjustment; therefore, including the issuer's cost of processing fraud-related chargebacks in the interchange fee standard will not result in double-recovery.

Network processing fees. The Board received numerous comments on the proposed exclusion of network processing fees (*e.g.,* switch fees) as a type of allowable cost. Many issuers and networks requested that the Board include network processing fees because such fees are directly related to the authorization, clearance, and settlement of a transaction. One network asserted that excluding network processing fees created an inconsistency if per-transaction fees paid to third parties could be included as allowable costs. Merchants, by contrast, overwhelmingly supported the exclusion of network processing fees because, if such fees were included, merchants would be in the position of paying all network fees for a transaction. One issuer contended that if network processing fees were excluded, issuers should be permitted to receive net compensation from the networks so that issuers could realize the value to the networks of their cardholder base. This is discussed further in the section related to circumvention and evasion.

The Board believes that network processing fees are both specific to a particular transaction and incurred for the issuer's role in authorization, clearance, and settlement. Network processing fees are incurred by issuers in the course of effecting electronic debit transactions, and the total amount of fees charged to an issuer is determined by the amount of electronic debit transactions processed for that issuer. The Board has included network processing fees in determining the standard for interchange fees. Merchant-routing choice may place downward pressure over time on the level of network fees assessed to acquirers. To the extent that acquirers and merchants may be in the position of directly paying all of their network fees as well as paying the network fees of covered issuers through interchange fees, such an arrangement would be similar to traditional paper-check processing where the payee's bank (the corollary to the acquirer for the merchant) typically pays all of the processing costs, while the payor's bank (the corollary of the issuer in an electronic debit transaction) typically pays no processing fees. The Board recognizes, however, that in electronic check collection systems, both the payee's bank and the payor's bank generally pay processing fees.

Transactions monitoring. The proposal excluded authorization-related fraud-prevention costs from allowable costs in proposed § 235.3. Numerous commenters (predominantly issuers) recommended including costs of such fraud-prevention activities in the interchange fee standard because the pre-authorization fraud-prevention activities are integral to transaction authorization. These commenters suggested that such costs could include the cost of enrolling in or maintaining programs that monitor transactions prior to making the decision to authorize the transaction. Merchants and a few other commenters opposed including fraud-prevention costs in the interchange fee standard because such costs are intended to be included through the fraud-prevention adjustment.

Transactions monitoring systems assist in the authorization process by providing information to the issuer before the issuer decides to approve or decline the transaction. Issuers may monitor transactions through the use of neural networks and fraud-risk scoring

[124] The Board's survey data included the costs of loading funds to prepaid cards as part of reported processing costs. The Board does not believe these costs should be considered in establishing the interchange fee standard because they are not specific to a particular electronic debit transaction and are more akin to deposit account costs, which have not been included in setting the debit interchange fee standard. However, these costs could not be separated from other processing costs that should be included. Because reloadable prepaid cards transactions are a very small proportion of total electronic debit transactions, the Board believes this inclusion is immaterial and does not affect the calculation of the overall cap amount. Future surveys will ask that this cost not be included in reporting processing costs for reloadable prepaid costs.

[125] The circumstances under which an issuer may reverse a transaction vary based on network rules and include an error in the transaction information, duplicate processing, an unauthorized transaction, and non-receipt of merchandise.

[126] That commenter suggested that, under proposed Alternative 1, the Board should allow issuers to recover costs where the merchant has gone out of business, and under proposed Alternative 2, the Board should reduce the cap to 11 cents and allow issuers to recover 1 cent for maintaining an effective debit card chargeback program.

systems. Transactions monitoring is as integral to the authorization decision as confirming that a card is valid and authenticating the cardholder. For example, an issuer may flag a transaction as suspicious and decline the authorization request or require the merchant to verify the transaction with the issuer before deciding whether to approve or deny the transaction.

In comparison, the types of fraud-prevention activities considered in connection with the fraud-prevention adjustment (discussed in an interim final rule published separately in the **Federal Register**) are those activities that prevent fraud with respect to transactions at times other than when the issuer is effecting the transaction. The issuer's cost of this type of action is not considered a cost of authorization. For example, an issuer may send cardholders alerts after authorizing a transaction or series of transactions to inquire about suspicious activity. These subsequent alerts are intended to prevent future fraudulent transactions and are not a cost of authorizing a particular transaction. Any costs of those subsequent alerts are considered in the fraud-prevention adjustment, but not as a basis for the interchange fee standard. Similarly, the cost of research and development of new authentication methods would be considered in the fraud-prevention adjustment but would not be a cost that is specific to a particular electronic debit transaction and therefore cannot be considered in determining the fee standard.

Fraud losses. The proposal did not include fraud losses incurred with respect to electronic debit transactions as an allowable cost. Numerous merchants argued for this exclusion because they believed that allowing issuers to pass fraud losses on to acquirers or merchants through the interchange fee would largely eliminate the incentive for issuers to take steps to minimize fraud losses, contrary to policy goals of reducing the occurrence of, and losses from, fraudulent electronic debit transactions. On the other hand, numerous issuers and some networks supported including fraud losses as costs that are specific to a particular transaction. These commenters argued that it would be unreasonable for issuers to bear fraud losses without any compensation from merchants because merchants receive benefits from authorized debit card sales (including the payment guarantee) and are in a unique position to prevent fraud losses by checking for cardholder identification or signature, among other things. Moreover, these commenters argued that excluding fraud losses from allowable costs would encourage merchants to ignore possible fraudulent electronic debit transactions. A few issuers also indicated that they incur insurance costs against fraud losses, including paying a per-account deductible.

Two issuers provided general suggestions for measuring the amount of fraud losses that should be included in allowable costs. One issuer suggested that fraud losses be reflected as a variable component in the interchange fee standards because fraud losses increase with transaction size. Another issuer suggested that interchange fees reimburse an issuer for fraud losses based on the issuer's fraud levels vis-à-vis industry fraud levels, but did not elaborate further as to the precise formula to be used.

The Board has considered the comments received on fraud losses. The final rule includes an allowance for fraud losses in determining the interchange fee standard. For purposes of the final rule, fraud losses are those losses incurred by the issuer, other than losses related to nonsufficient funds, that are not recovered through chargebacks to merchants or debits to or collections from customers.[127]

Fraud losses are costs that are specific to a particular transaction. The issuer's fraud losses are generally the result of the authorization, clearance, and settlement of an apparently valid transaction that the cardholder later identifies as fraudulent. An issuer may experience losses for fraud that it cannot prevent and cannot charge back to the acquirer or recoup from the cardholder.[128] The most common types of fraud reported in the Board's survey were counterfeit card fraud, lost and stolen card fraud, and card-not-present fraud.[129] Certain fraud and the related losses can be reduced through actions by the merchants. Even if the merchant takes all reasonable steps to verify the card user, however, the transaction may nonetheless be fraudulent.

Permitting issuers to recover at least some fraud losses through interchange fees is reasonable given that the source of fraud could be any participant in an electronic debit transaction and that the exact source of fraud often is unknown. Payment card network rules allocate responsibility for fraudulent transactions, but this allocation does not necessarily result in the loss ending up with the party that was in the best position to prevent the fraud. For example, the loss may have occurred from a data breach at a merchant or acquirer not involved in the fraudulent transactions. Additionally, network rules that are vague with respect to merchant requirements for authenticating a signature may lead to fraud losses being borne by the issuer when the merchant was in a position to compare the cardholder's signature with the signature on the back of a card and prevent the fraud.

Allowing a portion of fraud losses to be recovered through interchange fees will not eliminate the incentive for issuers to monitor and prevent fraud. Issuers will continue to bear the cost of some fraud losses and cardholders will continue to demand protection against fraud.

The cost of a fraud loss varies with the amount of the transaction. For example, an issuer takes on a greater risk when approving a $100 transaction than a $5 transaction because the amount of the potential loss is greater. Therefore, fraud losses are best assessed through an *ad valorem* component in the interchange fee standards.

C. Section 235.3 Interchange Fee Standards

EFTA Section 920(a)(3) requires the Board to establish ''standards for assessing'' whether the amount of any interchange transaction fee that an issuer receives or charges with respect to an electronic debit transaction is reasonable and proportional to the cost incurred by the issuer with respect to the transaction. The Board proposed that an issuer must comply with its interchange fee standards, under both proposed alternatives, on a per-transaction basis; that is, an issuer could not receive any interchange fee that exceeds its maximum permissible fee. The Board requested comment on two other applications of the interchange fee standards: one that would permit an issuer to comply with the fee standard, on average, for all of its electronic debit transactions, and another that would evaluate compliance at a network level and permit an issuer to comply with the fee standard if, for a particular network, all covered issuers on that network received the amount of the fee standard, on average, for all electronic debit transactions over the network.

[127] The amount of the fraud-prevention adjustment permitted under the accompanying interim final rule published separately in the **Federal Register** does not include consideration of fraud losses. The adjustment amount is based on fraud-prevention costs, rather than fraud losses.

[128] Rules regarding chargeback rights and obligations vary across payment card networks. Some networks have rules that prevent an issuer for imposing any liability on the cardholder for unauthorized transactions.

[129] Counterfeit-card fraud is when a fraudster obtains information about the card and creates a replica of the card.

1. Standards for Assessing

A number of issuers argued that a cap on interchange fees was a limit and not a ''standard for assessing'' whether interchange fees were reasonable and proportional to costs. These commenters argued that Section 920(a) requires more flexible guidelines.

The term ''standards'' generally means ''something established by authority as a rule for the measure of quantity, quality, etc.'' or the ''rule or principle that is used as a basis for judgment.'' [130] The final rule sets the standard for the maximum permissible interchange transaction fee that may be received by a covered issuer (*i.e.,* a transaction-level standard). If an interchange fee that an issuer receives does not exceed the cap, the amount of the interchange fee is reasonable and proportional to transaction cost. In this way, the cap represents a standard; it is a ''rule for the measure of quantity'' and ''a basis for judgment.''

The Board recognizes that providing a standard in the form of general guidelines would provide networks with more flexibility in setting interchange fees. The Board believes, however, that this approach would be extremely difficult to implement and is not required by the statute. Section 920(a) uniquely positions the Board to obtain information regarding each covered issuer's costs and, thus, to consider the transaction costs across all covered issuers in order to determine the point at which interchange fees would no longer be reasonable in light of allowable transaction costs. By contrast, a payment card network does not process transactions for each covered issuer and would receive information from only a subset of covered issuers. Without a uniform numerical standard applicable to all issuers, networks, and transactions (*i.e.,* as adopted in this rule), the definition of the highest reasonable fee could vary across issuers, networks, and transactions. This would make enforcement of the statute extremely difficult and burdensome for all parties and would encourage issuers to choose a network based on the network's application of the fee standards, rather than based on the services provided by the network.

Setting a uniform standard of the maximum permissible interchange transaction fee that may be received by a covered issuer is also the most practical and least burdensome approach in the context of a complex and dynamic system that handles large and growing volumes of transactions. As many commenters recognized, more general cost-based standards (including proposed Alternative 1) would place a significant burden on industry participants and supervisors.

In addition to meeting the words and purpose of the statute, the final rule's standard provides the proper economic incentives for issuers to improve their efficiency. The final rule provides each issuer an incentive to reduce its per-transaction costs below the level of the cap. The Board will use the data collection authority provided in Section 920(a) to regularly collect data on the costs incurred by issuers in connection with electronic debit transactions and, over time, will adjust the standards based on reported costs, if appropriate. Lower costs should result in a lower interchange fee cap as issuers become more efficient.

2. Transaction-Level Standard

In general, merchants, a few payment card networks, and acquirers (as well as other types of commenters) opposed both an issuer- and network-averaging approach in favor of a transaction-level approach. Merchants contended that averaging would enable the continuation of price discrimination against merchants, and Internet merchants in particular. A few of these commenters stated that averaging was inconsistent with the language of the statute because it permits consideration of non-cost factors in the interchange fee determination. Commenters opposed to averaging also argued that it would impose a substantial administrative burden on issuers, payment card networks, acquirers, and regulators. Additionally, a few commenters were concerned that averaging likely would result in statutory violations because predicting the transaction mix *ex ante* is exceedingly difficult, and issuers would be unable to control whether they met the target average because merchants would control routing. Another commenter was concerned that, under a network-averaging approach, the largest issuers on a network would receive higher interchange fees than smaller issuers. One issuer suggested that the safe harbor be an average effective rate that approximates current fee levels in order to avoid injecting significant risk into the payment system. This issuer suggested that the Board consider adjusting the safe harbor no sooner than one year after the exclusivity and routing rules go into effect, which should provide the Board time to evaluate whether routing rules are increasing competition.

A few commenters supported an issuer-averaging approach, including one issuer that suggested that the safe harbor be an average of all of an issuer's interchange fees across all networks. One network contended that permitting network averaging was necessary to provide meaningful flexibility in setting interchange fees, would provide incentives for fraud prevention, and would account for cost and risk variation across transactions. One network suggested that network averaging could be combined with a transaction-level upper boundary. The commenters in favor of a network-averaging approach suggested that networks would demonstrate compliance through regular reporting, and any issuers participating in those networks would be deemed to be in compliance. If a network exceeds the standard amount, the commenter suggested that the Board could either permit variation or require corrective actions.

The Board has determined to adopt neither an issuer-averaging nor a network-averaging standard. An issuer-averaging approach, where the only requirement is that an issuer, on average, receive an interchange fee that does not exceed the cap, would be significantly less burdensome from an enforcement perspective, but would be less likely to produce actual compliance. Issuers and networks would be unlikely to accurately predict an issuer's transaction mix *ex ante* because of fluctuation in cardholders' shopping patterns and merchant routing choice, and therefore may not be able to exactly meet an issuer average. Moreover, such an approach would be less transparent than a transaction-level standard because each party would be unable to determine whether a given interchange fee complied with the standard. Similarly, although a network-averaging approach to the standard would provide networks with more flexibility to vary the amounts of interchange transaction fees by merchant type and transaction type, an individual issuer's compliance would depend on the amounts of interchange transaction fees received by other issuers on the network.

3. Determining the Interchange Fee Standard

The Board surveyed institutions expected to be covered by the interchange fee standards to determine their costs relating to debit card programs, among other things. As discussed above, there is no industry standard for cost-accounting systems because institutions use cost-accounting

[130] *Webster's New World Dictionary and Thesaurus* 17 (2nd ed. 2002); *Random House Webster's Unabridged Dictionary* (2nd ed. 2001).

systems predominantly for internal management purposes. In recognition of this, the survey contained instructions regarding the types of costs a responding issuer should report and the types of costs a responding issuer should exclude entirely from its survey responses. Issuers also were asked to provide information on the number of purchase and other electronic debit transactions (such as returns and chargebacks).[131] [132]

Responding issuers were instructed to exclude corporate overhead costs or any other overhead costs for activities that are not directly related to the issuer's debit card program. If the responding issuer incurred overhead costs directly related to activity in a card program, the issuer could allocate those costs to card program activity. Similarly, if an issuer incurred costs for an activity that was jointly attributable to electronic debit transactions and another program (such as credit cards), the issuer was instructed to allocate the costs of that activity across the programs on a pro rata basis. Issuers were instructed to include the depreciation or amortization of capital expenditures. Throughout the survey instructions, issuers were directed not to include costs that were not tied to debit card programs.

With respect to costs incurred for debit card program activity, the survey requested cost information for the total costs of several activities that were not included as part of authorization, clearance, or settlement: Card production and delivery; cardholder inquiries; rewards, incentives, and affinity-partnerships; network membership; research and development; and compliance.[133] Survey respondents were instructed not to include the costs for these activities in any other cost category, which allowed isolation of these cost categories and prevented double-counting of costs. For the reasons stated above, costs for these activities were not considered as the basis for the interchange fee standard.

As discussed in more detail above, the types of costs that form the basis for the interchange fee standard are costs incurred for processing electronic debit transactions,[134] chargebacks, and similar transactions, including network processing fees and transactions monitoring costs; and fraud losses. Each of these categories was reported separately. With respect to transaction processing, issuers were instructed to include the total costs associated with providing authorization for transactions (including data processing, connectivity expenses, voice authorization inquiries, and referral inquiries); clearing and settlement (including receiving, verifying, reconciling, settling transactions with other financial institutions, and posting transactions to cardholder's accounts); and processing chargebacks and other erroneous transactions. Issuers were instructed to separately report network processing fees and their cost for transactions monitoring prior to authorization.[135] Issuers were asked to report costs directly attributable to PIN debit, signature debit, and prepaid card programs.

These data were used to compute an average per-transaction cost for each issuer that reported costs for authorization, clearance and settlement, network fees, and transactions monitoring based on the number of routine purchase transactions.[136] For each such issuer, the total of these costs was computed and divided by the total number of purchase transactions sent to the issuer for authorization during 2009. The data from the Board's survey showed that these average per-transaction costs reported by covered issuers ranged from 3 cents to 66 cents per transaction.[137] The Board used this range as a starting point for setting standards for the base component. Within this range, the Board ranked the average per-transaction allowable cost from the lowest- to highest-cost issuer.

The distribution of issuer costs in the survey is quite skewed, with the distribution concentrated in the range of costs below the 80th percentile, and a scattered set of institutions with significantly higher costs above this point. Below the 80th percentile, the difference between the per-transaction allowable costs of adjacently-ranked issuers is small. For example, among issuers whose costs are between the 20th and the 80th percentiles, the largest cost difference over a 5-percentile range of the distribution (*e.g.,* from the 60th to 65th percentile) is about 3 cents. Above the 80th percentile, however, the distribution shows a marked discontinuity, with per-transaction allowable costs varying more significantly across issuers of similar rank. Between the 80th and 85th percentiles, the difference in costs is about 20 cents. The average per-transaction cost of the issuers above the 80th percentile is 49 cents, more than double the level of the cap, and greater than the average interchange fee level recorded in the survey. It appears that some of these higher-cost issuers may face unique circumstances regarding their overall business orientation; for example, some of the issuers with high reported costs appear to be organizations whose commercial banking operations (and associated debit card programs) are small relative to their overall operations. The Board therefore does not believe that setting interchange fee standards to accommodate these higher-cost issuers would be reasonable or proportional to the overall cost experience of the substantial majority of covered issuers. Moreover, the Board does not believe that it is consistent with the statutory purpose to permit networks to set interchange fees in order to accommodate 100 percent of the average per-transaction cost of the highest-cost issuers.

Based on a review of the survey data and public comments, and for the

[131] In a purchase transaction, value is transferred from the cardholder to the merchant in exchange for goods and services. In a return transaction, the merchant reverses a purchase transaction (due, for example, to the return of goods by the cardholder), and value is transferred from the merchant to the cardholder.

[132] Although the response rates for the surveys were high, some respondents were not able to provide information on all data elements requested in the surveys. For example, most respondents provided cost data at an aggregate level, but some were unable to provide cost data at the level of detail requested in the surveys. In addition, inconsistencies existed in some reported data within individual responses and across responses. Where possible, minor problems (*e.g.,* adding components to determine the total or removing minus signs) were resolved, but responses with major problems (*e.g.,* failing to provide critical transaction volume information) were not used.

[133] Issuers were instructed to put information regarding these costs in Section IV of the Card Issuer Survey.

[134] These transactions included purchase and return transactions, authorizations without value transfer, denials, and funds loads to prepaid cards.

[135] Issuers were instructed to report these costs, except for transactions monitoring, in Section III of the Card Issuer Survey. Issuers were instructed to report all of their fraud-prevention activities and the total costs incurred for each activity in Section V of the Card Issuer Survey. The most commonly reported activity was transactions monitoring.

[136] The number of respondents varies across the cost-categories because not all issuers were able to break out certain cost information. For example, a number of prepaid card issuers reported that they did not know the specific costs associated with their prepaid card program. In some cases those issuers provided more complete data for their signature and PIN programs. In those cases, the issuer's signature and PIN purchase transactions and costs are included, but their prepaid purchase transactions and costs are excluded.

[137] One merchant group stated that the cost estimates in the Board's survey contained an upward bias due to the inclusion of higher-cost prepaid cards (many of which would be excluded). Unlike other debit cards, issuers may not have information on which prepaid cards are exempt because an exemption may be determined by factors in the program manager's or merchant's control (such as whether the card is marketed or labeled as a gift card). Accordingly, the survey did not instruct issuers to differentiate between exempt and non-exempt prepaid cards when reporting data.

reasons explained above, the final rule establishes a standard that caps the base component of any interchange fee at 21 cents per transaction, which corresponds to the 80th percentile issuer's average per-transaction included costs.

Fraud losses vary by the value of the transaction and, thus, were considered separately. Issuers were asked to report fraud losses—the total value of fraudulent transactions less any amounts recovered from acquirers, cardholders, or other parties. For issuers that reported net fraud losses, total net fraud losses were divided by the total value of purchase transactions.[138] The Board's survey indicated that the average per-transaction fraud loss, measured in basis points (bps), varied among responding issuers and ranged from 0.86 bps to 19.64 bps.

The Board has determined that it is appropriate to include an allowance for fraud losses in the interchange fee standard, capped at approximately the median of reported issuer fraud losses (5 bps). Using the median figure recognizes that, as explained above, fraud losses can result from the actions or inaction of merchants as well as issuers, and will provide incentives for both issuers and merchants to take appropriate steps to reduce fraud losses, since each group will incur some costs for these losses.

Issuers that incur the included costs at a level below the interchange fee standard cap (the sum of 21 cents and 5 bps multiplied by the value of the transaction) may retain the difference between their costs and the cap. The cap, however, will result in some issuers not fully recovering their average per-transaction cost through interchange fees. Some commenters argued that this result is inconsistent with ratemaking in other contexts in which rates enable regulated entities to recover costs plus a reasonable profit. The Board has considered the comments and, for the reasons explained above, believes that the similarities between the statutes governing rates for public utilities and other regulated entities and Section 920 are limited. In summary, EFTA Section 920(a) does not use the term ''just and reasonable'' that is typically used in public utility rate-setting statutes.[139] Congress is well aware of this term of art and would have used that phrase had it intended the Board to consider other ratemaking jurisprudence. In addition, public utility rate-setting involves unique circumstances, none of which is present in the case of setting standards for interchange transaction fees. Issuers are unlike public utilities and similarly regulated entities, which typically are required to provide the regulated service to the public or are otherwise restricted from discontinuing provision of the regulated service. In addition, unlike in the case of public utilities and similar entities where the entity's only source of revenue for the service or commodity is the regulated rate, Section 920 regulates only the fees issuers receive from the merchant side of the transaction, not from all sources.[140]

4. Uniform Interchange Fee Standard

Section 235.3(a) applies to all electronic debit transactions not otherwise exempt from the rule, and the maximum permissible interchange fee is the same irrespective of the network over which the transaction is processed, the type of debit card, and the method of cardholder authentication. To determine amounts that would be proportional to cost, the Board considered the average per-transaction allowable costs of issuers for signature-based debit, PIN-based debit, and prepaid card transactions.

a. Summary of Proposal and Comments

Under both proposed alternatives, the maximum permissible interchange fee would be the same irrespective of card type, network, or cardholder authentication method. The Board noted that issuers reported higher allowable costs for prepaid cards and requested comment on whether it should have separate standards for prepaid card transactions.

Several issuers, networks, merchants, and their trade groups opposed setting different standards (particularly the cap) for PIN-based and signature-based debit card transactions for a variety of reasons, including to avoid any possible discrimination between PIN-based and signature-based networks and to reduce operational complexity. Some of these commenters stated that authentication methods will likely expand beyond PIN and signature and that accounting for all types of authentication methods would further increase operational complexity of standards that differentiate by authentication method. Moreover, interchange fee standards that differentiate by authentication method may impede the introduction of new and innovative authentication methods. Some merchant commenters believed one uniform interchange fee standard would drive the marketplace to PIN-based transactions, which the merchants asserted was ''the lowest cost, most secure, and best functioning'' method. One merchant commenter contended that having one cap would eliminate circumvention and evasion concerns.

Other commenters supported having different standards for PIN-based and signature-based transactions because of different risks and costs associated with each type of transaction. These commenters contended that having one cap would decrease incentives for merchants to use, or become enabled to use, PIN-based transactions (especially in light of the expense of PIN pads). Additionally, some commenters believed a single cap would unfairly affect issuers that process predominantly signature transactions and would result in an issuer recovering a different portion of its costs from year to year depending on its transaction mix.

Several commenters that are active participants in the prepaid industry encouraged the Board to adopt a separate fee standard for prepaid cards in light of the higher costs. Other commenters suggested the Board allow for variation in interchange fees among different types of prepaid cards, because the costs of authorization, clearance, and settlement vary depending upon the type of prepaid card (*e.g.,* a non-reloadable general-use prepaid card and a health savings account prepaid card).

b. Analysis of Comments and Final Rule

Electronic debit transactions are processed over numerous different networks with numerous different pricing structures and participation rules and requirements, and each network's pricing, rules, and requirements vary by type of transaction. Signature networks may have higher switch fees than PIN networks, and within those groups, switch fees vary by network. Similarly, each network may have different rules related to charging back fraudulent transactions, and the rules vary by type of transaction (*e.g.,* card-present and PIN-based). Moreover, new card types and transaction types are developing due to innovation in the payment card industry.

[138] Issuers were instructed to report information related to fraud losses in Section VI of the Card Issuer Survey. Issuers that reported net fraud losses were not limited to those issuers that reported cost information necessary to calculate the base interchange fee component.

[139] *See, e.g.,* Natural Gas Act, 15 U.S.C. 717 et seq. *Duquense Light Co.* v. *Barash,* 488 U.S. 299 (1989).

[140] Several commenters pointed to *Brooks-Scanlon Co.* v. *R.R. Comm'n of La.,* 251 U.S. 396 (1920), in support of the proposition that the Board should not consider an issuer's ability to receive revenue by charging cardholders fees. The Board believes that there is a material difference between looking to revenue from a separate but commonly-owned business (as was the case in *Brooks-Scanlon*) and looking to revenue from the same service. *See Baltimore & Ohio Railroad* v. *U.S.,* 345 U.S. 146, 150 (1953).

Accordingly, if the standard were to differentiate between signature-based networks and PIN-based networks and were to recognize differentiation across all networks (*i.e.,* a network-specific standard) and transaction types (*e.g.,* card-present and card-not present), the resulting interchange fee standard would require issuers to track their costs (including fraud losses and switch fees) by network and transaction type in order to submit information to the Board. This level of detail would impose larger reporting burden on issuers, as well as a burden on supervisors, to ensure that an issuer was receiving the appropriate interchange fee revenue from each network for each transaction type.

As discussed above, the final rule accounts for variation in the cost incurred by an issuer in effecting an electronic debit transaction by considering the costs of all types of electronic debit transactions across all issuers responding to the Board's survey. By treating allowable costs that are likely to vary based on network and/or transaction type (*e.g.,* network fees and fraud losses) the same—on an average basis for any given transaction regardless of the network, card type, or transaction type—the final rule avoids providing incentives for issuers to steer consumers to use higher-cost networks, cards, and transaction types.

Several merchants suggested that the same interchange fee standard should apply across merchant types, transaction types, and transaction size, arguing that current variation in interchange fees is due to market power rather than true variation in costs or transaction risks (which, they asserted is accounted for through chargeback rules).[141] By contrast, several issuers suggested that the final rule should allow networks to set interchange fees based on transaction risk. These commenters asserted that fraud losses vary with transaction size, transaction type, and merchant location.

Merchants suggested that the Board establish different standards for small-ticket sales (under $5) because the proposed cap likely would result in higher interchange fees than merchants currently are paying on those transactions. Other merchants thought that variation in transaction risk should be addressed in the fraud-prevention adjustment, if addressed anywhere, and noted that fraud risk exists for both card-present and card-not-present transactions.

For the reasons stated above, the final rule permits an *ad valorem* component such that the total amount of an interchange transaction fee does not exceed the sum of the 21-cent base component and 5 basis points of the transaction value (plus the fraud-prevention adjustment, if applicable). Networks are not prohibited from varying the amount of either interchange fee component by transaction type, transaction value, or merchant type, provided the interchange fee for any transaction not exceed the maximum permissible amounts in § 235.3(b) (plus the fraud-prevention adjustment, if the issuer is eligible to receive the adjustment). *See* comment 3(b)–2. The flexibility to vary the amounts of interchange fee components below the cap enables networks to establish interchange fees that reflect variation in transaction risk and to account for other factors that affect a network's ability to increase its transaction volume.

IV. Section 235.5 Exemptions [142]

The proposed exemptions to the applicability of the interchange fee standard in § 235.5 implement the exemptions set forth in EFTA Section 920(a) for small issuers, government-administered payment programs, and certain reloadable prepaid cards.[143]

Because an electronic debit transaction may qualify for more than one exemption, the Board proposed comment 5–1 to clarify that an issuer need qualify for only one of the exemptions in order to exempt an electronic debit transaction from the interchange provisions in §§ 235.3, 235.4, and 235.6 of the proposed rules. The proposed comment further clarified that a payment card network establishing interchange fees need only satisfy itself that the issuer's transaction qualifies for at least one of the exemptions in order to exempt the electronic debit transaction from the interchange fee restrictions. The Board did not receive any comment on the clarification, and the substance of comment 5–1 has been adopted as proposed with modifications to conform the language of the comment to other revisions.

The Board has adopted new comment 5–2 to provide that payment card networks that plan to allow issuers to receive interchange fees higher than those permitted under §§ 235.3 and 235.4 pursuant to one of the exemptions in § 235.5 must develop their own processes for identifying issuers and products eligible for such exemptions. As discussed in more detail below with respect to each of the exemptions in § 235.5, the Board believes payment card networks are in the best position to develop processes for identifying issuers and products eligible for the various exemptions. However, to assist payment card networks in determining which of the issuers participating in their networks are subject to the rule's interchange fee standards, the Board will publish lists annually of institutions above and below the small issuer exemption asset threshold.

A. Section 235.5(a) Exemption for Small Issuers

EFTA Section 920(a)(6)(A) provides an exemption from EFTA Section 920(a) for any issuer that, together with its affiliates, has assets of less than $10 billion. EFTA Section 920(a)(6)(B) limits the term ''issuer'' for purposes of this exemption to the person holding the asset account that is debited through an electronic debit transaction.[144]

Proposed § 235.5(a) implemented EFTA Sections 920(a)(6)(A) and (B) by providing that §§ 235.3, 235.4, and 235.6 do not apply to an interchange transaction fee received or charged by an issuer with respect to an electronic debit transaction if (i) the issuer holds the account that is debited; and (ii) the issuer, together with its affiliates, has assets of less than $10 billion as of the end of the previous calendar year. Proposed comment 5(a)-1 clarified that an issuer would qualify for this exemption if its total worldwide banking and nonbanking assets, including assets of affiliates, are less than $10 billion. Furthermore, consistent with other Board rules, the Board proposed to designate the end of the calendar year to measure the assets of an issuer and its affiliates.[145]

The Board received numerous comments from a variety of commenters, including large and small issuers, merchants, consumer groups, members of Congress, and other financial institution regulatory agencies expressing concern that the small issuer

[141] For example, some merchants stated that card-not-present merchants are experiencing increasingly low rates of fraud (primarily due to the merchants' own investments in fraud prevention), but are subject to higher interchange rates and chargeback rates.

[142] The companion interim final rule published separately in the **Federal Register** adds § 235.4 (Fraud-prevention adjustment).

[143] EFTA Section 920(a)(6) and (7).

[144] EFTA Section 920(a)(6)(B). The Board noted in its supplementary information to its proposed rule that an issuer of decoupled debit cards, which is not the institution holding the consumer's asset account from which funds are debited when the card is used, would not qualify for the exemption under EFTA Section 920(a)(6)(A) given the definition of ''issuer'' under EFTA Section 920(a)(6)(B), regardless of the issuer's asset size.

[145] *See, e.g.,* 12 CFR 203.2(e)(1)(i) and 12 CFR 228.20(u).

exemption would not be effective in practice.[146] Many issuer commenters stated that they did not believe that payment card networks would implement two-tier fee structures (*i.e.,* different fee structures for covered issuers and exempt issuers). Other issuer commenters stated that although networks may attempt to implement two-tier fee structures, market forces and merchant routing choice will erode the differences between the two fee structures until there is only one interchange fee that all issuers may charge or very little variation between the two fees. Some of these commenters expressed concern that if small issuers were required to accept the same interchange fees as covered issuers, small issuers' debit card programs might not be sustainable and that these issuers could be forced to severely limit or abolish these programs.

Many issuer commenters also requested that the Board mandate that payment card networks implement two-tier fee structures. Several issuer commenters stated that even if payment card networks were to institute two-tier fee structures, they believe merchants would pressure customers or steer customers through discounts to use another form of payment or refuse exempt cards or cards issued by exempt issuers.

By contrast, merchant commenters also noted that they believe networks have an incentive to institute two-tier fee structures to attract and retain the business of exempt issuers and issuers of exempt products. In addition, merchant commenters, some consumer group commenters, and a member of Congress stated that they do not believe merchants would risk alienating customers by refusing to accept certain cards or discriminating against the use of certain cards through, for example, the use of differential pricing.

The Board's final rule provides exemptions from the interchange fee standards in accordance with EFTA Sections 920(a)(6) and (7). The EFTA does not provide the Board with specific authority to require networks to implement these exemptions in any particular way. The Board notes, however, that payment card networks that collectively process more than 80 percent of debit card volume have indicated that they plan to implement two-tier fee structures.

[146] Although these comments focused on the effectiveness of the small issuer exemption, the other exemptions (*i.e.,* debit cards issued pursuant to certain government payment programs and certain general-use prepaid cards) raise similar concerns.

The Board is taking several steps, including using the data collection authority provided in EFTA Section 920(a)(3)(B), to allow the Board to monitor and report to Congress on the effectiveness of the exemption for small issuers. First, the Board plans to publish annually lists of institutions above and below the small issuer exemption asset threshold to assist payment card networks in determining which of the issuers participating in their networks are subject to the rule's interchange fee standards.[147] Second, the Board plans to survey payment card networks annually and publish annually a list of the average interchange fees each network provides to its covered issuers and to its exempt issuers. This list should enable issuers, including small issuers, and Congress to more readily understand whether the provisions of EFTA Section 920 and the implementing rule, including the small issuer exemption, are having a meaningful effect.

With respect to comments on discrimination by merchants, Section 920(b)(2) prohibits payment card networks from inhibiting the ability of any person to provide a discount or in-kind incentive for payment by the use of debit cards to the extent that the discount or in-kind incentive does not differentiate on the basis of the issuer or the payment card network. Section 920(b)(4)(A) further provides that no provision of Section 920(b) shall be construed to authorize any person to discriminate between debit cards within a payment card network on the basis of the issuer of the debit card.

Moreover, the Board understands that many payment card networks have rules that require merchants to accept all cards of that payment product type within that network, regardless of issuer. Merchants also would likely face negative consequences by refusing to accept a particular issuer's debit card. Unlike credit cards, where customers may have cards from more than one issuer, customers are more likely to have only one debit card. A merchant refusing a customer's particular debit card could cause the customer to use a credit card, a potentially more expensive form of payment for the merchant. Alternatively, the merchant may lose the sale if the customer does not have enough cash or another payment method that would be acceptable to the merchant.

The Board also received several other comments on this exemption. Some issuer commenters and a financial regulatory agency urged the Board to extend the exemption for small issuers to the network exclusivity and routing provisions of § 235.7. Although EFTA Section 920(a)(6) provides that small issuers are exempt from the provisions of EFTA Section 920(a) concerning the interchange fee standards, the statute does not extend the exemption to the network exclusivity and routing provisions of EFTA Section 920(b). Some commenters urged the Board to use the exception authority under EFTA Section 904(c) to extend the exemption. The Dodd Frank Act removes this authority from the Board as of July 21, 2011, however.

[147] The lists will be posted on the Board's public Web site.

A payment card network suggested that in assessing whether an issuer qualifies for the exemption in § 235.5(a), only U.S. assets should be considered. EFTA Section 920(a)(6) does not specify that the exemption should be based on U.S. assets only and nothing in the purpose or structure of EFTA Section 920 or in practical operation indicates that the provision should not apply to issuers with large foreign operations that also operate in the U.S. Indeed, applying the statute to apply to worldwide assets would be consistent with the principle of national treatment of foreign firms operating in the U.S. Therefore, the Board believes that this measurement should be based on worldwide assets.

The final rule also clarifies whether trust assets should be considered in determining whether an issuer's assets fall below the $10 billion exemption threshold. Trust assets under management are not considered assets of the issuer or its affiliates, and are not reflected on the issuer's or affiliate's balance sheet. Therefore, comment 5(a)–1 states that an issuer qualifies for the small issuer exemption if its total worldwide banking and nonbanking assets, including assets of affiliates, other than trust assets under management, are less than $10 billion.

In the supplementary information to its proposed rule, the Board noted that to the extent payment card networks plan to permit issuers meeting the small issuer exemption to receive higher interchange fees than allowed under §§ 235.3 and 235.4, such networks should establish a process to identify small issuers and to provide information to acquirers and merchant processors to enable them to determine what interchange fee applies to each issuer. The Board requested comment on whether the rule should establish a certification process and reporting period for an issuer to notify a payment card network and other parties that the issuer qualifies for the small issuer exemption.

Payment card network commenters suggested that a Board-developed process would ensure that there is consistent treatment across the industry and requested that the Board annually publish a list of exempt and non-exempt issuers based on asset size. A merchant trade group and several processors suggested that the Board develop a certification process for small issuers to notify the Board and the payment card networks within 90 days of the end of the preceding calendar year that they qualify for the exemption. A merchant trade group commenter also expressed concerns with networks solely managing the exemption process. Another processor commenter suggested that the payment card networks should manage the certification process but that the Board should establish the reporting period for consistency.

The Board plans to publish annually lists of institutions above and below the small issuer exemption asset threshold and those for which the Board is unable to make a determination, due to incomplete or unreliable affiliate data.[148] There may exist a small number of debit-card issuers that do not appear on any of these lists.[149] The Board will compile these lists based on data in the Board's possession.[150] These lists, based on assets as of December 31, 2010, will be posted on the Board's Web site. The Board has redesignated proposed § 235.5(a) as § 235.5(a)(1) and adopting § 235.5(a)(2) to provide that a person may rely on these Board-published lists to determine whether an issuer, together with its affiliates, has assets of less than $10 billion as of the end of a calendar year. To the extent that an issuer qualifies for the small issuer exemption but is not included on the Board's list of exempt institutions, payment card networks may institute their own processes for such issuers to certify their eligibility for the exemption to the networks. *See* comment 5–2.

From year to year, issuers that are exempt may become covered issuers based on changes in assets and affiliates. The Board has added § 235.5(a)(3) (and comment 5(a)–2) to provide that, if an issuer no longer qualifies for the small issuer exemption as of the end of a calendar year because at that time it, together with its affiliates, has assets of $10 billion or more, the newly covered issuer must begin complying with the interchange fee standards (§ 235.3), the fraud-prevention standards (§ 235.4) (to the extent the issuer wishes to receive a fraud-prevention adjustment), and the provisions prohibiting circumvention, evasion, and net compensation (§ 235.6) no later than July 1 of the following year. This date provides time for issuers and networks to determine the applicability of the exemption and implement any necessary system updates to enable compliance.

B. Section 235.5(b) Exemption for Government-Administered Programs

EFTA Section 920(a)(7)(A)(i) provides an exemption for an interchange transaction fee charged or received with respect to an electronic debit transaction made using a debit or general-use prepaid card that has been provided to a person pursuant to a Federal, State, or local government-administered payment program, in which the person may use the debit or general-use prepaid card only to transfer or debit funds, monetary value, or other assets that have been provided pursuant to such program. The Board proposed to implement this provision in § 235.5(b) with minor non-substantive changes to the statutory language.[151] A merchant trade group commenter suggested that the exemption for government-administered payment programs should be temporary. The statute does not place an expiration date for the exemption unless certain limited conditions are met. The final rule follows the statute.

Issuer commenters asked the Board to expand the exemption for government-administered payment programs to the network exclusivity provisions in § 235.7. Although the statute exempts government-administered payment programs from the interchange fee standards, it does not provide an exemption from the network exclusivity provisions for these programs, or specific authority for the Board to grant an exemption from these provisions. Thus, the Board has not exempted government-administered payment programs from the provisions of § 235.7.

Commenters requested that the Board provide further clarification on application of the exemption for government-administered payment programs. One depository institution trade group suggested that the exemption for government-administered payment programs be extended to ''multi-purse'' cards where a debit or general-use prepaid card may access funds other than funds provided by a government-administered payment program. The Board believes the statute is clear in stating that the exemption is available for debit or general-use prepaid cards in which a person may use such card *only* to transfer or debit funds, monetary, value or other assets that have been provided pursuant to a government-administered payment program. Therefore, the Board has not made the suggested change.

Another commenter requested that the Board clarify that the government-administered payment programs include programs in which funds are paid to a consumer by government agencies, such as jury-duty fees that are funded to a prepaid card, and programs administered by tribal systems. Jury-duty programs administered by Federal, State or local governments, including the courts, appear clearly covered by the exemption in EFTA Section 920(a)(7) to the extent they meet the other requirements of that section. The Board has not attempted to list every type of government program that qualifies for this exemption and has instead retained the general language in the statute.

With respect to programs administered by tribal governments, the Board notes that the statute refers to ''Federal, State, or local government-administered programs.'' Tribal governments do not appear to be either ''Federal'' or ''State'' governments. However, unlike other statutes that the Board has implemented by rule,[152] EFTA Section 920 does not limit ''local'' governments to political subdivisions of Federal or State governments. Therefore, the Board believes that the term ''local'' government would include a tribal

[148] The Board has insufficient data to determine whether every issuer, together with its affiliates, has assets above or below $10 billion; *e.g.,* the Board may not have data on affiliates of industrial loan companies with assets below $10 billion.

[149] The lists, for example, would not include depository institutions without regulatory financial data reported as of the report date, depository institutions without federal insurance, and issuers that are not depository institutions.

[150] The Board's sources of data to compile these lists include: the Consolidated Financial Statements for Bank Holding Companies (FR Y–9C; OMB No. 7100–0128), the Consolidated Reports of Condition and Income (Call Reports) for independent commercial banks (FFIEC 031 & 041; OMB No. 7100–0036), the Consolidated Reports on Condition and Income (Call Reports) for Edge and agreement corporations (FR 2886b; OMB No. 7100–0086), the Reports of Assets and Liabilities of and for U.S. branches and agencies of foreign banks (FFIEC 002; OMB No. 7100–0032), the Thrift Financial Reports (OTS 1313; OMB No. 1550–0023) for thrift holding companies and thrift institutions, the Credit Union Reports of Condition and Income (NCUA 5300/5300S; OMB No. 3133–0004) for credit unions, and the Corporate Credit Union Monthly Call Report (NCUA 5310; OMB No. 3133–0067) for corporate credit unions.

[151] As the Board discussed in its proposed rule, Section 1075(b) of the Dodd-Frank Act amends the Food and Nutrition Act of 2008, the Farm Security and Rural Investment Act of 2002, and the Child Nutrition of 1966 to clarify that the electronic benefit transfer or reimbursement systems established under these acts are not subject to EFTA Section 920. These amendments are consistent with, and covered by, the exemption under EFTA Section 920(a)(7)(i).

[152] *See, e.g.,* the Expedited Funds Availability Act (12 U.S.C. 4001(24)) and provisions regarding NOW accounts in 12 U.S.C. 1832(a).

government and that government-administered payment programs would include programs administered by tribal governments. The Board has added a sentence to comment 5(b)–1 to clarify this interpretation.

A merchant trade group commented that it does not believe that HSAs, FSAs, or HRAs are government-administered payment programs. Certain cards that access HSAs, FSAs, and HRAs may qualify for exemptions under § 235.5 depending on how the account is structured. To the extent such accounts are offered in connection with a person's employment and administered by or on behalf of a government employer, the Board believes such accounts may be considered government-administered payment programs. However, a plain reading of the statute indicates that HSAs, FSAs, and HRAs administered for non-governmental entities or individuals by or on behalf of a non-government employer are not ''government-administered payment programs,'' which is the language used by the statute.

The Board proposed comment 5(b)–1 to clarify the meaning of a ''government-administered program.'' The proposed comment provided that a program is considered government-administered regardless of whether a Federal, State, or local government agency operates the program itself or outsources some or all functions to service providers that act on behalf of the government agency. The proposed comment 5(b)–1 also stated that a program may be government administered even if a Federal, State, or local government agency is not the source of funds for the program it administers. The Board did not receive comment on proposed comment 5(b)–1, which is adopted as proposed, with minor non-substantive wording changes for clarity.

The Board also requested comment on whether it should establish a process by which cards that qualify for the government-administered payment program exemption could be identified and information related to such cards relayed to payment card networks. Such a process could assist networks in establishing a two-tier interchange fee structure that allows issuers to receive higher interchange fees than permitted under §§ 235.3 and 235.4 for transactions made using debit cards and general-use prepaid cards issued pursuant to government-administered payment programs. Unlike the process for identifying small issuers that qualify for the exemption in § 235.5(a), commenters were split on whether they thought the Board should develop the process for identifying cards that qualify for the government-administered payment programs exemption. While a Board-established system could provide consistency in the process, the Board acknowledges that identifying and certifying card programs is complex and that the Board may not be in the best position to specify this process. Furthermore, as one payment card network noted, hundreds of new card programs are introduced each year, and Board involvement in the process could delay the timely introduction of these programs. The Board understands that payment card networks generally have a process currently in place to review and approve new card programs, and that determining whether such products would meet the exemption requirements could be built into existing procedures.

For these reasons, the Board believes that payment card networks should have the flexibility to design their own systems for identifying cards that are issued pursuant to a Federal, State, or local government-administered payment program. Therefore, the final rule does not specify the process for identifying these cards, and as provided in comment 5–2, discussed above, the Board expects that payment card networks will have a process for ensuring that only qualifying card programs take advantage of this exemption.

C. Section 235.5(c) Exemption for Certain Reloadable Prepaid Cards

EFTA Section 920(a)(7)(A)(ii) contains an exemption from the debit interchange fee standards for certain qualifying reloadable, non-gift prepaid cards. The Board proposed to implement the exemption set forth in EFTA Section 920(a)(7)(A)(ii) in § 235.5(c)(1) and in the proposed definition of the term ''general-use prepaid card'' in § 235.2(i). Specifically, EFTA Section 920(a)(7)(A)(ii) provides an exemption for an interchange transaction fee charged or received with respect to an electronic debit transaction for a plastic card, payment code, or device that is (i) linked to funds, monetary value, or assets purchased or loaded on a prepaid basis; (ii) not issued or approved for use to access or debit any account held by or for the benefit of the cardholder (other than a subaccount or other method of recording or tracking funds purchased or loaded on the card on a prepaid basis); (iii) redeemable at multiple, unaffiliated merchants or service providers, or automated teller machines; (iv) used to transfer or debit funds, monetary value, or other assets; and (v) reloadable and not marketed or labeled as a gift card or gift certificate.

The Board received several comments regarding this exemption. Commenters expressed concern that issuers may try to restructure accounts in order to qualify for the exemption under EFTA Section 920(a)(7)(A)(ii). One merchant trade group suggested that the Board limit the exemption to cards that are reloadable by means other than ACH transfer or a check drawn upon an asset account. A processor commented that the exemption promotes form-over-substance manipulation of debit card programs because certain reloadable prepaid cards are virtually identical in function to debit cards. For example, a reloadable card would function nearly in the same manner as a debit card if the funds underlying the card may be accessed by check, ACH, or wire transfer, in addition to by use of the prepaid card.

The Board believes that reloadable cards that provide access to the funds underlying the card through check, ACH, wire transfer or other method (unless these other means of access were used solely for a one-time cash-out of the remaining balance on the card) would not meet the requirement in Section 920(a)(7)(A)(ii)(II) that the card not be issued or approved for use to access or debit any account held by or for the benefit of the cardholder (other than certain sub-accounts). If funds underlying the card may be accessed by the customer using alternate payment methods, the customer would have access to an account held by the customer or for the customer's benefit.

The Board has added new § 235.5(c)(1)(iii) to clarify that the exemption for a general-use prepaid card applies only if the card is the only means to access the funds underlying the card, except when all remaining funds are provided to the cardholder in a single transaction. Thus, transactions using prepaid cards that provide regular access to funds underlying the card through check or ACH would be subject to the interchange fee restrictions.

Comment 6(a)–2 provides examples of activities that may warrant additional supervisory scrutiny to determine whether there has been circumvention or evasion of the interchange fee standard. For example, additional supervisory scrutiny may be warranted if an issuer replaces its debit cards with prepaid cards that are linked to its customers' transaction accounts and funds swept from the transaction accounts to the prepaid accounts as needed to cover transactions made.

The Board also received many comments on the interpretation of the condition that the exemption in proposed § 235.5(c)(1) is available only if a card is not issued or approved for use to access or debit any account held by or for the benefit of the cardholder (other than a subaccount or other method of recording or tracking funds purchased or loaded on the card on a prepaid basis). An issuer and a merchant group noted that FDIC pass-through insurance is only available for omnibus accounts for which the individual participants can be identified by the accountholder. Based on this observation, a merchant group stated that if funds are accorded FDIC coverage, then the account is considered to be held ''for the benefit of the cardholder,'' and an electronic debit transaction made using a card that accesses such funds should not be eligible for the exemption under § 235.5(c)(1).

EFTA Section 920(a)(7)(A)(ii) exempts a general-use prepaid card only if it is not issued or approved for use to access or debit any account held by or for the benefit of the cardholder (other than a subaccount or other method of recording or tracking funds purchased or loaded on the card on a prepaid basis). The parenthetical indicates that if the ''account held * * * for the benefit of the cardholder'' is actually a subaccount or other method of recording or tracking funds purchased or loaded on the card on a prepaid basis, the general-use prepaid card is not considered to access an account held by or for the benefit of the cardholder for purposes of determining whether the general-use prepaid card is exempt. General-use prepaid cards that access funds in an omnibus account that are identifiable to the cardholder by virtue of a subaccount (and thus are eligible for FDIC pass-through insurance) are not considered general-use prepaid cards that are issued or approved for use to access or debit an account held by or for the benefit of the cardholder and thus may still qualify for the exemption in § 235.5(c)(1).

Commenters also requested that the Board make a clearer distinction between account and subaccount. In response, the Board is adopting new comment 5(c)–1 to draw a distinction between an ''account'' and a ''subaccount.'' Comment 5(c)–1 states that a subaccount is an account within an account, opened in the name of an agent, nominee, or custodian for the benefit of two or more cardholders, where the transactions and balances of individual cardholders are tracked in such subaccounts. An account that is opened solely in the name of a single cardholder is not a subaccount. This clarification is consistent with the way the Board understands subaccounts are structured for most prepaid card programs.

1. Reloadable and Not Marketed or Labeled as a Gift Card or Gift Certificate

The Board proposed to import commentary related to the meaning of reloadable and not marketed or labeled as a gift card or gift certificate from 12 CFR 205.20 (''Gift Card Rule''), in which the Board had previously defined and clarified the meaning of ''reloadable and not marketed or labeled as a gift card or gift certificate.'' Specifically, proposed comment 5(c)–1, providing guidance on when a general-use prepaid card is ''reloadable,'' was adapted from comment 20(b)(2)–1 under the Gift Card Rule. Proposed comment 5(c)–2, which was adapted from comment 20(b)(2)–2 under the Gift Card Rule, clarified the meaning of the term ''marketed or labeled as a gift card or gift certificate.'' Proposed comment 5(c)–3 provided examples of what the term ''marketed or labeled as a gift card or gift certificate'' includes and does not include that are identical to the examples in comment 20(b)(2)–3 under the Gift Card Rule. Proposed comment 5(c)–4, which addressed issues related to maintaining proper policies and procedures to prevent a general-use prepaid card from being marketed as a gift card or gift certificate, was adapted from 20(b)(2)–4 under the Gift Card Rule. Finally, proposed comment 5(c)–5, which provided guidance relating to online sales of gift cards, was substantially the same as comment 20(b)(2)–5 under the Gift Card Rule.

The Board received few comments on proposed comments 5(c)–1 through 5(c)–5. One issuer expressed concerns that the commentary, taken together, is too prescriptive. The Board believes that the detail is necessary to provide issuers with sufficient guidance to determine whether a prepaid card is considered to be reloadable and not marketed or labeled as a gift card or gift certificate. Furthermore, the Board believes it is important to maintain consistency with the Gift Card Rule in interpretation of what is meant by ''reloadable and not marketed or labeled as a gift card or gift certificate.'' Issuers and other parties that are involved in the distribution and sale of prepaid cards are required to make these determinations with respect to the Gift Card Rule, and consistent interpretation across the two rules should reduce confusion and compliance burden.

One merchant group commented that they did not believe HSAs, FSAs, or HRAs qualified for the exemption in § 235.5(c)(1) because they believe that cards accessing HSAs, FSAs, and HRAs are not freely reloadable and may only be reloaded during designated times. The statute does not require that, to qualify for the exemption, a card be reloadable on a continuous basis, only that the card be reloadable and not marketed as a gift card. Accordingly, the final rule has not been changed to require that a card be continuously reloadable to qualify for the exemption for reloadable cards. Therefore, the Board is adopting proposed comment 5(c)–1 as comment 5(c)–2 with minor changes to clarify this point. The Board is adopting proposed comments 5(c)–2 through 5(c)–5 without change as comments 5(c)–3 through 5(c)–6.

2. Certification

The Board requested comment on whether it should establish a process to identify accounts accessed by cards eligible for the reloadable prepaid cards exemption or whether it should permit payment card networks to develop their own processes. Comments received on the process for identifying accounts for the reloadable prepaid card exemption were similar to the comments received on the process for identifying accounts for the government-administered payment programs exemption. For the reasons discussed above with respect to the government-administered payment program exemption, the Board believes that the process should be developed and administered by the payment card networks. *See* comment 5–2. Identifying accounts is a complex process that the payment card networks may be better situated to administer. Furthermore, the Board is concerned that a Board-administered process could unnecessarily delay the introduction of new card programs.

3. Temporary Cards Issued in Connection With a General-Purpose Reloadable Card

Proposed § 235.5(c)(2) provided that the term ''reloadable'' includes a temporary non-reloadable card if it is issued solely in connection with a reloadable general-use prepaid card. As the Board discussed in its proposal, this treatment of temporary cards issued in connection with a general-purpose reloadable card is consistent with its treatment under the Gift Card Rule. Proposed comment 5(c)–6, similar to comment 20(b)(2)–6 under the Gift Card Rule, provides additional guidance regarding temporary non-reloadable cards issued solely in connection with a general-purpose reloadable card. The Board did not receive comment on the proposed § 235.5(c)(2), which is adopted as proposed. There were also no comments on proposed comment 5(c)–6, which is adopted as comment 5(c)–7 without change.

4. Cards Accessing HSAs, FSAs, and HRAs and Qualified Transportation Benefits

Many issuer commenters urged the Board to exempt cards accessing HSAs, FSAs, or HRAs from the interchange fee restrictions as well as the network exclusivity and routing provisions. These commenters also suggested that cards accessing qualified transportation benefits should be exempt. In support of their views, these commenters cited statements from certain members of Congress indicating their belief that cards accessing these types of accounts should be exempt from these provisions.

The statute does not provide an exemption for cards accessing HSAs, FSAs, or HRAs or qualified transportation benefits. Some of these cards may nonetheless fall outside the definitions that establish the scope of coverage of EFTA Section 920. For example, § 235.2(a)(2), which defines ''account,'' does not cover accounts held under a *bona fide* trust agreement. The Board understands that some health-related accounts are established as *bona fide* trust accounts. Therefore, to the extent an account is established as a *bona fide* trust account, electronic debit transactions using a card that accesses such an account would not be covered by the provisions of this part.

For HSAs, FSAs, or HRAs or qualified transportation benefits that are not established as *bona fide* trust accounts, cards accessing such accounts may still meet one of the exemptions under § 235.5 from the interchange fee restrictions, depending on how the account is structured and the issuer of the card. The Board addressed specific comments related to whether electronic debit transactions made using cards that access HSAs, FSAs, and HRAs qualify for the various exemptions from the interchange fee restrictions in the supplementary information to § 235.5(b) and (c) above.

In addition, a number of commenters agreed that issuers face significant complications in complying with the network exclusivity provisions with respect to certain health care and employee benefit cards under current government rules governing these programs. As discussed further in the supplementary information related to § 235.7(c)(3) and comment 7(c)–1, the Board is providing a delayed effective date for electronic debit transactions using debit cards that use point-of-sale transaction qualification or substantiation systems for verifying the eligibility of purchased goods or services to provide issuers of such cards additional time to identify and implement approaches to comply with the rule's network exclusivity provisions.

D. Section 235.5(d) Exception

EFTA Section 920(a)(7)(B) provides that the exemptions available under EFTA Sections 920(a)(7)(A)(i) and (ii) terminate after the end of the one-year period beginning on the effective date of the statute if either of the following fees may be charged: a fee for an overdraft, including a shortage of funds or a transaction processed for an amount exceeding the balance; or a fee imposed by the issuer for the first withdrawal per month from an ATM that is part of the issuer's designated ATM network. Proposed § 235.5(d) implemented this section by providing that the exemptions in §§ 235.5(b) and (c) are not available for any interchange transaction fee received or charged by an issuer on or after July 21, 2012, with respect to an electronic debit transaction, if any of the following fees may be charged to a cardholder with respect to the card: (i) A fee or charge for an overdraft, including a shortage of funds or a transaction processed for an amount exceeding the account balance, unless the fee or charge is imposed for transferring funds from another asset account to cover a shortfall in the account accessed by the card; or (ii) a fee imposed by the issuer for the first withdrawal per calendar month from an automated teller machine that is part of the issuer's designated automated teller machine network.[153] The Board's proposal clarified that the fee described in § 235.5(d)(1) does not include a fee or charge imposed for transferring funds from another asset account to cover a shortfall in the account accessed by the card. Such a fee is not an ''overdraft'' fee because the cardholder has a means of covering a shortfall in the account connected to the card with funds transferred from another asset account, and the fee is charged for making such a transfer. The Board has determined to adopt § 235.5(d) as proposed, but is making some revisions to the commentary as discussed below.

Several industry commenters suggested the Board clarify the proposed exception. One prepaid card processor requested that the Board make clear that an issuer with its own proprietary ATM network, which identifies the issuer's name and does not charge a fee for the first ATM withdrawal in a calendar month, does not lose the exemption because the cards it issues also have access to a nonproprietary ATM network that charges fees. Proposed § 235.5(d)(2) provides that the exemptions are not available if a fee is imposed by the issuer for the first withdrawal per calendar month from an ATM that is part of the issuer's designated ATM network. Therefore, a fee may be charged for a withdrawal from an ATM outside of the issuer's designated ATM network without the issuer losing the exemption. The Board has adopted comment 5(d)–1 to clarify this point by providing that an electronic debit card transaction may still qualify for the exemption under §§ 235.5(b) or (c) with a respect to a card for which a fee may be imposed for a withdrawal from an ATM that is outside of the issuer's designated ATM network as long as the card complies with the condition set forth in § 235.5(d)(2) for withdrawals within the issuer's designated ATM network.

An issuer requested that the Board clarify that the condition in § 235.5(d)(2) regarding ATM fees would not apply to cards that do not have ATM access. A card that does not have ATM access will not be subject to any fees for withdrawals from an ATM; therefore, such a card would not lose the exemption on the basis of § 235.5(d)(2). The Board has added a sentence to comment 5(d)–1 to clarify this point.

The Board also received a comment from a prepaid card processor suggesting that the Board provide alternatives for issuers without their own proprietary ATM network to meet the condition set forth in § 235.5(d)(2) by entering into an arrangement with either (i) a nonproprietary network where a fee will not be charged for the first ATM withdrawal in a calendar month; or (ii) a local bank, bank agent, or retail seller to allow for in-branch or in-store free cash withdrawal per calendar month using the card, regardless of whether any ATMs are available for use. With respect to the first suggested alternative, the Board notes that an issuer's ''designated ATM network'' is defined in § 235.2(g) as including either a network in the name of the issuer or any network of ATMs identified by the issuer that provides reasonable and convenient access to the issuer's customers. As a result, the definition already contemplates the possibility of an issuer entering into an arrangement with a nonproprietary ATM network. With respect to the second suggested alternative, tellers, bank agents, and point-of-sale terminals are not considered ATMs and cannot

[153] Section 235.2(g) defines the term ''designated automated teller machine (ATM) network.''

comprise an ATM network. If the card can be used to access ATMs with an issuer's designated ATM network, then in order for the card to qualify for the general-use prepaid exemption after July 21, 2012, a fee cannot be imposed by the issuer for the first withdrawal per calendar month from an ATM that is part of the issuer's designated ATM network, irrespective of whether a cardholder can obtain fee-free cash withdrawals from a branch or a retail store.

A prepaid card trade group suggested that the Board permit issuers to meet the condition in § 235.5(d)(2) by providing a credit to the cardholder within the month that a fee for withdrawal from an ATM is imposed. Although a cardholder in this scenario would be reimbursed the fee, and thus have a fee-free ATM withdrawal, there may be other negative consequences to the cardholder that would not occur if the fee for the ATM withdrawal had not initially been imposed. For example, the imposition of such a fee could cause a subsequent transaction to be declined or returned. The fact that the fee is later reimbursed does not reverse the negative consequence of the fee being imposed in the first place. Therefore, the final rule does not permit issuers to meet the condition in § 235.5(d)(2) by imposing the fee and providing a subsequent credit.

Finally, consumer groups were supportive of the conditions in § 235.5(d) and thought the conditions provided important consumer protections. However, they believed the Board should require additional protections, including extending the other provisions of Regulation E, such as error resolution and periodic statement requirements, to general-use prepaid cards, and preventing any form of credit that automatically triggers repayment of funds deposited on a general-use prepaid card. The Board believes that these suggestions fall outside the scope of this rulemaking and will not address these issues in this final rule.

V. Section 235.6 Prohibition on Circumvention or Evasion

EFTA Section 920 contains two separate grants of authority to the Board to address circumvention or evasion of the restrictions on interchange transaction fees. First, EFTA Section 920(a)(1) provides the Board with general authority to prescribe rules to prevent circumvention or evasion of the interchange fee standards under EFTA Section 920(a). In addition, EFTA Section 920(a)(8) authorizes the Board to prescribe rules regarding any network fees, but such authority is limited to regulations to ensure that a network fee (i) ''is not used to directly or indirectly compensate an issuer with respect to'' an electronic debit transaction; and (ii) ''is not used to circumvent or evade'' the interchange transaction fee restrictions under EFTA Section 920(a) and this rule.[154] Under EFTA Section 920(a)(8)(B), using a network fee to directly or indirectly compensate an issuer with respect to an electronic debit transaction is a separate prohibition from using a network fee to circumvent or evade the interchange fee standards. The proposed rule contained a general prohibition against circumventing or evading the interchange transaction fee restrictions, as well as a statement that circumvention or evasion occurs if an issuer receives net compensation from a payment card network with respect to electronic debit transactions.

The final rule adopts the proposed rule's general prohibition of circumvention or evasion. Comment 6(a)–1 clarifies that the determination of circumvention or evasion will be based on the particular facts and circumstances. The final rule also prohibits an issuer from receiving net compensation from a payment card network, excluding interchange transaction fees received from acquirers. The commentary to the final rule includes examples of situations that do not involve net compensation, but may nevertheless warrant additional supervisory scrutiny to determine whether circumvention or evasion exists. Finally, the final rule clarifies the time period over which net compensation will be measured.

A. Overview of Network Fees, Discounts, and Incentives

Payment card networks charge network participants a variety of fees in connection with electronic debit transactions. On the issuer side, fees charged by the network include access fees for connectivity and fees for authorizing, clearing, and settling debit card transactions through the network (*i.e.,* switch fees). Issuers also pay fees to the network for the costs of administering the network, such as service fees for supporting the network infrastructure, and membership and licensing fees. In addition, a network may charge fees to issuers for optional services, such as for transaction routing and processing services provided by the network or its affiliates or for fraud detection and risk mitigation services.

On the acquirer and merchant side, a network similarly charges fees for accessing the network, as well as fees for authorizing, clearing, and settling debit card transactions through the network. Likewise, networks charge network administration fees, membership or merchant acceptance fees, and licensing or member registration fees to acquirers and/or merchants. There are also fees for various optional services offered by the network to acquirers or merchants, including fees for fraud detection and risk mitigation services.

A fee charged by the network can be assessed as a flat fee or on a per-transaction basis, and may also vary based on transaction size, transaction type, or other network-established criteria. Issuers and merchants may be given individualized discounts by a network relative to its published network fee based on their transaction volume.

In addition to discounts, issuers and merchants may receive incentive payments or rebates from a network. These incentives may include upfront payments to encourage issuers to shift some or all of their debit card volume to the network, such as signing bonuses upon contract execution. Such payments may help issuers defray the conversion cost of issuing new cards or of marketing the network brand. In addition, issuers may receive incentive payments upon reaching or exceeding debit card transaction, percentage share, or dollar volume threshold amounts.

Discounts and incentives enable networks to compete for business from issuers and merchants. Among other things, these pricing tools help networks attract new issuers and retain existing issuers, as well as expand merchant acceptance to increase the attractiveness of the network brand. Discounts and incentives also help networks to encourage specific processing behavior, such as the use of enhanced authorization methods or the deployment of additional merchant terminals.

B. Section 235.6(a) Prohibition of Circumvention or Evasion

A payment card network may consider a number of factors in calibrating the appropriate level of network fees, discounts, and incentives in order to achieve network objectives. EFTA Section 920(a) does not directly regulate the fees that a network may charge for any of its services. Thus, the final rule does not seek to set or establish the amount, type, or level of

[154] Under EFTA Section 920(a)(1), a network fee is defined as ''any fee charged and received by a payment card network with respect to an electronic debit transaction, other than an interchange transaction fee.''

network fees that a network may permissibly impose on any network participant for its services. However, the statute authorizes the Board to prescribe rules to prevent circumvention or evasion of the interchange transaction fee standards. This authority is both general with respect to the Board's implementation of the interchange transaction fee standards under EFTA Section 920(a)(1), as well as specific with respect to the use of network fees under EFTA Section 920(a)(8)(B)(ii).

Under the proposed rule, § 235.6(a) set out a general prohibition against circumventing or evading the interchange transaction fee standards in §§ 235.3 and 235.4. In addition, proposed § 235.6 expressly prohibited, as an example of circumvention or evasion of the interchange transaction fee standards, an issuer from receiving net compensation from a payment card network with respect to electronic debit transactions because such compensation could effectively serve as a transfer to issuers that may be in excess of the amount of interchange transaction fee revenue allowed under the standards in §§ 235.3 and 235.4.

Proposed comment 6–1 further clarified that any finding of circumvention or evasion of the interchange transaction fee standards will depend on the relevant facts or circumstances. Proposed comment 6–1.i. provided an example of net compensation occurring in violation of the prohibition on circumvention or evasion when an issuer receives payments or incentives in connection with electronic debit transactions that exceed the total amount of fees paid by the issuer to the network for such transactions. The proposed comment also included examples of payments or incentives and fees that would be included in the net compensation determination, as well as those that would not be included. Among the payments or incentives that would be considered in the net compensation analysis were payments or rebates to issuers for meeting or exceeding certain transaction volume or dollar amount thresholds, as well as marketing incentives and other fixed payments for ''debit card activities.''

Issuers and depository institution trade associations generally commented that the proposed rule appropriately limited the scope of the net compensation analysis to payments made ''with respect to electronic debit transactions.'' However, these commenters further stated that the proposed commentary interpreting the rule exceeded the scope of the statutory prohibition on circumvention or evasion in EFTA Section 920(a)(8) by also considering payments for ''debit card-related activities.'' In the view of these commenters, the only payments that should be considered in the net compensation analysis are payments to an issuer for its role in an electronic debit transaction, or more precisely, payments that vary with the number or volume of debit card transactions processed on the network. Accordingly, issuers asserted that payments made by networks to issuers for other debit card-related purposes, such as for marketing or to encourage investment in network infrastructure, should be excluded from the net compensation analysis. Several issuer commenters further expressed the view that inclusion of payments that were not tied to debit card volume would unnecessarily inhibit a network's ability to attract issuers, promote investment in the network, or provide incentives for desirable issuer behavior, such as enhancing data security procedures.

Merchant commenters and a member of Congress stated that the proposed rule was overly narrow in scope in limiting circumvention or evasion to circumstances in which an issuer receives net compensation from a network in connection with electronic debit transactions. These commenters urged the Board to clarify that net compensation is not the exclusive test for circumvention by, for example, including general anti-circumvention language in the rule. According to merchant commenters, such general anti-circumvention language would address attempts by networks and issuers to adjust their pricing policies or restructure their products to avoid being subject to the standards set forth in the rule. Merchants also recommended that the Board specifically include an enforcement mechanism to address occurrences of circumvention or evasion.

The final rule adopts the general prohibition on circumvention or evasion of the interchange transaction fee standards in §§ 235.3 and 235.4, substantially as proposed. Comment 6–1, as in proposed comment 6–3, clarifies that the prohibition in § 235.6 against circumventing or evading the interchange transaction fee standards does not apply to issuers or products that qualify for an exemption under § 235.5. Thus, for example, § 235.6 does not apply to an issuer with consolidated assets below $10 billion holding the account that is debited in an electronic debit transaction. The final rule adopts the comment as proposed, redesignated as comment 6–1.

Comment 6(a)–1 is modified from the language in the proposed commentary to state more explicitly that circumvention or evasion may include, but is not limited to, circumstances in which an issuer receives net compensation from a payment card network with respect to electronic debit transactions or other debit card related activity. Although the proposal established a per se circumstance in which circumvention or evasion of the interchange transaction fee standards occurs (*i.e.,* when an issuer receives net compensation with respect to electronic debit card transactions), the Board did not intend to limit potential findings of circumvention or evasion to such circumstances. Rather, as stated in the supplementary information to the proposed rule, § 235.6 establishes a ''*general* prohibition against circumventing or evading the interchange transaction fee standards in §§ 235.3 and 235.4.'' [155] This concept is made more explicit in the final rule by separating the prohibition against circumvention and evasion and the prohibition against net compensation into different subsections. Comment 6(a)–1 to the final rule retains the provision in the proposed commentary stating that a finding of circumvention or evasion ''will depend on all relevant facts and circumstances.''

In the proposal, the Board requested comment on whether increases in fees charged by the network to merchants or acquirers coupled with corresponding decreases in fees charged by the network to issuers should also be considered circumvention or evasion of the interchange fee standards in §§ 235.3 and 235.4. For example, following the effective date of this rule, a network might increase network switch fees charged to merchants, acquirers, or processors while decreasing switch fees paid by issuers for the same types of electronic debit transactions. Under these circumstances, the increase in network processing fees charged to merchants is arguably ''passed through'' to issuers through corresponding decreases in processing fees paid by issuers.

Issuers and payment card networks generally commented that the rule should not address the level of network processing fees regardless of any changes to the proportion of such fees as applied to issuers and merchants. These commenters asserted that EFTA Section 920 is only intended to address the level of interchange transaction fees and therefore the statute does not

[155] *See* 75 FR at 81747 (Dec. 28, 2010) (emphasis added).

regulate the structure or amount of non-interchange fees set by networks, including network processing fees. Merchant commenters, however, stated that decreases in network processing fees charged to issuers and increases in network processing fees charged to merchants or acquirers could easily compensate issuers for reductions in the level of interchange transaction fees in circumvention of the interchange transaction fee standard. Merchants thus urged the Board to cap the level of network fees at current levels until the proposed network exclusivity and routing provisions were fully implemented (in particular, Alternative B) to allow merchants the ability to discipline network fees through their routing choices. Merchants also urged the Board to carefully monitor the networks' operating rules for any changes that shift liability from issuers to merchants as a way to make up for lost income from interchange.

Although the Board recognizes that decreases in issuer fees paid to the network could have the effect of offsetting reductions in interchange transaction fee revenue that will occur under the interchange transaction fee standards in §§ 235.3 and 235.4, the Board continues to believe that such circumstances would not necessarily indicate circumvention or evasion of the interchange transaction fee standards. Moreover, the Board is concerned that an outright prohibition on such shifts in the allocation of network fees would effectively lock in the current distribution of network fees between issuers and merchants, thereby constraining the ability of networks to adjust their own sources of revenue in response to changing market conditions. Such a prohibition may preclude a network from adopting a fee structure similar to that used by a competing network that obtained a larger proportion of its fees from the merchant side of the transaction. Finally, to the extent that networks alter fees for issuers that are incorporated into the interchange fee standard, the permissible interchange fee under the standards will adjust to reflect those fee changes. Accordingly, the final rule does not treat shifts in the relative proportion of network processing fees paid by issuers and merchants as a per se indication of circumvention or evasion of the interchange transaction fee standards. Instead, as discussed above, individual determinations of circumvention or evasion would depend of the particular facts and circumstances.

New comment 6(a)–2.i thus states that increases in network fees charged to merchants or acquirers and decreases in network fees charged to issuers do not by themselves constitute circumvention or evasion of the interchange transaction fee standards; however, such action may warrant additional supervisory scrutiny to determine whether the facts and circumstances constitute circumvention or evasion.[156] New comment 6(a)–2.ii includes another example based on merchant comments regarding issuers adjusting their products to avoid the final rule's interchange fee limits. The comment describes a situation where an issuer replaces its debit cards with prepaid cards that are exempt from the interchange fee standards of §§ 235.3 and 235.4. The exempt cards are linked to its customers' transaction accounts and funds are swept from the transaction accounts to the prepaid accounts as needed to cover transactions made. Although this situation may not constitute per se circumvention or evasion, it warrants additional supervisory scrutiny to determine whether the facts and circumstances constitute circumvention or evasion.

C. Section 235.6(b) Prohibition of Net Compensation

The final rule sets out a prohibition against net compensation in § 235.6(b). The description of net compensation contained in proposed comment 6–1.i has been moved to § 235.6(b) of the final rule's regulatory text. As in the proposed comment, an issuer has received net compensation from a payment card network if the total amount of payments or incentives received by the issuer from the payment card network during a calendar year in connection with electronic debit transactions or other debit card-related activity, excluding interchange transaction fees that are passed through to the issuer by the network, exceeds the total of all fees paid by the issuer to the network for electronic debit transactions or other debit card related activity during that calendar year.

The Board notes that the prohibition in EFTA Section 920(a)(8)(B)(i) is not limited to direct compensation to an issuer with respect to electronic debit transactions, but also applies to circumstances in which network fees are used to ''indirectly'' compensate an issuer with respect to such transactions. Moreover, EFTA Section 920(a)(8)(B)(ii) also includes general authority to ensure that network fees are not used to circumvent or evade the interchange transaction fee standards of the rule. Pursuant to these statutory authorities, the Board believes that the net compensation determination should take into consideration any payments or incentives paid by a network to an issuer for debit card-related activities. In particular, the Board believes that limiting the payments or incentives to payments that are directly related to the number or volume of debit card transactions on the network would potentially create a significant loophole as networks could respond by providing sizable non-volume based incentive payments to an issuer for debit card activities to offset the reduced revenue from the limitations on interchange transaction fees in §§ 235.3 and 235.4. Accordingly, § 235.6(b) in the final rule states that payments and incentives paid to an issuer by a network, and fees paid by an issuer to a network ''with respect to electronic debit transactions or debit card-related activities,'' are not limited to volume-based or transaction-specific payments, incentives, or fees, but also include other payments, incentives, or fees related to an issuer's provision of debit card services. Such payments could include, for example, bonuses to convert an issuer's card base to a new signature network, or marketing incentives. Comment 6(b)–2 to the final rule provides guidance on the payments or incentives paid by a payment card network that could be considered in determining whether an issuer has received net compensation. Consistent with the proposal, comment 6(b)–2.i states that payments or incentives paid by a payment card network could include, but are not limited to, marketing incentives, payments or rebates for meeting or exceeding a specific transaction volume, percentage share, or dollar amount of transactions processed, or other payments for debit card-related activities.

As noted above, signing bonuses are used as a network tool for encouraging issuers to shift debit card volume to a network, and for maintaining existing card volume on the network. For example, an initial upfront payment from a network may serve to compensate the issuer for its costs in converting its card base to a new signature debit network. Signing bonuses may also offset the issuer's

[156] Merchants also commented that in permitting networks to raise their network fees for merchants or to decrease them for issuers (or both) so long as net compensation is not provided, the Board contradicted its own reasoning for excluding network fees as an allowable cost that can be recovered through the interchange transaction fee standards, that is, to prevent merchants from having to pay all processing fees. As discussed above, however, the final rule permits network processing fees incurred by issuers to be recovered through the interchange transaction fee standards as such costs are incurred to effect an electronic debit card transaction.

costs in upgrading its internal processing systems and establishing connectivity to the new network. In its proposal, the Board requested comment on whether signing bonuses should also be considered as payments or incentives paid by a network to an issuer for purposes of the net compensation determination.

Issuer commenters generally responded with similar arguments made in connection with the treatment of debit card-related payments unrelated to transaction volume, stating that such bonuses should not be included in the determination because they do not compensate an issuer for the number or volume of transactions processed on a network. One payment card network expressed concern that including signing bonuses in the net compensation determination could reduce a network's ability to compete with another payment card network that also offered products or services unrelated to their operation of the network at a discount. This network stated that if the final rule curtailed networks' ability to offer signing bonuses by including them in the net compensation calculation, operators of networks that did not offer additional products or services would be left at a competitive disadvantage in their ability to compete for debit card business.

Some issuers observed that initial upfront payments and incentives were likely to exceed the fees charged to the issuer for the first year. For example, a network may provide a new issuer an incentive to participate in the network to offset the issuer's costs to reissue cards, promote the new network brand to cardholders, and establish network connectivity. In this regard, because of the potential size of signing bonuses in relation to fees paid by an issuer on a year-to-year basis, several issuers and one payment card network urged the Board to clarify that signing bonuses would be eligible for pro rata treatment over the term of the contract.

Merchants, two payment card networks, and a processor with an affiliated payment card network, by contrast, believed that signing bonuses should be included in the net compensation determination. Some of these commenters expressed the view that excluding signing bonuses could undermine the entire net compensation approach because networks could create packages with signing bonuses, funded by imposing increased network fee on merchants, without violating the rule.

Comment 6(b)–2.i clarifies that the determination of whether net compensation exists must also take into account signing bonuses paid by a network to an issuer to retain or attract the issuer's debit card portfolio. Just as marketing incentives and other non-volume based payments for debit card-related activities could be used by a network to compensate an issuer for the issuer's role in electronic debit transactions above and beyond the limits permitted under §§ 235.3 and 235.4, the Board believes that signing bonuses could similarly be used as a mechanism to generate payments to an issuer in excess of the amount permitted under §§ 235.3 and 235.4, absent inclusion in the net compensation calculation. However, as further provided in comment 6(b)–2.ii, the Board agrees that it would be appropriate to allocate such bonuses over the life of the debit card contract in calculating the payments or incentives paid by a network to an issuer. To the extent an issuer receives signing bonuses for its entire card portfolio, including for the issuer's credit card business, an appropriate portion of such bonuses should be allocated to the issuer's debit card business based on the proportion of the cards or transactions that are debit cards or electronic debit transactions, as appropriate to the situation, for purposes of the net compensation determination.

Comment 6(b)–2.iii lists types of payments or incentives that need not be included in the total payments or incentives paid by a network to an issuer for purposes of the net compensation analysis. Among other payments that may be received from a network, issuers may exclude any interchange transaction fees that are passed through to the issuer by the network. The comment also clarifies that incentives paid by a payment card network do not include funds received by an issuer from a payment card network as a result of chargebacks or fines paid by merchants or acquirers for violations of network rules. In response to issuer comments, the commentary also clarifies that settlements or recoveries from merchants or acquirers to offset the costs of fraudulent transactions or a data security breach do not constitute payments or incentives paid by a payment card network.

The proposed commentary also stated that fees paid by an issuer could include fees for optional services provided by the network. *See* proposed comment 6–2.ii. Merchants expressed concern that the proposed approach created a loophole that could permit networks to increase the incentives paid to issuers without providing net compensation if fees paid to a network included fees paid to a third-party processor affiliated with the network. In such case, an issuer would be permitted to recover those costs from merchants and acquirers through the interchange fee standard to the extent such costs were related to the authorization, clearing, or settlement of electronic debit transactions. If those recoverable costs were also included in the net compensation test, however, such processing costs could increase the amount of incentives that could be transferred by the network to the issuer. The network could then fund the additional incentives by increasing the network fees paid by merchants or acquirers.

Merchant commenters proposed two different approaches to address their concerns. First, they stated that the Board could limit the recoverable costs through the interchange fee standards to a processor's actual costs of authorizing, clearing, and settling an electronic debit transaction where debit card processing is outsourced to the third-party processor. Issuers, however, generally do not have knowledge of their processors' actual costs. Alternatively, these commenters recommended that the final rule exclude fees paid by an issuer for third-party processing from the total amount of fees paid to a network for purposes of the net compensation determination.

The Board agrees that the proposed approach could enable networks to substantially increase the incentives paid to issuers without violating the net compensation test and has determined that the test should be based on fees that are not incorporated into the interchange fee standard. Therefore, the Board has excluded from the net compensation test fees for issuer-processor services paid by an issuer to a network or network affiliate. For similar reasons, the Board has excluded network processing, or switch, fees from the net compensation calculation because under the final rule such fees are also incorporated in the interchange fee standard.

New comment 6(b)–3 incorporates the proposed guidance describing the examples of fees paid by an issuer to a payment card network for purposes of the net compensation determination. Accordingly, the comment provides that fees paid by an issuer to a payment card network include, but are not limited to, network membership or licensing fees, and network administration fees. Fees paid by an issuer could also include fees for optional services provided by the network, such as risk management services.

Comment 6(b)–4 provides an example of circumstances that do not constitute net compensation to the issuer. In the example, an issuer receives an additional incentive payment from the network as a result of increased debit card transaction volume over the network during a particular calendar year. During the same period, however, the total network fees the issuer pays the payment card network with respect to electronic debit transactions also increase so that the total amount of fees paid by the issuer to the network continues to exceed the total amount of incentive payments received by the issuer from the network during that calendar year. Under these circumstances, the issuer does not receive net compensation from the network for electronic debit transactions. *See* comment 6(b)–4.i.

A few large issuers and a payment card network commented that the prohibition against circumventing or evading the interchange transaction fee standards should apply only to contractual arrangements between a payment card network and an issuer that are entered into on or after the date of enactment of the Dodd-Frank Act, July 21, 2010. The Board does not believe that such arrangements should be grandfathered, but the date on which such arrangements are entered into would be included in the facts and circumstances analysis for circumvention or evasion. Such arrangements would, however, be subject to the prohibition against net compensation.

D. Additional Uses of Circumvention or Evasion Authority

As discussed above under § 235.5, trade associations representing small issuers, including credit unions, and one federal banking agency urged the Board to use its circumvention or evasion authority to ensure that the small issuer exemption in EFTA Section 920(a)(6) from the interchange transaction fee standards is given effect by the networks. In particular, these commenters were concerned that absent an express requirement on networks to adopt higher tiers of interchange fees for exempt issuers, such issuers would experience a significant reduction in interchange fee revenue, notwithstanding the exemption.

The Board notes that Section 920(a) imposes restrictions on the interchange fees that issuers may charge or receive and requires the Board to set standards regarding those fees—it does not confer authority on the Board to regulate the activities of networks (other than regarding the use of network fees to compensate issuers or to circumvent the interchange fee standards) or to require merchants to pay any particular level of fees. Moreover, although the statute provides an exemption from the interchange transaction fee standards for issuers with less than $10 billion in consolidated assets, the statute neither imposes an affirmative duty on networks to implement different interchange transaction fee rates for covered and non-covered issuers, nor requires merchants to pay a particular level of interchange fee revenue that may be collected by an exempt issuer. Thus, the Board does not believe that the circumvention or evasion authority confers authority on the Board to require networks to take specific actions to implement the small issuer exception (which do not involve the use of network fees) or merchants to pay higher interchange fees to small issuers.

As discussed above, however, the final rule relies on specific authority granted in Section 920(a)(3)(B) to collect and publish information from issuers and networks to separately require networks to report to the Board the interchange revenue and related debit card volumes for exempt and covered issuers. The Board intends to publish on an annual basis the average interchange revenue received by covered and exempt issuers by network. The Board anticipates that greater transparency regarding network interchange policies will facilitate issuers' ability to more easily choose the networks that best serve their individual requirements, including the level of interchange transaction fees that apply to issuers on the network.

VI. Section 235.7 Limitations on Payment Card Restrictions

EFTA Section 920(b)(1) directs the Board to prescribe regulations with respect to two limitations set out in the statute regarding transaction processing. First, the Board must prescribe regulations prohibiting an issuer or payment card network from restricting the number of payment card networks on which an electronic debit transaction may be processed to fewer than two unaffiliated networks (network exclusivity restrictions).[157] Second, the Board must prescribe regulations that prohibit an issuer or payment card network from directly or indirectly inhibiting any person that accepts debit cards for payment from directing the routing of an electronic debit transaction through any network that may process that transaction (merchant routing restrictions).[158] Section 235.7 implements these limitations on payment card network restrictions.

EFTA Sections 920(b)(2) and (3) impose certain limits on the ability of payment card networks to restrict merchants and other persons in establishing the terms and conditions under which they may accept payment cards. Specifically, EFTA Section 920(b)(2) prohibits a payment card network from establishing rules that prevent merchants from offering discounts or in-kind incentives based on the method of payment tendered to the extent that such discounts or incentives do not differentiate on the basis of the issuer or payment card network. In addition, EFTA Section 920(b)(3) prohibits a payment card network from establishing rules that prevent merchants from setting minimum transaction amounts for accepting credit cards to the extent that such minimums do not differentiate between issuers and payment card networks. These two statutory provisions are self-executing and are not subject to the Board's rulemaking authority.[159]

EFTA Section 920(b) does not provide a statutory exemption for small issuers, government-administered payment cards, or covered reloadable prepaid cards. Thus, the exemptions in section 235.5 of the rule do not extend to the prohibitions on network exclusivity arrangements and merchant routing restrictions under EFTA Section 920(b) implemented in § 235.7. *See* comment 7–1. As discussed below, however, the final rule provides a delayed effective date for certain types of debit cards to allow issuers to address significant technological or operational impediments to an issuer's ability to comply with the network exclusivity and routing provisions of the rule.

A. Section 235.7(a) Prohibition on Network Exclusivity

EFTA Section 920(b)(1)(A) directs the Board to prescribe rules prohibiting an issuer or a payment card network from directly, or indirectly through any agent, processor, or licensed member of a payment card network, restricting the number of payment card networks on which an electronic debit transaction may be processed to fewer than two unaffiliated payment card networks. Section 235.7(a) implements the new requirement and prohibits an issuer or payment card network from restricting the number of payment card networks on which an electronic debit transaction

[157] *See* EFTA Section 920(b)(1)(A).

[158] *See* EFTA Section 920(b)(1)(B).

[159] The Board may, however, increase from $10 the minimum value amount that a merchant may set for credit card acceptance. EFTA Section 920(b)(3)(B).

may be processed to fewer than two unaffiliated networks, regardless of the method of authentication.

Currently, issuers, or in some cases, networks, control the merchant routing of electronic debit transactions. For example, for PIN debit transactions, current network rules typically allow issuers to specify routing priorities among the networks enabled on their cards.[160] These issuer-determined routing priorities require a transaction to be performed using an issuer's preferred network, even if a merchant may prefer to perform the transaction over a lower-cost network that is available for the transaction. Moreover, issuers can influence routing by limiting the networks enabled on their cards. For example, certain issuers have agreed to make a payment card network, or group of affiliated networks, the exclusive network(s) associated with the issuer's debit cards in exchange for certain benefits.[161] In particular, some issuers have agreed to restrict their cards' signature debit functionality to a single signature debit network and their PIN debit functionality to the PIN debit network that is affiliated with the signature debit network. Finally, at least one commenter raised concerns that certain signature debit network rules could be interpreted to prohibit issuers of debit cards carrying the signature network brand from enabling other signature debit networks or certain competing PIN debit networks on the same card. Issuers and merchants, however, have different incentives regarding the routing of transactions, as described below.

Issuers may have a number of reasons to prefer that a particular payment card network carry their transactions. First, to the extent that interchange fees vary across networks, issuers would typically prefer the network with the highest interchange fee, all else equal. Second, in recent years, payment card networks have increasingly offered issuers other financial incentives in exchange for directing a substantial portion of their debit card transaction volume to their respective networks. For example, some issuers may agree to shift some or all of their debit card transaction volume to a network in exchange for higher incentive payments (such as volume-based payments or marketing support) or volume-based discounts on network fees charged to the issuer.

From the merchant perspective, the availability of multiple card networks for processing debit card transactions and the elimination of routing restrictions are attractive because they give merchants the flexibility to route transactions over the network that will result in the lowest cost to the merchant, such as through the network with the lowest interchange fee. This flexibility may promote direct price competition for merchants among the debit card networks that are enabled on the debit card. Accordingly, restrictions on this choice, such as network exclusivity arrangements, limit merchants' ability to route transactions over lower-cost networks and may reduce network price competition.

From the cardholder perspective, however, requiring that merchants have the ability to choose among multiple payment card networks enabled on debit cards—particularly multiple signature debit networks—could have adverse effects. In particular, such a requirement could limit the cardholder's ability to obtain certain card benefits. For example, a cardholder may receive zero liability protection or enhanced chargeback rights only if a transaction is processed over a specific card network. Similarly, insurance benefits for certain types of transactions or purchases or the ability to receive text alerts regarding possible fraudulent activity may be tied to the use of a specific network.[162] Requiring multiple unaffiliated payment card networks, coupled with a merchant's ability to route electronic debit transactions over any of those networks, could reduce the ability of a cardholder to control the network over which a transaction would be routed. Consequently, such a requirement could reduce the likelihood that the cardholder would be able to obtain benefits that are specific to a particular card network. Moreover, it may be challenging for issuers or networks to market a benefit to cardholders if the issuer has to inform cardholders that they will receive certain benefits only if a merchant chooses to route their transaction over that particular network. On the other hand, cardholders and consumers generally may benefit to the degree that routing choice for merchants results in lower debit interchange fees with savings that are passed on to consumers in the form of lower prices for goods and services.

1. Proposed Rule

In the proposed rule, the Board requested comment on two alternative approaches for implementing the restrictions on debit card network exclusivity. The first alternative (Alternative A) would require a debit card to have at least two unaffiliated payment card networks available for processing an electronic debit transaction. Under this alternative, an issuer could comply by, for example, having one payment card network available for signature debit transactions and a second, unaffiliated payment card network available for PIN debit transactions. The second alternative (Alternative B) would require a debit card to have at least two unaffiliated payment card networks available for processing an electronic debit transaction for each method of authentication available to the cardholder. For example, a debit card that can be used for both signature and PIN debit transactions would be required to offer at least two unaffiliated signature debit payment card networks and at least two unaffiliated PIN debit payment card networks. The second alternative recognized in part that PIN debit is not currently available for a significant number of merchants, either because they do not accept PIN debit or because PIN debit is not generally feasible in some retail environments, such as for Internet transactions, or transactions such as hotel stays and car rentals, where the final amount of the transaction cannot be determined at the time a transaction is authorized.

In the comments received, support for the two alternative approaches was divided primarily along issuer and merchant perspectives, with issuers strongly in support of Alternative A and merchants strongly in support of Alternative B. Payment card networks also favored Alternative A, while the one consumer group commenting on the issue favored Alternative B.

2. Comments Received

Issuers and networks stated that Alternative A as proposed fully satisfies the text and intent of the network exclusivity restrictions in EFTA Section 920(b)(1)(A). Issuers and networks further asserted that the approach taken in proposed Alternative B is unsupported by the statute, which does not distinguish between transactions by

[160] In other cases, a PIN debit network itself may require, by rule or contract, that PIN debit transactions be routed over that network when multiple PIN networks are available. These issuer- or network-directed priority rules are generally unnecessary for signature debit networks as there is typically only a single payment card network available per card for processing a signature debit transaction.

[161] Some issuers also negotiate or enroll in ''exclusivity arrangements'' with payment card networks for other business purposes. For example, an issuer may want to limit its participation to one network (or two affiliated networks) to reduce the membership and compliance costs associated with connecting to multiple networks.

[162] These benefits are often provided for transactions routed over signature debit networks; they are less commonly available for PIN debit transactions.

the method of cardholder authentication. Issuers and networks also noted that Alternative A would be far less disruptive to the payment system because many institutions are already in compliance with Alternative A and support multiple unaffiliated PIN networks.

By contrast, issuers and networks expressed significant concern about the operational cost and burden of implementing Alternative B, which in their view is not currently feasible because it would require enabling multiple signature networks on a card. In particular, issuers, networks, and card processors noted several changes that would be required in order to implement Alternative B. Among these changes, these commenters stated that merchants, acquirers, issuer processors, and issuers would have to replace routing logic to ensure that authorization, settlement, dispute processing, and fraud reporting records for electronic debit transactions are routed to the network selected by the merchant, instead of basing the logic on the first digit of the account number or card BIN. These commenters also suggested that point-of-sale terminals would have to be re-programmed or replaced to ensure that transactions can be routed to the appropriate network. Issuers also cited the expense of negotiating contracts with and participating in additional networks, including the costs of complying with multiple network rules, in order to comply with Alternative B, a burden that could be particularly onerous for smaller issuers. Moreover, several issuers contended that under the proposed interchange fee standards, they would be unable to recover the full costs of their current programs, much less the additional costs required to comply with Alternative B.

Issuers and networks also expressed concern that Alternative B would discourage investment and innovation in new authentication technologies. For example, these commenters argued that networks and issuers may have less incentive to develop and deploy new methods of authentication if they are required to share that technology with other parties to ensure that the new authentication method could be used on multiple unaffiliated networks.

Several issuers asserted that in many cases where PIN debit is unavailable, it is due to a merchant's choice not to offer PIN debit. These issuers also cited the development of alternative technologies that could facilitate the use of PIN debit in additional retail environments, including Internet transactions.

Finally, many issuers stated their belief that Alternative B is more likely to cause consumer confusion and potentially frustrate consumer choice to the extent that certain cardholder benefits, such as zero liability, enhanced chargeback rights, rewards, or insurance, are tied to the use of a particular network. In their view, Alternative B, with the potential of requiring four networks on a debit card, would make it less likely that a cardholder would receive those benefits if a merchant opted to route a transaction over a different network.

Merchants strongly urged the Board to adopt Alternative B to require debit cards to carry at least two unaffiliated networks for each method of authentication in order to create network competition for every transaction. Merchants argued that Alternative B would give them the ability to discipline the level of network processing fees by routing transactions to the lowest cost network. A consumer group commenter agreed that Alternative B was more likely to lead to greater competition between networks through lower transaction fees and better services, which would in turn benefit consumers through lower prices for goods and services.

Merchant commenters described a number of situations in which Alternative B would provide merchants with greater routing choice. These commenters observed that certain retail environments, such as Internet transactions, cannot readily accept PIN debit under current technology. These commenters further argued that, in other cases, certain types of debit cards may not be suited for PIN debit, such as health care cards that require specialized transaction qualification or substantiation systems that currently operate only on signature debit networks. In each of these circumstances, a merchant would not have any routing options under Alternative A. Merchants also noted that under Alternative A, even where both signature and PIN debit are available, a merchant's routing choice would be limited to a single network once the consumer has selected his or her authentication method. Merchants thus asserted that Alternative B was most consistent with statutory purpose because it would not limit merchant routing choice either by the way a transaction is authorized or by the type of transaction.

Finally, merchant commenters believed that Alternative B was more likely to foster new entrants offering signature debit to increase market competition. These commenters also predicted that new PIN debit networks would enter the market if Alternative B were adopted. Merchant commenters thus rejected issuer assertions regarding the operational burden associated with Alternative B, arguing that existing infrastructure already in place to support multiple PIN networks could be leveraged to also support multiple signature debit networks.

3. Section 235.7(a)(1)—General Rule

The final rule adopts Alternative A (at least two unaffiliated payment card networks) with respect to the network exclusivity provisions. The Board believes that Alternative A is most consistent with EFTA Section 920(b)(1)(A), which provides that an issuer and payment card network do not violate the prohibition against network exclusivity arrangements as long as the number of payment card networks on which an electronic debit transaction may be processed is not limited to fewer than two unaffiliated payment card networks. The plain language of the statute does not require that there be two unaffiliated payment card networks available to the merchant for each method of authentication. In other words, the statute does not expressly require issuers to offer multiple unaffiliated signature and multiple unaffiliated PIN debit card network choices on each card.

The Board has also considered the compliance burden presented by the two alternative approaches and the benefits to consumers of each approach. The Board understands that many issuers, particularly small issuers, are already in compliance with Alternative A, as they may already have multiple unaffiliated PIN networks enabled on their debit cards, or a signature network and an unaffiliated PIN network. Thus, Alternative A would minimize the compliance burden on institutions, particularly small issuers that might otherwise be adversely affected by a requirement to have multiple networks for each method of debit card authentication. Alternative A would also present less logistical burden on the payment system overall as it would require little if any re-programming of routing logic by issuers, networks, issuer processors, and acquirers.

From the consumer perspective, as noted above, requiring multiple payment card networks could limit the cardholder's ability to obtain card benefits that are tied to a particular network, such as zero liability protection or the ability to receive text alerts regarding possible fraud. Moreover, explaining the circumstances under which a cardholder may receive those benefits could be challenging for issuers, regardless of the alternative approach taken in the final rule. The Board believes that Alternative A would result in less consumer confusion than might otherwise result under Alternative B.

The Board acknowledges that Alternative A provides merchants fewer routing options with respect to certain electronic debit transactions compared to Alternative B. Nonetheless, under Alternative A, merchants that currently accept PIN debit would have routing choice with respect to PIN debit transactions in many cases where an issuer chooses to participate in multiple PIN debit networks. Moreover, the Board notes that EFTA Section 920(b)(1)(A) prohibits an ''issuer or payment card network'' from restricting the number of payment card networks on which an electronic debit transaction may be processed. To the extent a merchant has chosen not to accept PIN debit, the merchant, and not the issuer or the payment card network, has restricted the available choices for routing an electronic debit transaction under Alternative A. Similarly, where a consumer selects signature or PIN debit as the method of payment, the consumer, and not the issuer or the payment card network, has restricted the available routing choices.

The Board further understands that there exist emerging PIN debit products and technologies that would allow PIN debit to be used in additional retail environments where PIN debit is not generally offered, such as for online purchases. Some billers and at least one online merchant accept transactions that are routed over PIN debit networks, without requiring the cardholder to provide his or her PIN.[163] The Board anticipates that the elimination of network and issuer-based routing restrictions may further promote innovation to facilitate the use of PIN debit in additional retail environments. *See* discussion in relation to § 235.7(b).

Finally, the Board is persuaded that Alternative B and its requirement to enable multiple unaffiliated payment card networks on a debit card for each method of card authentication could potentially limit the development and introduction of new authentication methods. Although PIN and signature are the primary methods of debit card transaction authentication today, new authentication measures involving biometrics or other technologies may, in the future, be more effective in reducing fraud. An issuer, however, may be unable to implement these new methods of card authentication if the rule requires that such transactions be capable of being processed on multiple unaffiliated networks offering the new authentication method.

Thus, for the foregoing reasons, the final rule provides that the network exclusivity provision in § 235.7(a)(1) is satisfied as long as an electronic debit transaction may be processed on at least two unaffiliated payment card networks. Comment 7(a)–1 clarifies that § 235.7(a)(1) does not require an issuer to have multiple, unaffiliated networks available for each method of cardholder authentication. Under the final rule, it would be sufficient, for example, for an issuer to issue a debit card that operates on one signature-based card network and on one PIN-based card network, as long as the two card networks are not affiliated. Alternatively, an issuer could issue a debit card that operates on two or more unaffiliated signature-based card networks, but is not enabled for PIN debit transactions, or that operates on two or more unaffiliated PIN-based card networks, but is not enabled for signature debit transactions.

4. Section 235.7(a)(2)–(3) Permitted And Prohibited Arrangements

Proposed § 235.7(a)(2) described three circumstances in which an issuer or payment card network would not satisfy the general requirement to have at least two unaffiliated payment networks on which an electronic debit transaction may be processed, regardless of which of the alternatives is adopted. The proposed provision generally described circumstances in which a payment card network that is added to a debit card would not satisfy the network exclusivity provisions in § 235.7(a)(1) due to geographic or merchant coverage restrictions. *See* proposed §§ 235.7(a)(2)(i) and (ii). The proposal also prohibited, as an impermissible exclusivity arrangement, contractual restrictions or limitations set by a payment card network on an issuer's ability to contract with another payment card network. *See* proposed § 235.7(a)(2)(iii).

The final rule generally adopts the proposed provisions with modifications and adjustments in response to comments. Section 235.7(a)(3) of the final rule describes prohibited exclusivity arrangements by networks. Proposed § 235.7(a)(2)(i) provided that an issuer would not satisfy the requirement to have at least two unaffiliated payment card networks enabled on a debit card by adding a payment card network that is not accepted on a nationwide basis. Thus, for example, an issuer could not comply with the network exclusivity provision by having a second unaffiliated payment card network that is accepted in only a limited geographic region of the country. The proposal further provided, however, that an issuer could comply with proposed § 235.7(a)(1) if, for example, the debit card operates on one national network and multiple geographically limited networks that are unaffiliated with the first network and that, taken together, provide nationwide coverage. The Board also requested comment on the impact of the proposed approach on the viability of regional payment card networks and on small issuers that are more likely to use regional networks for their debit cards.

Several issuers objected to the proposed condition that a payment card network operate on a nationwide basis, asserting that the rule should permit issuers broad discretion to select unaffiliated networks that serve their market areas and cardholder needs, and that a network with coast-to-coast coverage may not be appropriate for all issuers. Issuers and a few networks expressed concern that smaller regional networks would be affected adversely if the nationwide coverage requirement were adopted, because the requirement would reduce competition between large and small networks. A few issuers commented that small issuers that currently use regional networks would incur additional costs to add nationwide PIN networks under the proposed rule, but would receive little benefit as most of their card transactions currently take place within their network's geographic coverage area. Moreover, commenters argued that requiring nationwide coverage would effectively prevent the establishment of new networks, which historically have started in small geographic markets.

Issuers and networks suggested a number of alternative approaches to the proposed rule, including providing that a network must have general acceptance availability within the cardholder's area of residence; allowing a network to be added as long as is it accepted at the nation's largest retailers; and providing that a regional network must establish network connectivity or reciprocal arrangements with other networks that would allow a card to have nationwide coverage by routing transactions to the regional network via a gateway arrangement. A few issuers and one regional network suggested a coverage test under which a certain percentage of a debit card's transactions must take

[163] A large online merchant is currently processing some online customer payments as PIN-less debit transactions. *See http://www.amazon.com/gp/help/customer/display.html/ref=hp_518224_pinless?ie=UTF8&nodeId=518224&#pinless*

place within a network's geographic coverage area.

Merchants generally argued that a network with limited geographic acceptance would not comply with the statute because there would be portions of the United States where merchants would not have a viable second debit network option. Merchants further argued that an issuer could add other regional networks such that the networks would collectively provide merchants the ability to route an electronic debit transaction over at least two unaffiliated payment card networks throughout most of the country. In that regard, merchants disagreed that the proposed rule would reduce the viability of regional networks, contending that such networks would likely gain volume if they are enabled on additional debit cards to comply with the rule.

The final rule in § 235.7(a)(2) describes the necessary conditions to satisfy the requirement to have at least two unaffiliated payment card networks available for processing an electronic debit transaction under § 235.7(a)(1).[164] As in the proposal, under the final rule, an issuer may satisfy the network exclusivity provisions of § 235.7(a)(1) if an electronic debit transaction may be processed on at least two unaffiliated payment card networks that operate throughout the United States. Debit cards that operate on at least two nationwide payment card networks would most effectively provide merchants routing choice regardless of where a cardholder uses the card.

The Board does not believe, however, that a payment card network operating on a nationwide basis should be the sole means by which an issuer could satisfy the network exclusivity provisions. An overly restrictive nationwide coverage requirement may reduce network choice for issuers, with little benefit to merchants, particularly where the vast majority of debit card transactions by an issuer's cardholders may take place within the network's geographic coverage area. Accordingly, the final rule provides additional flexibility for issuers by permitting an issuer to comply with the network exclusivity provisions by enabling on its debit cards a network that does not, by rule or policy, restrict the operation of the network to a limited geographic area, specific merchant, or particular type of merchant or transaction, and that has taken steps reasonably designed to enable the network to be able to process the electronic debit transactions that the network reasonably expects will be routed to it, based on projected transaction volume. A smaller network could be used to help satisfy an issuer's requirement to enable two unaffiliated networks if the network was willing to expand its coverage in response to increased merchant demand for access to its network, and the smaller network meets the other requirements of § 235.7(a) for a permitted arrangement. If, however, the network's policy or practice was to limit such expansion, it would not qualify as one of the two unaffiliated networks. *See* comment 7(a)–2.i.

Proposed § 235.7(a)(2)(ii) provided that adding an unaffiliated payment card network that is accepted only at a small number of merchant locations or for limited merchant types would not comply with the requirement to have at least two unaffiliated payment card networks on a debit card. For example, an issuer could not solely add, as an unaffiliated payment card network, a network that is accepted only at a limited category of merchants (for example, at a particular supermarket chain or at merchants located in a particular shopping mall). *See* proposed comment 7(a)–4.ii.

Merchant comments supported the proposed prohibition on limited merchant coverage networks. Issuers and networks did not object to proposed § 235.7(a)(2)(ii). The final rule adopts a prohibition on networks that are limited to particular merchants or merchant types as part of the necessary conditions set out in § 235.7(a)(2) and expands the prohibition to include networks that are limited to particular transaction types. Proposed comment 7(a)–4.ii is also adopted, and is redesignated as comment 7(a)–2.ii in the final rule.

Section 235.7(a)(2) of the final rule also provides that a payment card network that has not taken steps reasonably designed to enable the network to process the electronic debit transactions that the network reasonably expects will be routed to it would not count towards the issuer's requirement to have at least two unaffiliated payment card networks on which an electronic debit transaction may be processed. The new prohibition responds to merchant comments that expressed concern that issuers may respond to the network exclusivity provisions by adding small, capacity-constrained networks with the expectation that such networks would not have the capacity to handle their additional volume such that transactions would default to a larger payment card network on the card. The Board agrees that such arrangements would not meet the intent to provide merchants with routing choice in those cases where a network does not take steps reasonably designed to enable the network to meet reasonably foreseeable demand for processing transactions given the number of cards enabled for processing over the network and the general usage patterns of the cardholders. The new prohibition is not intended, however, to address the rare circumstances where a network may be off-line for technical reasons and an electronic debit transaction is processed on a different payment card network on a stand-by basis or where volume is unexpected. *See* comment 7(a)–2.iii.

Proposed § 235.7(a)(2)(iii) prohibited a payment card network from restricting or otherwise limiting an issuer's ability to contract with any other payment card network that may process an electronic debit transaction involving the issuer's debit cards. Proposed comment 7(a)–5 provided examples of prohibited restrictions on an issuer's ability to contract with other payment card networks, including network rules or guidelines that limited the number or location of network brands, marks, or logos that may appear on a debit card. *See* proposed comment 7(a)–5.ii. The prohibition on payment card network restrictions on an issuer's ability to contract with other networks is adopted with certain revisions for clarity and is redesignated as § 235.7(a)(3)(i). *See also* comment 7(a)–3.

Depository institutions trade associations commented that the proposed network contracting prohibition was overbroad and impermissibly prohibited all arrangements between networks and issuers that in any way restrict the networks made available on a debit card for processing a transaction. In their view, the provision as proposed would prohibit an issuer from agreeing to limit the number of networks enabled on its debit cards to no more than two networks per method of authentication even if such restriction would not violate either Alternative A or B. One issuer urged the Board to clarify that the proposed provision is directed at rules-based, blanket prohibitions against an issuer enabling a competing network.

The examples in proposed comment 7(a)–5 elicited several comments from two payment card networks expressing concern that the proposed examples conflicted with established principles in trademark law. In particular, these commenters argued that the example of network rules limiting the number or

[164] For clarity, the final rule describes the geographic coverage and other requirements for payment card networks that would satisfy the network exclusivity provisions through positive requirements, instead of describing payment card networks that would not satisfy the rule.

location of network brands, marks, or logos in comment 7(a)–5.ii would impermissibly restrict their ability to protect their investment in their marks or brands and their ability to limit consumer confusion. These networks also urged the Board to clarify that the proposed prohibition is not intended to change the card design and related security requirements that networks may apply to their payment card products, such as size and location requirements for the network logo, card account number, and expiration date, as well as the location of the magnetic stripe and card verification number. One processor affiliated with a payment card network urged the Board to include safe harbor language in the final rule to ensure that a payment card network could not assert a trademark infringement or other claim against an acquirer or network for routing transactions on that network's branded card through competing networks enabled on the card in order to prevent merchants from exercising routing choice as intended under EFTA Section 920(b)(1)(B).

The final rule adopts the prohibition on payment card network restrictions or limitations on an issuer's ability to contract with other payment card networks that may process an electronic debit transaction generally as proposed with certain revisions in § 235.7(a)(3). Specifically, § 235.7(a)(3) provides that, for purposes of the network exclusivity provisions in § 235.7(a)(1), a payment card network may not restrict or otherwise limit an issuer's ability to contract with any other payment card network that may process an electronic debit transaction involving the issuer's debit cards. Thus, for example, the rule prohibits a network from limiting or otherwise restricting, by rule, contract, or otherwise, the other payment card networks that may be enabled on a particular debit card. *See* comment 7(a)–3.i. The rule would also prohibit a network from specifying the other payment card networks that may be enabled on a particular debit card in order to comply with § 235.7(a)(1). Comment 7(a)–3.i includes as an example of a prohibited rule or contract any express prohibition on an issuer's ability to offer certain specified payment card networks on the debit card or any requirement that only certain specified networks may be offered on the card.

Comment 7(a)–3.ii clarifies that § 235.7(a)(3) would also prohibit network rules or guidelines that allow only that network's (or its affiliated network's) brand, mark, or logo to be displayed on a particular debit card, or that otherwise limit the ability of brands, marks, or logos of other payment card networks to appear on the debit card. Without this prohibition, network rules could inhibit an issuer's ability to add other payment card networks to a debit card, particularly if the other networks also require that their brand, mark, or logo appear on a debit card in order for a card to be offered on that network. Comment 7(a)–3.ii is revised from the proposed comment, which would have listed, as an example of a prohibited network restriction on an issuer's ability to contract with other networks, any limits on the number or location of network brands, marks, or logos that may appear on the card. In the final rule, only contract provisions limiting the ability of one or more network brands, marks, or logos to appear on the debit card are expressly prohibited, as such restrictions could prevent a consumer from knowing the networks that are enabled on a debit card. Thus, the rule is not intended to restrict networks from imposing branding, card-design, or security requirements on their cards to promote brand recognition and consistency across payment card types or to limit consumer confusion as long as such requirements do not effectively limit the ability of other payment card networks to appear on the debit card, such as when multiple signature networks require their logo to appear in the same location on the card. The final rule does not, however, otherwise address other trademark-related issues raised by commenters as such issues are outside the scope of the rule.

Notwithstanding the examples in comment 7(a)–3, comment 7(a)–4 in the final rule clarifies that nothing in the rule requires that a debit card display the brand, mark, or logo of each payment card network over which an electronic debit transaction may be processed. For example, the rule does not require a debit card that operates on two or more different unaffiliated payment card networks to bear the brand, mark, or logo for each card network. The Board believes that this flexibility is necessary to facilitate an issuer's ability to add (or remove) payment card networks to a debit card without being required to incur the additional costs associated with the reissuance of debit cards as networks are added (or removed). The Board received one comment supporting comment 7(a)–6 as proposed and it is adopted without substantive change, redesignated as comment 7(a)–4 in the final rule.

In its proposal, the Board requested comment as to whether it was necessary to address in the rule a payment card network's ability to require an issuer to commit a certain volume, percentage share, or dollar amount of transactions over the network given that volume, percentage share, or dollar amount commitments generally could only be given effect through issuer or payment card network priorities that direct how a particular debit card transaction should be routed by a merchant. The Board noted in the proposal, however, that such issuer or payment card network routing priorities could be prohibited by the proposed limitations on merchant routing restrictions.

Issuers and one card processor agreed that the merchant routing provisions in proposed § 235.7(b) would make explicit rules relating to volume, percentage share, or dollar amount commitments unnecessary given that merchants would be able to choose the payment card network for processing a transaction. Merchants, however, believed that if the Board were to adopt Alternative A with respect to the network exclusivity provisions, it should prohibit a network's ability to impose volume, percentage share, or dollar amount commitments notwithstanding the routing provisions in § 235.7(b). According to these merchant commenters, if routing options were reduced to a single signature debit and a single PIN debit option, networks and issuers would continue to be able to reasonably predict and influence signature debit volumes.

Under the final rule, the issuer's ability to influence volume, percentage share, or dollar amount of transactions that are processed through any particular network will be significantly reduced, given that merchant routing preferences will take priority over issuer and network routing preferences (see discussion of § 235.7(b) below). In addition, as discussed above, any network that issuers add to debit cards to fulfill the requirement for two unaffiliated networks in § 235.7(a)(1) must meet the requirements of § 235.7(a)(2). The Board recognizes that issuers may be able to use incentives to influence cardholders to use a particular authentication method (signature or PIN) at the point of sale. At the same time, however, merchants may also steer consumers toward a particular authentication method through, for example, default settings on transaction terminals or discounts for choosing certain payment methods. Given the issuer's limited ability to control volume, percentage share, or dollar amount of transactions over a particular network, the Board has determined not to address this issue in the final rule.

A few issuers and two payment card networks opposed the prefatory language in proposed § 235.7(a)(2) interpreting EFTA Section 920(b)(1)(A)'s prohibition on network exclusivity arrangements as requiring a debit card ''to have at least two unaffiliated payment card networks on which an electronic debit transaction may be processed.'' These commenters argued that EFTA Section 920(b)(1)(A) should only be read as a prohibition on ''restricting'' the number of payment card networks on which an electronic debit transaction may be processed to fewer than two unaffiliated payment card networks. In their view, the statute does not mandate a minimum number of payment card networks to be enabled on a debit card as long as an issuer or a payment card network does not affirmatively create any impediments to the addition of unaffiliated payment card networks on a debit card. Thus, these commenters argued that the statute does not prohibit voluntary arrangements by an issuer to limit the number of payment card networks on a card.

EFTA Section 920(b)(1)(A) states that ''an issuer or payment card network shall not directly or through any agent, processor, or licensed member of a payment card network, by contract, requirement, condition, penalty, or otherwise, restrict the number of payment card networks on which an electronic debit transaction may be processed'' to fewer than two unaffiliated payment card networks. Thus, by its terms, the statute's prohibition on exclusivity arrangements is not limited to those that are mandated or otherwise required by a payment card network. In the Board's view, individual issuer decisions to limit the number of payment card networks enabled on a debit card to a single network or affiliated networks are also prohibited as a ''direct'' restriction on the number of such networks in violation of the statute. The Board believes that to conclude otherwise would enable an issuer to eliminate merchant routing choice for electronic debit transactions with respect to its cards, contrary to the overall purpose of EFTA Section 920(b). Accordingly, the final rule adopts the substance of proposed comment 7(a)–7 and prohibits voluntary exclusivity arrangements with respect to debit cards (now designated as comment 7(a)–5). The final comment 7(a)–5 provides that the network exclusivity provision in § 235.7(a) requires that debit cards must be enabled on at least two unaffiliated payment card networks in all cases, even if the issuer is not subject to any rule of, or contract, arrangement or other agreement with, a payment card network requiring that all or a specified minimum percentage of electronic debit transactions be processed on the network or its affiliated networks.

Comment 7(a)–6 (designated 7(a)–8 in the proposal) clarifies that the network exclusivity rule does not prevent an issuer from including an affiliated payment card network among the networks that may process an electronic debit transaction for a particular debit card, as long as at least two of the networks that accept the card are unaffiliated. The Board proposed two different versions of comment 7(a)–6 based on the appropriate network exclusivity alternative. No comments were received under either version and the final rule adopts the Alternative A version of the comment as proposed. The final comment 7(a)–6 clarifies that an issuer is permitted to offer debit cards that operate on both a signature debit network as well as an affiliated PIN debit network, as long as at least one other payment card network that is unaffiliated with either the signature or PIN debit networks also accepts the card.

5. Section 235.7(a)(4) Subsequent Affiliation

Proposed § 235.7(a)(3) addressed circumstances where previously unaffiliated payment card networks subsequently become affiliated as a result of a merger or acquisition. Under these circumstances, an issuer that issues cards with only the two previously unaffiliated networks enabled would no longer comply with § 235.7(a)(1) until the issuer is able to add an additional unaffiliated payment card network to the debit card. The Board requested comment regarding whether 90 days after the date on which the prior unaffiliated payment card networks become affiliated provides sufficient time for issuers to add a new unaffiliated network in order to comply with the rule.

Several issuers and one processor stated that the proposed 90-day window for adding a new network in the event of a payment network merger was too short. Some issuers suggested a transition period of at least one year, while one large issuer suggested 24 months from the date the merger closes.

The final rule (§ 235.7(a)(4)) requires issuers to add an additional unaffiliated payment card network to a debit card within six months after the date of a merger or acquisition that causes the previously unaffiliated payment card networks enabled on a debit card to become affiliated. Based on its outreach, the Board understands that adding an additional PIN network to a debit card can be accomplished in a relatively short period of time, particularly in circumstances in which an issuer uses a processor that is already connected to several PIN debit networks. The additional period of time in the final rule provides issuers more time if necessary to negotiate new agreements and establish connectivity with the new network.

6. Applicability to All Form Factors

New comment 7(a)–7 addresses the applicability of the network exclusivity provisions with respect to cards, codes, or devices that may be issued in a form factor other than a card. The Board requested comment on how to apply the network exclusivity provisions to such cards, codes, or devices given that they may be capable of being processed using only a single authentication method. For example, a transaction using a mobile phone embedded with a contactless chip may be able to be processed only as a signature debit transaction or only on certain networks. The Board noted that under the proposed rule (under either alternative), the issuer would be required to add at least a second unaffiliated signature debit network to the device to comply with the requirements of § 235.7(a). The Board thus requested comment on the effect of the network exclusivity provisions in § 235.7(a) on the development of these devices in the future.

Some issuers, processors, and networks commented that requiring new payment devices or methods to be processed by multiple networks would inhibit the development of these innovations. They further asserted that it was unnecessary for the Board's rule to cover new form factors given that merchant adoption and acceptance of these innovations is voluntary. One payment card network argued that a consumer's decision to use an alternative form factor in a transaction was analogous to a cardholder's election to initiate an electronic debit transaction by signature or PIN debit at the point of sale. As an alternative approach, one processor urged the Board to clarify that alternative form factors would be compliant if they are associated with a ''companion card'' that is compliant, even if the alternative form factor itself may only be used to initiate transactions over a single network.

Merchants and one payment card network, by contrast, urged the Board to require the addition of a second unaffiliated network for any payment code or device, including cards with contactless features. In their view, current limitations restricting the use of contactless devices on a network have been attributable to a desire to limit competition from PIN networks rather than technological issues presented by the PIN networks.

The Board believes the statute is clear that the network exclusivity provisions apply to electronic debit transactions involving any device that meets the definition of ''debit card'' under EFTA Section 920(c)(2). Accordingly, comment 7(a)–7 of the final rule provides that the network exclusivity provisions in § 235.7(a) apply to all ''debit cards,'' as that term is defined in EFTA Section 920(c)(2), regardless of whether the debit card is issued in card form or in the form of another ''payment code or device.'' The final comment thus clarifies that all debit cards must be accepted on at least two unaffiliated payment card networks on which an electronic debit transaction may be processed. Moreover, this is the case even if a supplemental debit card is issued in connection with a card, code, or other device that fully complies with the rule.

B. Section 235.7(b) Prohibition on Merchant Routing Restrictions

EFTA Section 920(b)(1)(B) requires the Board to prescribe rules prohibiting an issuer or payment card network from directly or indirectly ''inhibit[ing] the ability of any person who accepts debit cards for payments to direct the routing of electronic debit transactions for processing over any payment card network that may process such transactions.'' The Board is implementing this restriction in § 235.7(b).

As noted above, the rules of certain PIN debit payment card networks currently require PIN debit transactions to be routed based on the card issuer's designated preferences when multiple PIN debit networks are available to process a particular debit card transaction. In other cases, the PIN debit network itself may require, by rule or contract, that the particular PIN debit transaction be routed over that network when multiple PIN networks are available.[165] Such rules or requirements prevent merchants from applying their own preferences with respect to routing the particular debit card transaction to the PIN debit network that will result in the lowest cost to the merchant. EFTA Section 920(b)(1)(B) prohibits these practices. As a result, in practice, this means that merchants, not issuers or networks, will be able to direct the routing of transactions.

Proposed § 235.7(b) prohibited both issuers and payment card networks from inhibiting, directly, or through any agent, processor, or licensed member of the network, by contract, requirement, condition, penalty, or otherwise, a merchant's ability to route electronic debit transactions over any payment card network that may process such transactions. Issuers commented generally that the routing provision would likely frustrate consumer choice and their ability to receive cardholder benefits, such as zero liability and enhanced chargeback rights, which are unique to a particular network. Issuers also expressed concern that the routing provisions would make it difficult for them to explain to their customers the circumstances under which they would or would not receive such issuer-specific benefits. Issuers and one payment card network urged the Board to require merchants to continue to honor consumer choice for routing of the electronic debit transaction or, at a minimum, to require merchants to inform cardholders of the network that will carry the transaction before the transaction is consummated to minimize consumer confusion regarding the network that will process the transaction. By contrast, merchants strongly supported the proposed provision.

Section 235.7(b), which tracks the language of the EFTA Section 920(b)(1)(B), is adopted as proposed. The final rule does not include any requirement on merchants to disclose the network selected to process a particular electronic debit transaction as some commenters suggested. EFTA Section 920(b) does not impose such a requirement, and the Board believes that issues regarding merchant card acceptance practices are best left to the individual network-merchant relationship.

In the proposal, the Board did not interpret EFTA Section 920(b)(1)(B) to grant a person that accepts debit cards the ability to process an electronic debit transaction over any payment card network of the person's choosing. Rather, the Board interpreted the phrase ''any payment card network that may process such transactions'' to mean that a merchant's choice is limited to the payment card networks that have been enabled on a particular debit card. Accordingly, the Board proposed comment 7(b)–1 to clarify that the prohibition on merchant routing restrictions applies solely to the payment card networks on which an electronic debit transaction may be processed with respect to a particular debit card.

Issuers and networks agreed with the proposed comment providing that a merchant's routing choices should apply only with respect to the networks that the issuer has enabled to process transactions for the card. By contrast, comments of some merchants and a payments processor stated that the plain language of the statute indicated that Congress intended merchants to be able to process electronic debit transactions over any payment card network that may process such transactions. In these commenters' view, had Congress intended to limit the routing choice mandate to the payment card networks enabled by the issuer on a particular debit card, it could have done so by statute.

The Board continues to believe that the appropriate reading of the routing provisions in EFTA Section 920(b)(1)(B) limits merchant routing choice to the card networks that an issuer has chosen to enable on a cardholder's card. In particular, the Board notes that allowing merchants to route transactions over any network, regardless of the networks enabled on the debit card, would render superfluous the requirement in EFTA Section 920(b)(1)(A) that electronic debit transactions have the ability to be processed over at least two unaffiliated networks. Also, the issuer (or its processor) must be connected to a network for that network to be able to route the transaction information and data, and the issuer must have an agreement with the network to settle transactions cleared over that network. Accordingly, comment 7(b)–1 is adopted as proposed with some revisions to clarify that the rule does not permit a merchant to route the transaction over a network that the issuer did not enable to process transactions using that debit card.

Proposed comment 7(b)–2 provided examples of issuer or payment card network practices that would inhibit a merchant's ability to direct the routing of an electronic debit transaction in violation of § 235.7(b). The proposed comment addressed both practices relating to the sending of transaction information to the issuer and certain practices that may affect the network choices available to the merchant at the time the transaction is processed. The final commentary adopts the examples in 7(b)–2 generally as proposed with certain adjustments for clarity.

The first example of an impermissible restriction on a merchant under proposed comment 7(b)–2 addressed issuer or card network rules or

[165] These issuer- or network-directed priority rules are generally unnecessary for signature debit networks as there is only a single payment card network available for processing a signature debit transaction.

requirements that prohibit a merchant from ''steering,'' or encouraging or discouraging, a cardholder's use of a particular method of debit card authentication. *See* proposed comment 7(b)–2.i. For example, merchants may want to encourage cardholders to authorize a debit card transaction by entering their PIN, rather than by providing a signature, because PIN debit carries a lower risk of fraud than signature debit. Merchants supported the proposed example in comment 7(b)–2.i, stating that any rules that prohibit steering or that could inhibit merchants' ability to steer—including anti-discrimination or no-surcharge rules—should be invalidated by § 235.7(b).

A payment card network and a few issuers opposed the Board's statement in the supplementary information that, under the proposed example, merchants would be permitted to block a consumer's choice of signature debit. These commenters expressed concern that if merchants were permitted to block the use of signature debit, consumers could be misled about which payment networks' cards the merchant accepted. In addition, issuer and payment card network commenters stated that allowing merchants to block signature debit would take away consumers' ability to limit exposure of their PIN if they wanted to use their debit card.

This example is adopted as proposed. As discussed above under § 235.7(a), an issuer may comply with the network exclusivity provisions by enabling a debit card with a single signature debit network and a single unaffiliated PIN debit network. For such cards, a merchant can influence routing choice by, for example, determining whether a debit card is PIN-enabled and, if it is, prompting the cardholder to input his or her PIN, rather than asking the consumer whether the transaction is ''debit'' or ''credit.''

The second example of a prohibited routing restriction is network rules or issuer-designated priorities that direct the processing of an electronic debit transaction over a specified payment card network or its affiliated networks. *See* comment 7(b)–2.ii.) Thus, for example, if multiple networks were available to process a particular debit transaction, neither the issuer nor the networks could specify the network over which a merchant would be required to route the transaction (or be required to avoid in routing the transaction). Nothing in comment 7(b)–2.ii, however, is intended to prevent an issuer or payment card network from designating a default network for routing an electronic debit transaction in the event a merchant or its acquirer or processor does not indicate a routing preference. In addition, comment 7(b)–2.ii does not prohibit an issuer or payment card network from directing that an electronic debit transaction be processed over a particular network if required to do so by state law.[166] Although one commenter urged the Board to preempt state laws that mandate the routing of electronic debit transactions to prevent networks or other parties from securing favorable state laws requiring routing to a particular network, the final rule does not adopt the recommendation because state laws do not constitute issuer or network restrictions on merchant routing that are prohibited by the statute. Proposed comment 7(b)–2.ii is adopted as proposed, with the clarification that issuer and network practices that direct the processing of a transaction away from a specified network or its affiliates is prohibited.

Under the third example, a payment card network could not require a specific payment card network based on the type of access device provided by the cardholder. *See* comment 7(b)–2.iii. For example, a payment card network would be prohibited from requiring that an electronic debit transaction that is initiated using ''contactless'' or radio frequency identification device (RFID) technology be processed over only a signature debit network. The Board received one comment from a processor that supported the example. The Board is adopting the example with a revision to clarify that the example applies to payment card networks rather than authentication methods.

New comment 7(b)–3 clarifies that the prohibition on merchant routing restrictions does not prohibit a payment card network from offering payments or incentives to merchants to encourage the merchant to route electronic debit card transactions to that network for processing. The Board believes that a payment card network does not impermissibly ''inhibit'' the merchant's ability to route transactions over any available networks within the scope of the prohibition in EFTA Section 920(b)(1)(B) by offering such incentives because it is the merchant itself that has voluntarily chosen to direct electronic debit transactions over a particular network in exchange for consideration from the network.

Although proposed § 235.7(b) provides merchants control over how an electronic debit transaction is routed to the issuer, the proposed rule did not require that a merchant make network routing decisions on a transaction-by-transaction basis. As stated in the supplementary information in the proposal, such a requirement may necessitate systematic programming changes and equipment upgrades, may be operationally infeasible and cost-prohibitive in the near term, and is not needed to carry out the purpose of these provisions.[167] Instead, under comment 7(b)–3 as proposed, it is sufficient to allow a merchant to designate network routing decisions in a routing table in advance for its transactions, similar to the way that issuer-directed priorities are established today. Alternatively, a merchant could delegate to its acquirer or processor the decision of how to route transactions.

One processor supported the proposed comment and urged the Board to further clarify that allowing more complex routing logic beyond network choice, such as basing a routing decision on the transaction amount, would be discretionary. Merchants did not oppose the proposed comment, but urged the Board to mandate that merchants be given additional information, including access to the BIN tables and the effective weighted average interchange rates that are applicable to each merchant, at no cost, to facilitate merchants' ability to determine which networks are lower cost for purposes of directing routing.

Proposed comment 7(b)–3 is adopted with minor wording changes and redesignated as comment 7(b)–4 to the final rule. The comment clarifies that § 235.7(b) does not require that the merchant have the ability to select the payment card network over which to route or direct a particular electronic debit transaction at the time of the transaction. Thus, under the comment to the final rule, it would be sufficient for a merchant and its acquirer or processor to agree to a pre-determined set of routing choices that apply to all electronic debit transactions that are processed by the acquirer or processor on behalf of the merchant, or for the merchant to delegate the routing decisions to its acquirer or processor. The final rule does not specify criteria regarding the routing choices that must be provided to a merchant by its acquirer or processor because the Board believes such determinations are best left to the individual merchant's arrangement with its acquirer or processor. The final rule also does not require networks to make BIN tables or merchant-specific effective average interchange rates available to merchants as such a requirement is outside the

[166] *See, e.g.,* Iowa Code § 527.5.

[167] *See* 75 FR 81752 (Dec. 28, 2010).

scope of the statute. Nonetheless, the Board notes that, pursuant to EFTA Section 920(a)(3)(B), the Board intends to periodically publish the average interchange fee, by network, received by issuers, which may provide merchants information regarding relative interchange rates across networks.

One issuer commented that the Board should clarify that the payment card network that a merchant uses to process the initial purchase transaction for goods or services must also be used by the merchant for processing subsequent transactions related to the original purchase transaction. The Board has added new comment 7(b)–5 to clarify that the rule does not supersede any network rule that requires the chargeback or return of a transaction to be processed over the same network as the original transaction.

C. Section 235.7(c) Effective Date

The network exclusivity rules in § 235.7(a) are generally effective and compliance is mandatory on April 1, 2012, with respect to issuers. With respect to payment card networks, however, the compliance date for the provisions in §§ 235.7(a)(1) and (a)(3) is October 1, 2011. In addition, as described below, the compliance date is delayed until April 1, 2013 for certain cards that use transaction qualification or substantiation systems. Non-reloadable general-use prepaid cards sold on or after April 1, 2013, must comply with the rule. Non-reloadable general-use prepaid cards sold prior to April 1, 2013, are not subject to the rule. Reloadable general-use prepaid cards sold on or after April 1, 2013, must comply with the rule. With respect to reloadable general-use prepaid cards sold and reloaded prior to April 1, 2013, the compliance date is May 1, 2013. With respect to reloadable general-use prepaid cards sold prior to April 1, 2013, and reloaded after April 1, 2013, the compliance date is 30 days after the date of reloading.

The merchant routing provisions of § 235.7(b) are effective on October 1, 2011. However, issuers and payment card networks may voluntarily comply with these rules prior to these dates.

1. Section 235.7(c)(1) and (c)(2)—General Rule and Effective Date for Payment Card Networks

The statute does not specify an effective date for the EFTA Section 920(b) provisions on network exclusivity and merchant routing restrictions. The Board requested comment on the appropriate implementation time for the network exclusivity and routing provisions given the different proposed alternatives under § 235.7(a). Specifically, the Board requested comment on a potential effective date of October 1, 2011, for the provisions under § 235.7 if the Board were to adopt Alternative A under the network exclusivity provisions. Recognizing that Alternative B would require significantly more time to comply with the rule, the Board requested comment on an effective date of January 1, 2013, if Alternative B were adopted in the final rule.

Several issuers stated that the proposed effective dates did not allow sufficient time for compliance under either proposed alternative. With respect to Alternative A, issuers and some payment card networks requested longer lead times, generally until 2012 or 2013. Many such commenters observed that a significant number of issuers will be trying to add unaffiliated payment card networks at the same time to comply with the network exclusivity provisions in § 235.7(a). Consequently, these commenters were concerned that simultaneous efforts by numerous issuers will create a bottleneck at each network with respect to negotiating new membership agreements with the respective networks. These commenters urged the Board to provide additional time for compliance to allow for an orderly transition. Issuer commenters also noted that time would be needed for establishing connectivity with new payment card networks and for upgrading internal processing systems to support those networks. Some issuers, networks, and processors noted that the proposed time periods were also unrealistic from acquirers' perspective as they must implement the ability for individual merchants to designate customized transaction routing rules. Finally, networks and processors urged the Board to time any effective dates to coincide with regularly scheduled industry-wide changes.

By contrast, merchants, although recommending the adoption of Alternative B, urged the Board, if it adopted Alternative A, to make it effective promptly in order to void "exclusivity" deals currently in place. Merchants also expressed the view that there was little reason issuers could not comply with Alternative A for all debit cards by October 1, 2011, given that 70 percent of debit cards already have dual functionality. Merchants also stated that Alternative A would not require issuers to reissue cards to meet the proposed timeframe, and that issuers could easily establish the necessary connectivity through their processors during that time. A member of Congress also commented that the proposed time periods for the alternatives were appropriate.

As discussed above, the final rule adopts Alternative A with respect to the network exclusivity provisions in § 235.7(a). Thus, an issuer generally could comply with the rule by enabling a signature debit network and an unaffiliated PIN debit network on its debit cards for processing an electronic debit transaction. Based on comments received and the Board's own outreach and analysis, the final rule in § 235.7(c)(1) states that, except as otherwise provided, the network exclusivity provisions in § 235.7(a) are effective for issuers on April 1, 2012.

Many issuers are already in compliance with the network exclusivity provisions in § 235.7(a) because they have multiple unaffiliated PIN networks enabled on their debit cards. Based on the Board's outreach, the Board understands that adding an additional PIN network can generally be accomplished in a matter of months where an issuer connects to a network through an issuer processor that has already established connectivity with other PIN networks. Thus, the Board believes that, in most cases, issuers would be able to comply with Alternative A by the October 1, 2011, date originally proposed. Nonetheless, to relieve the burden on issuers that may need more time to negotiate new agreements with networks, establish connectivity, and revise their internal processing systems to support the new networks, the final rule provides an additional six months to April 1, 2012, for compliance with the network exclusivity provisions in § 235.7(a).

The Board believes that issuers should have the opportunity to begin to comply with § 235.7(a) in advance of the effective date, irrespective of any existing network rules that would prohibit them from adding an additional network to their debit cards. Therefore, in new § 235.7(c)(2), the Board is making the provisions of § 235.7(a) that are applicable to payment card networks effective on October 1, 2011. Accordingly, as of that date, a network may not enforce a rule that restricts the ability of an issuer to add a network to comply with § 235.7(a).

The final rule maintains the October 1, 2011, effective date for the merchant routing provisions in § 235.7(b). The earlier effective date is intended to allow merchants and acquirers to implement and exercise the new routing authority as soon as issuers make additional networks available on their debit cards. Thus, for transactions made using cards of issuers that comply with the network exclusivity provisions in § 235.7(a) prior to April 1, 2012, merchants will be able to take advantage of the new routing flexibility, assuming their acquirers update the BIN tables to reflect the new routing priorities preferred by the merchants.

2. Sections 235.7(c)(3) and (c)(4) Delayed Compliance Date for Certain Debit Cards

The final rule also establishes a delayed compliance date for the network exclusivity provisions in § 235.7(a) in limited circumstances for certain types of debit cards that present technological or other operational impediments to an issuer's ability to comply with the rule. Although EFTA Section 920(b) does not provide the Board authority to exempt such debit cards from the network exclusivity provisions, the Board believes it is appropriate to establish a delayed compliance date of April 1, 2013, to allow issuers additional time to develop technological solutions to enable compliance with the rule. The effective date for the merchant routing provisions in § 235.7(b) would not be delayed for these cards to allow merchants to exercise routing choice once alternative networks are made available.

In the proposal, the Board noted that certain debit cards issued in connection with health flexible spending accounts and health reimbursement accounts are required by Internal Revenue Service (IRS) rules to use certain technologies at the point of sale to ensure that the eligibility of a medical expense claim can be substantiated at the time of the transaction. The Board further stated its understanding, however, that PIN debit networks may not currently offer the functionality or capability to support the required technology. The Board recognized therefore that applying the network exclusivity prohibition to these health benefit cards in particular could require an issuer or plan administrator to add a second signature debit network to comply with IRS regulations if PIN networks were unable to add the necessary functionality to comply with those regulations. The Board requested comment on the appropriate treatment of these products with respect to the network exclusivity provisions in § 235.7(a).

Issuers and program administrators of health spending cards generally asserted that Congress did not intend to cover healthcare and employee benefit cards under any of the provisions in EFTA Section 920, even though the statute did not include a specific statutory exemption for such products. These commenters noted that the Inventory Information Approval System (IIAS) required by the IRS for auto-substantiating medical expenses for eligibility is not currently supported by the PIN networks. Thus, commenters expressed concern that the significant costs associated with either adding a second signature network or developing PIN network support for the IIAS could limit the viability of such card programs and cause employers and plan administrators to return to the inefficient system of using paper receipts to verify the eligibility of transactions. Commenters thus urged the Board to exempt cards linked to such health spending accounts from the network exclusivity and routing provisions.

Similar requests for exemption were made by commenters with respect to other employee benefit cards, such as cards used to provide transit benefits, which also require the use of specialized transaction qualification systems for verifying the eligibility of tax-exempt expenses. For transit cards in particular, commenters also stated that the time required to enter a PIN ran counter to the processing-speed objective of the transit authorities.

Although EFTA Section 920 does not grant the Board authority to exempt cards linked to health spending accounts or other types of debit cards from the network exclusivity and routing provisions, the Board has determined there is good cause to delay the effective date of the network exclusivity provisions in § 235.7(a) to April 1, 2013 for debit cards that use point-of-sale transaction qualification or substantiation systems, such as the IIAS, to verify the eligibility of purchased goods or services in connection with health care and employee benefit accounts in accordance with IRS rules. *See* § 235.7(c)(3). The Board believes it is necessary to provide a longer compliance period for these cards to give PIN networks time to develop the capability to handle transactions using these cards or to give industry participants time to modify the manner in which signature debit routing is determined, so that these cards can be enabled on multiple signature debit networks.

Comment 7(c)–1 provides examples of debit cards that may qualify for the delayed effective date in connection with certain health care or employee benefit accounts. The comment clarifies that the delayed effective date for certain health care or employee benefit cards also applies to debit cards linked to health savings accounts that use transaction substantiation or qualification authorization systems at the point of sale, even if IRS rules do not require the use of such systems in connection with verifying the eligibility of expenses purchased with such cards. Although not specifically required by IRS rules, the Board understands that in virtually all cases health savings account cards use the same IIAS systems as do health flexible spending accounts and health reimbursement account cards to reduce the administrative burden for cardholders associated with sending in paper receipts for substantiating health-related expenses.

Several issuers and card program managers urged the Board to exempt non-reloadable gift cards from the network exclusivity provisions. These commenters noted that single-load prepaid cards typically run only on the signature debit networks, and that such products would be adversely affected by a requirement to enable or support PIN debit transactions. In particular, these commenters stated that the addition of a PIN debit network could require the consumer to call a service center to activate the card and obtain the PIN. By contrast, signature-only prepaid cards can be activated at the point of sale, and used immediately thereafter by the consumer. Commenters also stated that PIN access was unnecessary for single load cards that typically are depleted over a short period of time, and often after a single use.

Other issuer commenters urged the Board to exempt more broadly prepaid cards that are designed to only support a single method of authentication by a cardholder, whether such cards were reloadable or not. These commenters stated that many prepaid card programs do not have PIN capability in order to limit cash access by cardholders due to potential money laundering and other regulatory concerns. One depository institution trade association stated that for reloadable prepaid cards, the network exclusivity provisions should only apply to cards sold after October 1, 2013, to allow issuers to manage down their existing card inventories.

The Board believes it is appropriate to establish various delayed compliance dates for general-use prepaid cards to allow issuers time to develop the ability to enable cardholders to use PIN debit networks for prepaid card transactions or to give industry participants time to modify the manner in which signature debit transaction routing is determined, so that these cards can be enabled on multiple signature debit networks. Accordingly, the effective date for non-reloadable general-use prepaid cards is April 1, 2013. Non-reloadable general-use prepaid cards sold prior to the effective date are not subject to the requirements of § 235.7(a). The additional time is intended to allow issuers to draw down existing card inventories, as well as to modify systems or develop solutions in order to comply with § 235.7(a). As noted above, single-load cards typically are depleted over a short period of time, and often after a single use. Instituting a PIN program for such cards in the short term would not seem to be beneficial as the cardholder would be unlikely to use the PIN option. Issuers of non-reloadable general-use prepaid cards commonly may not have the customer identification information that would be necessary to mail or otherwise provide the cardholder with PIN information. An alternate solution for non-reloadable cards is to add a second signature network, similar to prepaid cards with substantiation requirements. The delayed effective date provides issuers and payment card networks additional lead time before all prepaid cards must be capable of supporting more than one network for processing electronic debit transactions. Moreover, many of these cards already have been sold to customers and may be active through that date, and the issuer likely does not have the customer identification information necessary to provide the cardholder with a PIN. Application of these provisions to cards that have already been sold to customers who may not be known to the issuers may create difficulties for the issuers, as well as potential difficulties for the cardholders.

With respect to reloadable general-use prepaid cards, the effective date is April 1, 2013 (or later, in some circumstances), and all reloadable general-use prepaid cards sold on or after April 1, 2013, must be in compliance. Reloadable general-use prepaid cards share many of the problems as non-reloadable cards. However, PIN technology appears more prevalent with reloadable prepaid cards than with non-reloadable cards. The Board, therefore, anticipates that issuers of reloadable general-use prepaid cards are more likely to add an unaffiliated PIN network than another signature network to fulfill their obligations under § 235.7(a). Although cardholders of reloadable prepaid cards may be provided a PIN at activation, commonly the issuer does not obtain customer identification information until the card is reloaded. Thus, for cards sold before April 1, 2013, an issuer may not have the ability to provide the cardholder with a PIN (if a PIN network is enabled) until the card is reloaded and the issuer obtains the necessary customer identification information to contact the cardholder. Accordingly, reloadable general-use prepaid cards sold prior to April 1, 2013, are not subject to § 235.7(a) unless and until they are reloaded. With respect to reloadable general-use prepaid cards that are sold and reloaded prior to April 1, 2013, the effective date is May 1, 2013. With respect to reloadable general-use prepaid cards sold prior to April 1, 2013, and reloaded after April 1, 2013, the effective date is 30 days after the date of reloading. The 30-day period is intended to ensure that issuers have sufficient time to provide card holders with information on the additional network, such as a PIN, after obtaining the necessary information to contact the card holder.

The final rule does not delay the effective date for the network exclusivity provisions for debit cards that are approved or issued for use on alternative or emerging payment card networks that do not require a cardholder's use of a signature or entry of a PIN to authenticate an electronic debit transaction. Issuers were divided regarding whether the network exclusivity and routing provisions should be applied to emerging payment systems. Payment card networks commenting on the issue were similarly divided on the issue.

Those commenters requesting exemptions from the network exclusivity and routing provisions expressed concern that the application of the rule would stifle innovation and reduce competition in the payments market. For example, commenters requesting an exemption for cards used on emerging payment systems stated that competing networks could refuse to add the emerging network's debit cards to limit competition. These commenters suggested that an exemption for emerging payment systems would encourage investment in innovation and provide sufficient time for the nascent systems to conduct pilots and achieve scale. Merchants commenting on the issue agreed that it would be reasonable to permit new systems to undertake pilot programs until such time as they achieve critical mass.

By contrast, commenters that supported applying the network exclusivity and routing provisions to emerging payment systems stated that the rule should be equally applied to all networks to prevent an unlevel playing field. One such commenter stated that the Board's rule should apply based on whether an emerging payment system qualifies as a debit card or payment card network, regardless of whether it describes itself as a non-traditional or emerging network.

The purpose of the network exclusivity and routing provisions in EFTA Section 920(b) is to provide merchants with enhanced routing choice with respect to the networks available for processing an electronic debit transaction. In this regard, more, not fewer, networks would be desirable. As new technologies are being developed, the developers should take into consideration the provisions of EFTA Section 920(b). The Board believes that emerging payments technologies that meet the definition of "debit card" in the statute should not be subject to delayed effective dates for the network exclusivity and routing provisions.

VII. Section 235.8 Reporting Requirements and Record Retention

A. Summary of Proposal and Comments

The Board proposed to require issuers that are subject to §§ 235.3 and 235.4 and payment card networks to submit reports every two years, or more frequently as required, to the Board. Under the proposal, each entity required to submit a report must do so in a form prescribed by the Board and must provide information regarding costs incurred with respect to electronic debit transactions, interchange transaction fees, network fees, fraud-prevention costs, fraud losses, and any other information requested by the Board. The Board proposed that it would publish, in its discretion, summary or aggregate information from these reports. The Board proposed that each entity required to submit the report to the Board by March 31 of the year the entity is required to report. Finally, the Board requested comment on a requirement that each entity required to report retain records of reports submitted to the Board for five years. Such entities also would be required to make each report available upon request to the Board or the entity's primary supervisors.

The Board received a few comments on the proposed reporting requirements. Some issuers commented that requiring issuers to report interchange fee revenue was duplicative, and therefore unnecessary, because networks already maintain records of each issuer's interchange fee revenue. A few commenters suggested the Board survey all interested stakeholders, including small issuers, merchants of all sizes, and consumers to determine the impact of the restrictions on them. One commenter suggested the Board establish a process for affected entities to inform the Board of significant changes to previously reported processing costs and other information.

The Board received one comment regarding the frequency of reporting in proposed § 235.8(c). One merchant commenter asserted that the word ''bi-annual'' in EFTA section 920(a)(3)(B) mandated reporting twice a year, whereas the Board proposed to require reporting biennially, or every two years. This commenter supported the more frequent, twice-a-year reporting in order to provide interested parties more visibility into the costs and fees received by issuer.

B. Analysis and Final Rule

EFTA Section 920(a)(3)(B) authorizes the Board to collect from issuers and payment card networks information that is necessary to carry out the provisions of Section 920(a). In addition, Section 920(a)(3)(B) requires the Board, in issuing rules on interchange fee standards and on at least a ''bi-annual'' basis thereafter, to publish summary or aggregate information about costs and interchange transaction fees as the Board considers appropriate and in the public interest. As summarized above in the debit card industry overview section of this notice, the Board has collected information from issuers and networks, as well as acquirers, and is publishing summary information about debit card transactions, processing costs, interchange fees, network fees, fraud-prevention costs, and fraud losses in connection with this final rule. More detailed summary information is available on the Board's Web site.[168]

1. Section 235.8(a) Entities Required To Report

The Board has considered the comments regarding the entities from which the Board should collect information and has determined to adopt § 235.8(a) as proposed—limiting those entities required to report to issuers that are not otherwise exempt under § 235.5(a) and payment card networks, consistent with EFTA Section 920(a)(3). There are several other interested types of parties to debit card transactions, including, but not limited to, exempt issuers, acquirers, merchants, and cardholders. These other interested parties may or may not be able to provide information regarding costs, fees, fraud losses, volumes, and values associated with debit card transactions. However, EFTA Section 920 does not confer authority on the Board to compel all of these parties to provide information to the Board. EFTA Section 920(a)(3) authorizes the Board to require only issuers and payment card networks (and only as necessary to carry out the provisions of EFTA Section 920(a)) to provide information; this authority does not extend to merchants, cardholders, or others. Moreover, the Board is mindful of the large reporting burden that could be imposed on exempt entities through a request that those entities isolate and track various debit card costs. The Board will continue to consider what, if any, additional information could be useful in assessing the effects of its final rule and how such information could be obtained with minimal burden on the relevant parties.

2. Section 235.8(b) Report

Proposed § 235.8(b) set forth a non-exhaustive list of the information the Board may require entities to report, but did not specify which entities would be required to report which types of information. As stated in the proposal, the Board anticipates using forms derived from the Interchange Transaction Fee Surveys (FR 3062; OMB No. 7100).[169] At this time, the Board is not specifying the information that issuers and networks will be required to submit. Section 235.8(b)'s list of possible information required to be reported is intended to illustrate the kind of information the Board will require. The Board is making revisions to proposed § 235.8(b) to include information about transaction value, volume, and type, in part because the Board plans to request information from networks to monitor the extent to which they have adopted a two-tier interchange fee structure.[170] The Board intends to request comment on the reporting forms prior to the first report. At that time, the Board will consider whether collecting interchange fee revenue from both issuers and networks is necessary. Except for the revisions discussed in this paragraph, the Board is adopting § 235.8(b) as proposed.

3. Section 235.8(c) Record Retention

The Board requested comment on a requirement that each entity required to report must retain records of reports submitted to the Board for five years. Such entities also would be required to make each report available upon request to the Board or the entity's primary supervisors. The Board did not receive comments on this provision. Including a requirement that an issuer retain records to evidence compliance with the regulation is important to ensure that supervisory agencies have the information required to enforce the rule and to determine whether the entity has circumvented or evaded the interchange fee standard. However, specifying the precise form in which such evidence must be maintained is unnecessary. The issuer and its primary supervisor can determine in what form records must be retained to demonstrate compliance, so long as the information is retrievable and useable by the agencies.

To minimize the burden on issuers to retain information after the issuer's supervisor has examined the issuer for compliance, the Board is adopting § 235.8(c) to require issuers to retain records that demonstrate compliance with the requirements of part 235 for not less than five years after the end of the calendar year in which the electronic debit transaction occurred. For example, for an electronic debit transaction that occurred on March 1, 2012, an issuer must maintain records demonstrating compliance with the requirements of this part through December 31, 2017. The issuer's primary regulator, however, may determine that a longer record retention period is warranted. *See* § 235.9. Section 235.8(c)(2) sets forth an exception to the general rule—if an issuer receives actual notice that it is subject to an investigation by an enforcement agency, the issuer shall retain the records until final disposition of the matter unless an earlier time is allowed by court or agency order.

4. Submission Timeframe and Frequency

The Board proposed to require issuers that are subject to §§ 235.3 and 235.4 and payment card networks to submit reports to the Board every two years. The Board requested comment, under proposed § 235.8(c), on reserving discretion to require more frequent reporting. The Board proposed that entities required to report submit the report to the Board by March 31 of the year they are required to report in order to provide a reasonable time to compile the data necessary to complete the report.

The Board did not receive comments explicitly regarding the submission timeframe of required reporting, but did receive a few comments on a similar provision—issuer submission of cost information to networks under proposed Alternative 1. In relation to that provision, commenters, although not necessarily supporting Board-required certification, supported a March 31 deadline for submission if adopted by the Board. The Board, however, has

[168] *http://www.federalreserve.gov/paymentsystems/files/debitfees_costs.pdf.*

[169] Copies of the survey forms are available on the Board's Web site at *http://www.federalreserve.gov/newsevents/reform_meetings.htm.*

[170] See discussion, above, in relation to § 235.5.

determined not to mandate a specific date in the regulatory text in order to retain flexibility to adjust the reporting deadline or the reporting period to provide an appropriate period of time for institutions to respond. Accordingly, the Board is not adopting in its final rule proposed § 235.8(c). Rather, similar to other reports the Board requires to be filed, the instructions to the report will indicate when the report is due.

The Board also expects initially to require different reporting frequencies for issuers and payment card networks. As discussed above in relation to § 235.5, the Board plans to gather information from networks regarding their interchange fee structures on an annual basis and from covered issuers regarding their costs every two years.

The statute requires the Board to disclose aggregate or summary information concerning costs and fees on at least a biannual basis. ''Biannual'' can mean either twice a year or every two years.[171] The Board believes it is appropriate to interpret ''biannual'' as meaning every two years in the context of the statute's disclosure provision, given the substantial reporting burden involved in collecting the issuer cost data. More frequent reporting by networks or issuers may be warranted in the future, depending on what the data collected and other industry practices reveal. Accordingly, the Board is not specifying the frequency of required reporting in the regulatory text in order to retain flexibility. Similar to other reporting forms, the Board plans to indicate with publication of the form the frequency with which entities are required to report.

Additionally, the Board is deleting proposed § 235.8(d), which stated that the Board may, in its discretion, disclose aggregate or summary information reported. This provision was a restatement of the Board's statutory authority to disclose such information under EFTA Section 920(a)(3) and is not necessary.

VIII. Section 235.9 Administrative Enforcement

EFTA Section 920(d) provides that the requirements of EFTA Section 920 may be enforced by the relevant Federal administrative agencies in accordance with EFTA Section 918. Proposed § 235.9 set forth the agencies that may enforce compliance with part 235. The Board received no comments explicitly on proposed § 235.9, but received comments from some merchants urging the Board to require *ex post* verification by supervisors of issuer compliance with the fee standards and to enumerate penalties for failure to comply.[172] Any penalties for non-compliance are subject to the discretion of an issuer's or a network's primary supervisor. Accordingly, the Board has not set forth penalties for non-compliance with this part. The Board received no other comments on proposed § 235.9 and has determined to adopt § 235.9 as proposed.

IX. Section 235.10 Effective Date

Except as provided in § 235.7 (discussed above), the provisions of this final rule are effective and compliance is mandatory beginning October 1, 2011.[173] Issuers may voluntarily comply with these provisions prior to that date.

The Board proposed that the interchange fee standards would be effective on July 21, 2011, coinciding with the effective date of EFTA Section 920(a) (set forth in EFTA Section 920(a)(9)). The Board received numerous comments regarding the effective date of the interchange fee standards, many of which urged the Board to delay the rule's effective date.

Several issuers and networks expressed concern that the proposed effective date would not allow sufficient time to make necessary system changes, under either of the proposed fee standard alternatives. For example, one processor stated that, currently, there is no interchange-fee data field transmitted with the transaction data at the time the acquirer or processor makes the routing decision. This commenter contended that networks should be responsible for identifying the specific interchange fee category to ensure merchants have interchange fee information available at the time of the routing decision. Many of these commenters suggested a phased-in approach of the new standards to mitigate the impact of the standards on market participants. A few issuers and networks suggested that the Board deem current interchange rates to comply with the ''reasonable and proportional'' requirement for some period of time until the industry can implement new standards (*i.e.,* one to two years). A few issuers suggested the Board, in addition to adopting a rule with a higher safe harbor and/or cap, study the impact of both the interchange fee standards and exclusivity and routing provisions prior to adjusting the safe harbor and/or cap.

Numerous issuers and networks contended that an issuer-specific standard would take longer to implement than a cap because networks and issuers would need to time to calculate their allowable costs and networks would need time to establish a process for obtaining this information, to write and implement new network rules, and to work with issuers, acquirers, processors, and merchants to implement the new interchange fee structure. A few commenters suggested specific compliance dates if the Board implemented proposed Alternative 2. The earliest suggested date was April 2012. More commonly, commenters suggested an effective date of one year from publication, with other commenters suggesting that implementation could not be accomplished until well after July 2013. One issuer suggested that July 2013 would permit networks to develop two-tier interchange fee structures. Irrespective of the actual effective date, one commenter suggested a mid-month effective date for changes to the interchange fees to align with current network processes designed to reduce the financial risk of month-end and quarter-end processing.

The Dodd-Frank Act does not specifically provide an effective date for the Board's rules implementing EFTA Section 920(a). The Board is directed to issue final regulations within nine months of the Dodd-Frank Act's enactment, and EFTA Section 920(a) is effective one year after enactment, indicating that Congress intended at least a three-month implementation period before the interchange fee standards become effective. Moreover, the final rule requires significant changes to existing interchange fee practices and systems changes by issuers and payment card networks. An October 1 effective date also coincides with the normal schedule for many network releases of systems changes. Additionally, the Congressional Review Act dictates that the Board's final rule—as a major rule—cannot be enforced until the end of a 60-day Congressional review period following transmission of the final rule to Congress.[174] For these reasons, the Board believes that an October 1, 2011 effective date balances Congress's directions of prompt effectiveness and sufficient time for

[171] *See Merriam-Webster's Collegiate Dictionary* (10th edition) defining ''biannual'' as meaning ''twice a year'' or ''biennial,'' which in turn is defined as occurring every two years.

[172] The Board received one comment suggesting a mechanism for enforcing compliance with a proposed network-average interchange fee approach. The Board has determined not to adopt a network-average approach to the interchange fee standards and, therefore, need not address the suggested approach to enforcement.

[173] Section 235.4 and accompanying definitions, which are added by the interim final rule published separately in the **Federal Register**, also are effective on October 1, 2011.

[174] *See* 5 U.S.C. 801.

congressional review and for issuers and payment networks to bring their systems and practices into compliance. The effective date for the provisions implementing the routing and exclusivity requirements of EFTA Section 920(b) are discussed above in connection with the explanation of the requirements of § 235.7.

Effects of the Rule on Various Parties

I. Overview of Comments Received

Comments from issuers, merchants, payment card networks, and consumers addressed the benefits and drawbacks of the current system, the impact of EFTA Section 920 and the effect of the Board's proposed rule on various parties and on the current system overall, and alternatives to the proposed rule. Numerous commenters (primarily issuers, networks, and some consumer representatives) stated that the current interchange fee system has resulted in the development of a payment system that provides significant benefits for merchants, consumers, and issuers. Many of these commenters stated that merchants should pay for the benefits they receive from accepting debit cards, which they said included cost savings relative to accepting cash, checks, or credit cards; faster check-out at the point of sale; higher consumer spending; guaranteed payment; avoiding liability for most fraudulent transactions; faster settlement; secure online transactions; and less time and money spent on collections, billing, and other administrative matters. Other commenters stated that the debit card system enables small merchants to compete with larger merchants.

Merchant commenters, by contrast, objected to the current interchange fee system, noting that although transactions processing costs have fallen substantially, interchange fees have not. These commenters also noted that merchants often do not know at the time of purchase the amount of the interchange fee that will be assessed on a transaction. In addition, many merchants objected to networks setting interchange fees centrally for all participating issuers, noting that these centrally determined fees bear no relation to the costs of individual issuers.

Merchant commenters explained that high interchange fees force them either to accept lower gross margins, raise prices charged to their customers, or reduce other costs. These commenters stated that, as a practical matter, they cannot discontinue acceptance of debit cards because of their widespread adoption by consumers. By contrast, numerous non-merchant commenters asserted that merchants that are unhappy with current interchange fee levels could stop accepting debit cards as a form of payment or could negotiate with networks and acquirers for lower interchange fees and merchant discounts. Some of these commenters noted that merchants are able to offer cash discounts in order to encourage payment by other means. Some merchant commenters, however, stated that offering cash discounts was impractical.[175]

Numerous commenters recognized that consumers benefit from debit cards. Specifically, these commenters asserted that debit cards provide consumers with a widely accepted payment method, increased security (by reducing fraud liability and the risk associated with carrying cash), and increased convenience (by reducing the need to carry cash). Several of these commenters stated that the current interchange fee system benefits consumers through lower fees for accounts and banking services, as well as rewards for debit card purchases. By contrast, several merchants stated that consumers pay higher retail prices as a result of merchants passing on the cost of interchange fees.

Commenters also stated that issuers receive benefits from debit cards, including interchange fee revenue. Several commenters stated that issuers use interchange revenue to cover operating costs and offset fraud losses. Other commenters noted additional benefits that debit cards provide for issuers. For example, these commenters asserted that debit cards provide a means for issuers to establish an account relationship with customers, to reduce the need for issuers to hold cash (and to maintain expensive brick-and-mortar branches in order to facilitate withdrawals), and to experience cost savings from processing fewer checks. By contrast, one issuer stated that debit card transactions are more expensive to process than checks due to processing fees, cost of inquiries and disputes, and fraud losses.

Numerous commenters asserted that the Board's proposed rule would have adverse, unintended consequences on issuers, consumers, payment card networks, and the payment system more generally. A few commenters asserted that the Board's proposed rule would negatively impact small merchants as well. Many of these commenters stated that the Board's proposed rule should have included a competitive-impact analysis required by EFTA Section 904(a) that was performed in accordance with the Board's competitive-impact analysis bulletin.

II. Effects on Consumers

A. Comments Received

A number of commenters, primarily issuers and networks, asserted that consumers would be harmed by the proposed rule, contrary to the statutory intent. They predicted that the substantial reduction in interchange fee revenue resulting from the proposed rule would lead card issuers to raise fees charged to deposit account customers, reduce benefits for users of debit cards (*e.g.,* rewards or liability protections), not authorize the use of debit cards for high-risk or high-value transactions, or restrict or eliminate the issuance of debit cards. These commenters argued that low income consumers would likely experience the greatest harm, as they would be unable or unwilling to incur the higher costs associated with maintaining deposit accounts, and may consequently be forced out of the banking system.

At the same time, these commenters asserted that consumers would not experience any benefits from lower interchange fees because they expect that merchants would not reduce prices charged to consumers, given that there is no statutory requirement for them to do so.[176] They viewed the reduction in interchange fees as a transfer of revenue from card-issuing banks to merchants, with no benefit flowing to consumers.

In addition, some commenters argued that the exclusivity and routing provisions would adversely affect consumers by eliminating the ability of cardholders to ensure that a transaction was routed over a network that provides certain benefits to its cardholders. In particular, these commenters noted that certain cardholder benefits, such as zero liability, enhanced chargeback rights, rewards, or insurance, are often tied to the use of a particular network. In their

[175] Several merchant commenters also objected to certain other practices, such as processors offering low rates for an introductory period only, imposing hidden fees, and delaying availability of funds by an extra day if the merchant routes the transaction through a PIN-debit network. One merchant commenter stated that because EFTA Section 920(b)(2) does not restrict the ability of a payment card network to prohibit differential pricing on the basis of the network used, networks would not have sufficient incentives to reduce fees borne by merchants.

[176] In support of their contentions, these commenters pointed to the experience of other countries with regulating interchange fees, most notably Australia and Canada. Issuers and some consumers asserted that interchange fee regulation in other countries demonstrates that merchants will not pass on savings to consumers at the point of sale and that issuers will increase per-transaction fees or other account fees.

view, requiring unaffiliated networks on a card with merchant control of routing would make it less likely that a cardholder would receive those benefits if a merchant opted to route a transaction over the merchant's preferred network.

Other commenters, primarily merchants and some consumer groups, asserted that consumers would benefit from the proposed rule. Several commenters indicated that, currently, the cost of interchange fees is being passed on to consumers through higher retail prices, and therefore consumers would benefit from a reduction in the interchange fees. They argued that merchants would have no choice but to pass on their cost savings to consumers, given the competitive environment in which they operate. They further argued that low income consumers, who are currently less likely to use debit cards, would experience the greatest benefits from lower prices at the point of sale. Some commenters suggested that lower interchange fees could enable merchants to enhance their operations through, for example, more stores or improved customer service, which would benefit consumers. In addition, they questioned the claim that lower interchange fees would lead to higher account fees for deposit customers, noting that over the past decade both interchange fees and other bank fees have increased sharply.

B. Analysis

The ultimate net effect of the final rule on consumers will depend on the behavior of various participants in the debit card networks. A reduction in interchange fees would likely lead to a decrease in merchants' costs of debit card acceptance, which could be passed on to consumers in the form of lower prices. Merchants operating in highly competitive markets with low margins are likely to pass the bulk of these savings on to consumers, while merchants operating in less competitive markets may retain a greater portion of the savings. Thus, other things equal, the Board expects the rule to result in some reduction in prices for goods and services faced by consumers.[177]

However, if issuers encourage consumers to shift from debit cards to credit cards, which are more costly to merchants, overall merchant costs could rise, despite a reduction in the cost of accepting debit cards, and these higher costs could be passed on to consumers. If merchants continue their current practice of not varying their prices with the form of payment, any benefits associated with price reductions, or costs associated with price increases, would likely accrue to all consumers, regardless of whether they use debit cards. In addition, lower debit card interchange fees would likely provide merchants that currently do not accept debit cards with a greater economic incentive to do so, which may benefit consumers by increasing their ability to use debit cards.

At the same time, covered issuers are likely to implement some changes in response to the reduction in interchange fee revenue. They may seek alternative sources of revenue, including higher fees from debit card users or deposit account customers more generally, or may reduce or eliminate debit card rewards programs. In addition, card issuers may look for opportunities to reduce operating costs, which could involve reducing benefits associated with deposit accounts or debit cards.

Finally, the exclusivity and routing provisions of the final rule may limit the ability of cardholders to determine the network over which a transaction is routed and, thus, may limit their ability to ensure that they receive benefits associated with certain networks. Currently, however, consumers are typically unaware of the network used to route PIN debit transactions in situations where multiple PIN networks are enabled on their cards. Therefore, the effect on consumers of merchant routing decisions in such situations may be minimal. Moreover, under the final rule, which does not require multiple unaffiliated networks for each method of authentication, consumers may still be able to influence transaction routing through their choice of authentication method.

Thus, the effect of the rule on any individual consumer will depend on a variety of factors, including the consumer's current payment behavior (*e.g.,* cash user or debit card user), changes in the consumer's payment behavior, the competitiveness of the merchants from which the consumer makes purchases, changes in merchant payment method acceptance, and changes in the behavior of banks.

III. Effects on Issuers

A. Comments Received

Numerous commenters discussed the anticipated effect of the proposed rule on covered and exempt issuers; some commenters predicted that any adverse impact would be minimal, whereas other commenters predicted that the adverse impact would be far more severe. More specifically, merchant commenters believed that reducing interchange fees would not have a significant adverse impact on issuers' profits (noting that issuers were profitable before they received interchange revenue); they also questioned claims that issuers would reduce debit card issuance, because they believe debit cards are a lower-cost means of access to deposit account funds compared with checks.

Numerous issuer commenters stated that the proposed rule's substantial reduction in interchange fee revenue would adversely affect debit card programs. Many of these issuers stated that debit cards have become an essential tool for consumers; therefore, not offering debit cards is not an option. Issuers were concerned that a substantial drop in interchange fees would adversely affect their financial condition and raise safety and soundness concerns. A few issuers noted that the proposed rule's adverse impact would be particularly burdensome in light of the recent financial crisis and recent regulatory changes, including the repeal of the prohibition on paying interest on demand deposits, limitations on overdraft fees, and increases in deposit insurance fund premiums. Specifically, these issuers were concerned that they would be unable to earn sufficient revenue to attract capital and continue to invest in fraud prevention, processing, and other technologies.

Numerous issuers indicated that, if the Board adopted its proposal, they may impose or raise debit card or other account fees, decrease cardholder rewards and other benefits including interest, decrease the availability of debit cards and other banking services (by, for example, imposing debit card transaction size limits), or reduce the scale of their operations. Some consumer group commenters argued that, because covered issuers would simply raise other fees to make up for lost interchange revenue, the proposed rule would have little or no effect on covered issuers. Some issuer commenters asserted, however, that they would not be able to recoup all of the lost interchange fee revenue through other customer fees, and therefore

[177] It is not practical, however, to measure the extent to which lower interchange fees translate into lower merchant prices, because of the many other factors that also influence those prices. Australia has the longest experience with government limits on interchange fees. Although the Reserve Bank of Australia acknowledges the difficulties involved in measuring the effect of the interchange fee reductions on merchant prices, it has stated that it is confident that savings are passed through to consumers, given that in a competitive market, changes in merchants' costs are generally reflected in the prices that merchants charge. *See http://www.rba.gov.au/payments-system/reforms/review-card-reforms/review-0708-pre-conclusions/index.html.*

would need to scale back their debit card programs. One issuer claimed that the combination of higher customer fees and reduced program benefits would put covered issuers at a competitive disadvantage relative to exempt issuers.

Numerous commenters (predominantly issuers) noted that interchange fee revenue currently is used to offset fraud losses absorbed by issuers, particularly those related to signature debit transactions. Several of these commenters asserted that most of the losses result from action (or lack of action) on the merchant side of transactions. Merchant commenters, by contrast, believed it was unfair for merchants to pay for fraud losses that could be avoided through use of PIN debit transactions. In addition, merchants argued that issuer incentives to card holders to choose signature debit over PIN debit would be diminished if fraud losses were not compensated through interchange fees. In general, however, commenters disagreed on the allocation of fraud losses between merchants/acquirers and issuers.[178]

As provided by the statute, issuers with consolidated assets of less than $10 billion are exempt from the rule's interchange fee standards, but not from the network exclusivity and routing provisions. Some commenters, primarily issuers and smaller networks, argued that issuers that are exempt from the interchange fee standards would be harmed by the proposed rule because either (i) the exemption would not be effective, and exempt issuers would face reductions in interchange fees that are similar to those required for covered issuers; or (ii) the exemption would be effective, and merchants would discriminate against the higher-cost cards issued by exempt banks. These commenters believed that the exemption might not be effective because networks are not required to establish separate interchange fee schedules for exempt and covered issuers. Furthermore, they asserted that even if networks did establish separate schedules, market forces would put downward pressure on exempt issuers' interchange fees. In part, these commenters argued that this downward pressure on interchange fees would result from the prohibition on network exclusivity and routing restrictions, which would allow merchants to route transactions over networks with lower interchange fees. In addition, some of these commenters expressed concern that the proposed rule's requirement for at least two unaffiliated networks on a card would result in increased costs for issuers that are exempt from the interchange fee standards. Some commenters asserted that the harm to small issuers might be sufficient to cause some of them to fail. Some exempt issuers stated that they did not believe they would be able to replace lost revenue as readily as covered issuers because they have less diversified product lines than covered issuers.

Merchant commenters argued that issuers that are exempt from the interchange fee standards would not be harmed by the proposed rule. They argued that the exemption would be effective, noting that several networks have already indicated their intent to establish separate interchange fee schedules for covered and exempt issuers. They also dismissed the idea that merchants might discriminate against exempt issuers' cards, arguing that (i) merchants cannot practically implement such discriminatory practices and have an incentive to avoid alienating customers who hold cards issued by exempt issuers, and (ii) networks have rules requiring a merchant that accepts any of a network's debit cards to accept all of that network's debit cards, regardless of issuer.

B. Analysis

It is not clear how covered issuers will respond to the reduction in interchange revenue. Experience in other countries has shown that the extent of debit card usage is not necessarily related to the level of interchange revenue received by issuers.[179] Issuers may need to provide debit cards on attractive terms in order to attract and retain consumer transaction account balances. Covered issuers may offset some or all lost interchange fee revenue through a combination of customer fee increases (although competitive forces may limit their practical ability to do so), reductions in debit card rewards programs, and cost reductions.

It is difficult to predict the market response to the rule, and thus the likely overall effect of the rule on exempt issuers. Both the statute and the final rule permit, but do not require, networks to establish higher interchange fees for exempt issuers than would be allowable for covered issuers. Networks that collectively process about 80 percent of debit card volume have indicated that they will establish two separate interchange fee schedules when the rule goes into effect. These plans likely reflect the incentives networks have to attract and retain small issuers, which the Board estimates account for roughly 30 percent of debit card transaction volume. Networks will likely review the appropriateness of their interchange fee structures and levels over time as the competitive landscape continues to evolve.

To the extent that two-tier pricing is adopted by the networks, the Board believes that it is unlikely that merchants would discriminate against exempt issuers' cards. First, it would not appear to be in a merchant's interest to steer customers away from using an exempt issuer's debit card, because the cardholder will often not have a payment option that is more attractive to the merchant. Although some merchants have been known to steer customers who present a high-cost credit card to a lower-cost credit card, they have been able to do so because consumers often carry multiple credit cards. That is generally not the case with debit cards; consumers typically have only one checking account and hence one debit card. Merchants would have no incentive to steer customers to pay by credit card, because credit card payments generally involve a higher cost to merchants than do debit card payments. Moreover, given that fewer and fewer consumers carry checks or large amounts of cash, merchants risk losing the sale entirely if they attempt to steer customers away from exempt issuers' debit cards and towards non-card methods of payment.

In addition, as noted by some commenters, network rules prohibit such discrimination. For example, the honor-all-cards rules of the networks require a merchant that accepts a network's debit cards to accept all of that network's debit cards, regardless of the issuer. Moreover, although EFTA Section 920(b)(2) provides that a payment card network cannot restrict merchant discounts across methods of payment, it does not limit a network's ability to prohibit discounts on the basis of the issuer.

The network exclusivity and routing provisions, however, which by statute apply to issuers that are exempt from the interchange fee standards, may lead to higher costs for some exempt issuers. Moreover, these provisions could put some downward pressure on interchange fees overall if merchants are able to route transactions over lower-

[178] For example, some issuers assert they cannot charge back some fraudulent transactions even when a merchant does not follow network rules. Other commenters assert that it is difficult for merchants to prove they followed correct procedures, and therefore merchants bear much of the loss.

[179] In Canada, for example, debit card usage is widespread, despite the absence of an interchange fee.

cost networks. The ultimate effect of any downward pressure on interchange fees due to the network exclusivity and routing provisions depends on the industry response once those provisions are in effect. Thus, it is possible that, even with two-tier interchange fee schedules, some issuers that are exempt from the interchange fee standard may receive less interchange revenue than they would have absent the rule. The Board expects, however, that even if interchange fee revenue received by small issuers declines, it will remain above the level they would have received if they were not exempt from the interchange fee standard.

As discussed above, the Board is taking several steps to mitigate any adverse effect on small issuers. First, it will publish lists of institutions that fall above and below the small issuer exemption asset threshold, to assist payment card networks in determining which of the issuers participating in their networks are subject to the rule's interchange fee standards, and plans to update these lists annually. In addition, the Board plans to survey payment card issuers annually and publish a list of the average interchange fee that each network provides to its covered issuers and to its exempt issuers.[180] This list should enable issuers, including small issuers, to more readily compare the interchange revenue they would receive from each network.

IV. Effects on Merchants

A. Comments Received

Some commenters, primarily issuers and networks, expected that merchants would benefit from the rule, as they would face lower costs associated with debit card acceptance and would not pass these savings on to consumers. In addition, they argued that the exclusivity and routing provisions, which give merchants the ability to direct their transactions over the lower-cost network, may further benefit merchants. However, some of these commenters argued that small and medium-sized merchants may be harmed, as their acquirers would not necessarily pass on the benefits of lower interchange fees to them, whereas large merchants, which have more bargaining power in dealing with their acquirers, would benefit from lower interchange fees and would thereby gain a competitive advantage relative to smaller merchants.

Merchants generally expected the proposed rule to result in significant merchant cost savings, which, they argued, could be the difference between staying in business and going out of business. Merchant commenters supported the proposed rule's cost-based interchange fees and indicated that the rule would increase competition among payment card networks, improve pricing transparency, and increase innovations by merchants. Merchants also noted that cost savings could translate into increased hiring, more stores, or other enhancements, such as improved customer service. However, one merchant group was concerned that merchants with a high proportion of small-ticket transactions may stop accepting debit cards because the interchange fees for these types of transactions could increase under the proposed rule.

A few commenters were skeptical that competition from the network routing provisions would place material downward pressure on interchange fees. Some commenters expect issuers to promote use of credit cards over debit cards, which could result in higher costs for merchants due to higher credit card interchange fees.

B. Analysis

As noted above, merchants that operate in highly competitive markets with low margins are likely to pass on most or all of the interchange cost savings to their customers in the form of lower prices or improved service; by contrast, merchants that operate in less competitive markets may retain a greater portion of the interchange fee savings. The merchant-acquiring business, broadly speaking, is competitive; therefore, the Board believes that acquirers would pass on the savings from lower interchange fees to their merchant customers, regardless of merchant size. Consequently, the Board does not believe that the rule would adversely affect small and medium-sized merchants.[181] Although it is possible that merchants with a large proportion of small-ticket transactions may experience an increase in total interchange fees, the rule does not require networks to raise the current interchange fees for very-small-value transactions.

V. Effects on Other Parties

A. Comments Received

Many issuer and network commenters stated that the proposed rule's reduction in interchange fee revenue would adversely affect payment card networks, as well as the payment system more generally.[182] These commenters stated that the proposed interchange fee levels would erode the current beneficial characteristics of debit cards and stifle future innovation in the debit card industry (including the introduction of alternative payment systems). These commenters also stated that the proposal would lead to fewer payment options for consumers because issuers would stop offering debit cards (leading to increased reliance on cash and checks), promote the use of credit cards, or both. Promoting the use of credit cards, these commenters asserted, would adversely affect consumers because credit cards do not have the same debt-management characteristics as debit cards. Other commenters asserted that increased reliance on cash and checks would result in greater money laundering and tax compliance risks. By contrast, several merchants stated that a reduction in interchange fees would benefit the payment system by increasing merchant acceptance of debit cards (which have beneficial debt management characteristics).

B. Analysis

The effect of the rule on payment card networks and the payment system more generally will depend on the market responses to the rule by the various payment system participants. Based on experiences in other countries that have adopted interchange fee regulations, the Board does not expect a significant shift away from debit card payments or any meaningful degradation of the integrity of the payment system. The provisions prohibiting network exclusivity and routing restrictions could spur competition among payment card networks, which may have an overall positive effect on payment system efficiency.

EFTA 904(a) Economic Analysis

I. Statutory Requirement

Section 904(a)(2) of the EFTA requires the Board to prepare an economic

[180] Under EFTA Section 920(a)(3)(B), the Board may require any issuer or payment card network to provide the Board with such information as may be necessary to carry out the provisions of EFTA Section 920(a).

[181] Certain small and medium-sized merchants that have entered into long-term contracts with independent resellers of payment card services may experience some delay before realizing lower transaction costs.

[182] Some issuer and network commenters believe that interchange fee restrictions are unfair because financial institutions and networks invested in building the current network infrastructure. In contrast, some merchant commenters asserted that issuers and networks have already been more than compensated for historical investment in the debit card system. Another commenter stated that reduced interchange fee revenues would increase the cost of leasing point-of-sale terminals.

analysis of the impact of the regulation that considers the costs and benefits to financial institutions, consumers, and other users of electronic fund transfers. The analysis must address the extent to which additional paperwork would be required, the effect upon competition in the provision of electronic fund transfer services among large and small financial institutions, and the availability of such services to different classes of consumers, particularly low income consumers.

II. Cost/Benefit Analysis

The Section-by-Section Analysis above, as well as the Final Regulatory Flexibility Analysis and Paperwork Reduction Act analysis below, contain a more detailed discussion of the costs and benefits of various aspects of the proposal. This discussion is incorporated by reference in this section.

As required by Section 920 of the EFTA (15 U.S.C. 1693o–2), the final rule, which the Board is implementing in Regulation II, establishes standards for assessing whether an interchange transaction fee received or charged by an issuer (and charged to the acquirer) is reasonable and proportional to the cost incurred by the issuer with respect to the transaction. Specifically, the final rule provides that an issuer may not receive or charge an interchange transaction fee in excess of the sum of a 21-cent base component and 5 basis points of the transaction's value (the *ad valorem* component).

Certain issuers and products are exempt from the interchange fee restrictions, including small issuers that, together with their affiliates, have less than $10 billion in assets; certain cards accessing government-administered payment programs; and certain reloadable general-use prepaid cards that are not marketed or labeled as a gift certificate or gift card. Payment card networks may, but are not required to, differentiate between interchange fees received by covered issuers and products versus exempt issuers and products.

Regulation II also prohibits issuers and payment card networks from both restricting the number of payment card networks over which an electronic debit transaction may be processed to fewer than two unaffiliated networks and inhibiting the ability of a merchant to direct the routing of an electronic debit transaction over any payment card network that may process such transactions. Under the final rule, issuers are required to have at least two unaffiliated payment card networks for each debit card they issue.

A. Additional Paperwork

Under the final rule, issuers that do not qualify for the small issuer exemption would be required to provide cost data to the Board. Covered issuers would also be required to retain records that demonstrate compliance with the requirements of Regulation II for not less than five years after the end of the calendar year in which the electronic debit transaction occurred. If an issuer receives actual notice that it is subject to an investigation by an enforcement agency, the issuer must retain the records until final disposition of the matter.

In addition, under the Interim Final Rule, published separately in the **Federal Register**, issuers are required to develop, implement, and update policies and procedures reasonably designed to (i) identify and prevent fraudulent electronic debit transactions; (ii) monitor the incidence of, reimbursements received for, and losses incurred from fraudulent electronic debit transactions; (iii) respond appropriately to suspicious electronic debit transactions so as to limit the fraud losses that may occur and prevent the occurrence of future fraudulent electronic debit transactions; and (iv) secure debit card and cardholder data. If an issuer meets these standards and wishes to receive the adjustment, it must certify its eligibility to receive the fraud-prevention adjustment to the payment card networks in which the issuer participates.

For smaller institutions that are not required to submit cost information to the Board under Regulation II, the regulation does not impose any reporting requirements. However, it is possible small issuers may have reporting requirements to payment card networks to certify their exempt status. As discussed above, for those networks that choose to implement a two-tier interchange fee structure that provides different interchange rates to larger issuers and exempt small issuers, the Board plans to publish annually lists of institutions above and below the small issuer exemption asset threshold. If a payment card network decides to distinguish between large and small issuers, small issuers that are not on the Board's list of institutions that, together with their affiliates, have less than $10 billion in assets may need to provide information to the network in order to take advantage of the exempt fee structure.

B. Competition in the Provision of Services Among Financial Institutions

As discussed in ''Effects of the rule on various parties'' above, numerous commenters discussed the anticipated effect of the proposed rule on covered and exempt issuers. The Board understands that payment card networks that together process about 80 percent of debit card transaction volume have indicated their intent to establish two-tier interchange fee structures. To the extent payment card networks do not establish different interchange fee schedules for exempt and covered issuers, exempt issuers that participate in these networks will experience a decline in their interchange transaction fees, for transactions routed over these networks, similar in magnitude to that experienced by covered issuers. If exempt issuers have higher costs for debit card transactions than do covered issuers, this decline in interchange revenue may necessitate a larger adjustment of fees or other account terms by exempt issuers than by covered issuers. In addition, if exempt issuers typically offer narrower product or service lines than covered issuers, as suggested by some issuer commenters, then exempt issuers may adjust fees and account terms that are closely tied to their debit card operations or deposit accounts, whereas covered issuers may also modify fees and terms for other complementary or substitute products, such as credit cards, offered by those issuers. Under a scenario in which some networks do not establish different interchange fee schedules for exempt and covered issuers, resulting disparate changes in account fees or terms might cause a shift of deposit customers from exempt to covered issuers.

To the extent payment card networks do establish two-tier fee structures, covered issuers will likely experience a greater decline in their interchange revenue compared to exempt issuers. In such a situation, covered issuers may need to adjust fees and account terms in response to the lower interchange revenue, whereas exempt issuers may not. Under this scenario, consumers may shift their purchases of some financial services from covered issuers to exempt issuers in response to changes in fees and account terms at covered issuers. However, covered issuers with diversified product lines may look to retain customers by promoting alternative products not covered by the interchange fee standards, such as credit cards.

Regardless of whether or not networks establish two-tier fee structures, the competitive effects of any changes in fees or account terms across covered and exempt issuers due to a decline in interchange revenue will depend on the degree of substitution between small, exempt issuers and large, covered issuers. If the cross-price elasticity between exempt and covered issuers is large, then substantial shifts in market share may occur in response to disproportionate changes in fees and account terms by exempt versus covered issuers. Conversely, if substitution between exempt and covered issuers is low, then any changes in fees and account terms by exempt versus covered issuers may generate small shifts in market shares across exempt and covered issuers.

As the previous analysis suggests, the effect on competition among large and small financial institutions will depend on a number of factors, including the extent to which payment card networks implement and retain two-tier fee structures, the differentials in fees across tiers in such structures, the product and service lines offered by large and small financial institutions, and the substitutability of products and services across large and small financial institutions. As noted above, the Board understands that most debit card networks have indicated that they intend to implement two-tier fee structures; however, these are not binding commitments, and the level of interchange fees that will prevail in such systems is currently not known and will depend on market responses. Prior economic research suggests that competition between large and small depository institutions is weaker than competition within either group of institutions, likely because these institutions serve different customer bases.[183] For example, large institutions have tended to attract customers who desire expansive branch and ATM networks and a wide variety of financial instruments; by contrast, smaller institutions often market themselves as offering more individualized, relationship-based service and customer support to consumers and small businesses. This evidence suggests that substitution effects in response to changes in fees or account terms are stronger between depository institutions of similar sizes than across depository institutions of different sizes.

III. Availability of Services to Different Classes of Consumers

''Effects of the rule on various parties'' above discussed the comments the Board received regarding the effect the Board's proposed regulation may have on consumers. Furthermore, as discussed in ''Effects of the rule on various parties'', the ultimate net effect of the final rule on consumers will depend on the behavior of various participants in the debit card networks. Specifically, the effect of the rule on any individual consumer will depend on a variety of factors, including the consumer's current payment behavior (*e.g.,* cash user or debit card user), changes in the consumer's payment behavior, the competitiveness of the merchants from which the consumer makes purchases, changes in merchant payment method acceptance, and changes in the behavior of banks.

For low income consumers, to the extent that fees and other account terms become less attractive as a result of the rule, some low income consumers may be unwilling or unable to obtain debit cards and related deposit accounts. Similarly, less attractive fees and account terms may cause certain low income consumers who previously held debit cards and deposit accounts to substitute away from those products. At the same time, however, low income consumers who currently use cash for purchases may face lower prices at the point of sale if retailers that they frequent set lower prices to reflect lower costs of debit card transactions. Therefore, the net effect on low income consumers will depend on various factors, including each consumer's payment and purchase behavior, as well as market responses to the rule.

IV. Conclusion

EFTA Section 904(a)(3) states that: ''to the extent practicable, the Board shall demonstrate that the consumer protections of the proposed regulations outweigh the compliance costs imposed upon consumers and financial institutions.'' Based on the analysis above and in the Section-by-Section Analysis, the Board cannot, at this time, determine whether the benefits to consumers exceed the possible costs to financial institutions. As discussed above and in ''Effects of the rule on various parties,'' the overall effects of the final rule on financial institutions and on consumers are dependent on a variety of factors, and the Board cannot predict the market response to the final rule.

Final Regulatory Flexibility Analysis

An initial regulatory flexibility analysis (IRFA) was included in the proposal in accordance with Section 3(a) of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* (RFA). In the IRFA, the Board requested comments on all aspects of the IRFA, and, in particular, comments on the network exclusivity and routing alternatives (the provisions of the proposal that apply to small issuers). The Board also requested comments on any approaches, other than the proposed alternatives, that would reduce the burden on all entities, including small issuers. Finally, the Board requested comments on any significant alternatives that would minimize the impact of the proposal on small entities.

The RFA requires an agency to prepare a final regulatory flexibility analysis (FRFA) unless the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. Although it is difficult to quantify the analysis at this point, the Board believes that the rule, if promulgated, may have a significant economic impact on a substantial number of small entities and, accordingly, the Board has prepared the following FRFA pursuant to the RFA.

1. *Statement of the need for, and objectives of, the final rule.* As required by EFTA Section 920, the Board is adopting new Regulation II to establish standards for assessing whether an interchange transaction fee received or charged by an issuer is reasonable and proportional to the cost incurred by the issuer with respect to the transaction. Additionally, also as required by EFTA Section 920, new Regulation II prohibits issuers and payment card networks from both restricting the number of payment card networks over which an electronic debit transaction may be processed to less than two unaffiliated networks and inhibiting the ability of a merchant to direct the routing of an electronic debit transaction over a particular payment card network that may process such transactions.

2. *Summary of significant issues raised by public comments in response to the Board's IRFA, the Board's assessment of such issues, and a statement of any changes made as a result of such comments.* The Board received several comments on the IRFA. Some commenters contended that the IRFA should include an analysis of the effect of the proposed rule on small entities, including small merchants and small business debit card holders, as well as a study of the disparate impact

[183] *See, e.g.,* Robert Adams, Kenneth Brevoort, and Elizabeth Kiser, ''Who Competes with Whom? The Case of Depository Institutions,'' *Journal of Industrial Economics,* March 2007, v. 55, iss. 1, pp. 141–67; Andrew M. Cohen and Michael J. Mazzeo, ''Market Structure and Competition among Retail Depository Institutions,'' *Review of Economics and Statistics,* February 2007, v. 89, iss. 1, pp. 60–74; and Timothy H. Hannan and Robin A. Prager, ''The Profitability of Small Single-Market Banks in an Era of Multi-market Banking,'' *Journal of Banking and Finance,* February 2009, v. 33, iss. 2, pp. 263–71.

of the rule on smaller and larger businesses. One commenter also suggested that the IRFA should consider the effect on small businesses that receive financial services from small banks. Some commenters suggested that the Board's RFA analysis should take into consideration the effect of the rule on consumers, especially consumer debit card holders and lower income individuals. Another commenter argued that the IRFA was not reasonably complete because the cost survey on which the Board based its proposal did not consider small issuers. As noted above in the sections on ''Effects on Various Parties'' and the ''EFTA 904(a) Economic Analysis,'' the overall effects of the final rule on exempt issuers, small merchants, consumers, and other parties are dependent on a variety of factors, and the Board cannot predict the market response to the final rule.

In addition, numerous commenters discussed the proposed rule's impact on small entities, particularly small issuers. As discussed in more detail in the Section-by-Section Analysis, EFTA Section 920(a)(6)(A) provides an exemption from the interchange fee restrictions under EFTA Section 920(a) for any issuer that, together with its affiliates, has assets of less than $10 billion. Consequently, the provisions related to the interchange fee restrictions in the final rule do not directly impact small issuers. Commenters, however, were concerned that the small issuer exemption would not be effective in practice if payment card networks do not implement two-tier fee structures. As discussed above in this notice, trade associations representing small issuers, including credit unions, and one federal banking agency urged the Board to use its circumvention or evasion authority to ensure that the small issuer exemption in EFTA Section 920(a)(6) from the interchange transaction fee restrictions is given effect by the networks. In particular, these commenters were concerned that absent an express requirement on networks to adopt higher tiers of interchange fees for exempt issuers, such issuers would experience a significant reduction in interchange fee revenue, notwithstanding the exemption.

Although the statute provides an exemption from the interchange transaction fee restrictions for issuers with less than $10 billion in consolidated assets, the statute neither imposes an affirmative duty on networks to implement different interchange transaction fee rates for covered and exempt issuers, nor guarantees a particular level of interchange fee revenue that may be collected by an exempt issuer. As noted above, however, the Board is taking steps to respond to this issue in two ways. First, the Board plans to survey payment card issuers and networks annually and publish annually a list of the average interchange fees each network provides to its covered issuers and to its exempt issuers. This information will provide for more transparency for issuers, including small issuers, to more readily compare the interchange revenue they would receive from each network. Second, to facilitate a network's implementation of a two-tier fee structure, the Board will also compile annual lists of institutions above and below the small issuer exemption asset threshold. Payment card networks and issuers may then rely on such lists to determine which issuers qualify for the small issuer exemption. Issuers not appearing on the list of issuers that, together with their affiliates, have less than $10 billion in assets may still be required by payment card networks in which they participate to notify the networks that they qualify for the small issuer exemption. The Board believes the publication of the lists will greatly reduce the administrative burden associated with identifying small issuers that qualify for the exemption.

With respect to the network exclusivity and routing provisions, some commenters suggested that the Board exempt small issuers from these requirements. As explained above in the Section-by-Section Analysis, the statute does not provide an exemption for small issuers for these provisions. In addition, the exemption authority in EFTA Section 904(c) is transferred to the Consumer Financial Protection Bureau on July 21, 2011.

The Board has discretion, however, in setting the compliance date for these provisions. In designating April 1, 2012, as the date by which most issuers must comply with the network exclusivity provisions and October 1, 2011, as the date by which issuers must comply with the routing provisions, the Board has taken into account the concerns of issuers of all sizes. The technological options available for issuers generally will be the same for all issuers, regardless of asset size. Furthermore, as discussed in more detail in the Section-by-Section Analysis, certain debit cards have a delayed effective date, and issuers of such cards do not have to comply with the network exclusivity provisions for these cards until April 1, 2013.

3. *Description and estimate of small entities affected by the final rule.* This final rule will apply to small financial institutions that issue debit cards. A financial institution generally is considered small if it has assets of $175 million or less.[184] Based on 2010 Call Report data, approximately 11,000 depository institutions had total domestic assets of $175 million or less. The large majority of these institutions issue debit cards.

The sections above on ''Effects on Various Parties'' and the ''EFTA 904(a) Economic Analysis'' provide a more detailed discussion of the direct and indirect impact of the rule on various parties.

4. *Projected reporting, recordkeeping, and other compliance requirements.* With respect to the limitations on interchange transaction fees, the Board's final rule does not impose compliance requirements on small issuers.[185] In accordance with EFTA Section 920 the Board's rule exempts from the limitations on interchange transaction fees all issuers that, together with affiliates, have assets of less than $10 billion. The Board's final rule does not, however, require payment card networks to distinguish between issuers with assets of $10 billion or more and smaller issuers in setting interchange rates. If a payment card network decides to distinguish between large and small issuers, small issuers that are not on the Board's list of institutions that, together with their affiliates, have less than $10 billion in assets may need to provide information to the network in order to take advantage of the exempt fee structure.

The final rule prohibiting network exclusivity arrangements will affect small financial institutions that issue debit cards if such institutions do not currently comply with the final rule's standards. Under the final rule, a small issuer, like other issuers, would be required to have at least two unaffiliated payment card networks for each debit card it issues. If the issuer does not have at least two unaffiliated payment card networks for each debit card it issues, it would be required to add an additional network. This process may require making a decision as to which additional network to add to the debit card, establishing a connection to the new network, and updating internal processes and procedures.

[184] U.S. Small Business Administration, Table of Small Business Size Standards Matched to North American Industry Classification System Codes, available at *http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_sstd_tablepdf.pdf.*

[185] There may be some small financial institutions that have very large affiliates such that the institution does not qualify for the small issuer exemption.

5. *Steps taken to minimize the economic impact on small entities; significant alternatives.* In its proposed rule, the Board requested comment on the impact of the prohibition on network exclusivity and routing restrictions on small entities and solicited comment on any approaches, other than the proposed alternatives, that would reduce the burden on all entities, including small issuers. The Board received comment suggesting that small issuers should be exempt from the network exclusivity and routing provisions. However, as noted above in the Section-by-Section Analysis, EFTA Section 920 does not provide for this exemption, and the Board does not have authority to adopt an exemption for small issuers from these provisions. As noted above, the Board will publish lists of institutions above and below the small issuer exemption asset threshold to facilitate the implementation of two-tier interchange fee structures by payment card networks. In addition, the Board plans to publish annually information regarding the average interchange fees received by exempt issuers and covered issuers in each payment card network; this information may assist exempt issuers in determining the networks in which they wish to participate.

The factual, policy, and legal reasons for selecting the alternatives adopted in the final rule regarding each provision of the rule are discussed above in the Section-by-Section Analysis regarding each such provision. In addition, the reasons for rejecting other significant alternatives to the final rule considered by the Board are discussed in those sections as well.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3521; 5 CFR Part 1320 Appendix A.1), the Board reviewed this final rule under the authority delegated to the Board by the Office of Management and Budget. As mentioned in the preamble, the Board is seeking comment, via an interim final rulemaking, on the provisions required under § 235.4 for the fraud-prevention adjustment, published separately in the **Federal Register**. No collections of information pursuant to the PRA are contained in this final rule. Once the Board develops a survey to obtain information under § 235.8, containing recordkeeping and reporting requirements, staff will conduct an analysis under the PRA and seek public comment in the **Federal Register.**

Use of ''Plain Language''

Section 722 of the Gramm-Leach-Bliley Act of 1999 (12 U.S.C. 4809) requires the Board to use ''plain language'' in all final rules published after January 1, 2000. The Board has sought to present this final rule in a simple and straightforward manner. The Board received no comments on whether the proposed rule was clearly stated and effectively organized, or on how the Board might make the text of the rule easier to understand.

Text of Final Rule

List of Subjects in 12 CFR Part 235

Banks, banking, Debit card routing, Electronic debit transactions, and Interchange transaction fees.

Authority and Issuance

For the reasons set forth in the preamble, the Board amends Title 12, Chapter II of the Code of Federal Regulations by adding a new part 235 to read as follows:

PART 235—DEBIT CARD INTERCHANGE FEES AND ROUTING

Sec.

Authority: 15 U.S.C. 1693o–2.

§ 235.1 Authority and purpose.

(a) *Authority.* This part is issued by the Board of Governors of the Federal Reserve System (Board) under section 920 of the Electronic Fund Transfer Act (EFTA) (15 U.S.C. 1693o–2, as added by section 1075 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010)).

(b) *Purpose.* This part implements the provisions of section 920 of the EFTA, including standards for reasonable and proportional interchange transaction fees for electronic debit transactions, standards for receiving a fraud-prevention adjustment to interchange transaction fees, exemptions from the interchange transaction fee limitations, prohibitions on evasion and circumvention, prohibitions on payment card network exclusivity arrangements and routing restrictions for debit card transactions, and reporting requirements for debit card issuers and payment card networks.

§ 235.2 Definitions.

For purposes of this part:

(a) *Account* (1) Means a transaction, savings, or other asset account (other than an occasional or incidental credit balance in a credit plan) established for any purpose and that is located in the United States; and

(2) Does not include an account held under a bona fide trust agreement that is excluded by section 903(2) of the Electronic Fund Transfer Act and rules prescribed thereunder.

(b) *Acquirer* means a person that contracts directly or indirectly with a merchant to provide settlement for the merchant's electronic debit transactions over a payment card network. An acquirer does not include a person that acts only as a processor for the services it provides to the merchant.

(c) *Affiliate* means any company that controls, is controlled by, or is under common control with another company.

(d) *Cardholder* means the person to whom a debit card is issued.

(e) *Control* of a company means—

(1) Ownership, control, or power to vote 25 percent or more of the outstanding shares of any class of voting security of the company, directly or indirectly, or acting through one or more other persons;

(2) Control in any manner over the election of a majority of the directors, trustees, or general partners (or individuals exercising similar functions) of the company; or

(3) The power to exercise, directly or indirectly, a controlling influence over the management or policies of the company, as the Board determines.

(f) *Debit card* (1) Means any card, or other payment code or device, issued or approved for use through a payment card network to debit an account, regardless of whether authorization is based on signature, personal identification number (PIN), or other means, and regardless of whether the issuer holds the account, and

(2) Includes any general-use prepaid card; and

(3) Does not include—

(i) Any card, or other payment code or device, that is redeemable upon presentation at only a single merchant or an affiliated group of merchants for goods or services; or

(ii) A check, draft, or similar paper instrument, or an electronic representation thereof.

(g) *Designated automated teller machine (ATM) network* means either—

(1) All ATMs identified in the name of the issuer; or

(2) Any network of ATMs identified by the issuer that provides reasonable and convenient access to the issuer's customers.

(h) *Electronic debit transaction* (1) Means the use of a debit card by a person as a form of payment in the United States to initiate a debit to an account, and

(2) Does not include transactions initiated at an ATM, including cash withdrawals and balance transfers initiated at an ATM.

(i) *General-use prepaid card* means a card, or other payment code or device, that is—

(1) Issued on a prepaid basis in a specified amount, whether or not that amount may be increased or reloaded, in exchange for payment; and

(2) Redeemable upon presentation at multiple, unaffiliated merchants for goods or services.

(j) *Interchange transaction fee* means any fee established, charged, or received by a payment card network and paid by a merchant or an acquirer for the purpose of compensating an issuer for its involvement in an electronic debit transaction.

(k) *Issuer* means any person that authorizes the use of a debit card to perform an electronic debit transaction.

(l) *Merchant* means any person that accepts debit cards as payment.

(m) *Payment card network* means an entity that—

(1) Directly or indirectly provides the proprietary services, infrastructure, and software that route information and data to an issuer from an acquirer to conduct the authorization, clearance, and settlement of electronic debit transactions; and

(2) A merchant uses in order to accept as a form of payment a brand of debit card or other device that may be used to carry out electronic debit transactions.

(n) *Person* means a natural person or an organization, including a corporation, government agency, estate, trust, partnership, proprietorship, cooperative, or association.

(o) *Processor* means a person that processes or routes electronic debit transactions for issuers, acquirers, or merchants.

(p) *Route* means to direct and send information and data to an unaffiliated entity or to an affiliated entity acting on behalf of an unaffiliated entity.

(q) *United States* means the States, territories, and possessions of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any political subdivision of any of the foregoing.

§ 235.3 Reasonable and proportional interchange transaction fees.

(a) *In general.* The amount of any interchange transaction fee that an issuer may receive or charge with respect to an electronic debit transaction shall be reasonable and proportional to the cost incurred by the issuer with respect to the electronic debit transaction.

(b) *Determination of reasonable and proportional fees.* An issuer complies with the requirements of paragraph (a) of this section only if each interchange transaction fee received or charged by the issuer for an electronic debit transaction is no more than the sum of—

(1) 21 cents and;

(2) 5 basis points multiplied by the value of the transaction.

§ 235.4 [Reserved]

§ 235.5 Exemptions.

(a) *Exemption for small issuers.* (1) *In general.* Except as provided in paragraph (a)(3) of this section, §§ 235.3, 235.4, and 235.6 do not apply to an interchange transaction fee received or charged by an issuer with respect to an electronic debit transaction if—

(i) The issuer holds the account that is debited; and

(ii) The issuer, together with its affiliates, has assets of less than $10 billion as of the end of the calendar year preceding the date of the electronic debit transaction.

(2) *Determination of issuer asset size.* A person may rely on lists published by the Board to determine whether an issuer, together with its affiliates, has assets of less than $10 billion as of the end of the calendar year preceding the date of the electronic debit transaction.

(3) *Change in status.* If an issuer qualifies for the exemption in paragraph (a)(1) in a particular calendar year, but, as of the end of that calendar year no longer qualifies for the exemption because at that time it, together with its affiliates, has assets of $10 billion or more, the issuer must begin complying with §§ 235.3, 235.4, and 235.6 no later than July 1 of the succeeding calendar year.

(b) *Exemption for government-administered programs.* Except as provided in paragraph (d) of this section, §§ 235.3, 235.4, and 235.6 do not apply to an interchange transaction fee received or charged by an issuer with respect to an electronic debit transaction if—

(1) The electronic debit transaction is made using a debit card that has been provided to a person pursuant to a Federal, State, or local government-administered payment program; and

(2) The cardholder may use the debit card only to transfer or debit funds, monetary value, or other assets that have been provided pursuant to such program.

(c) *Exemption for certain reloadable prepaid cards*—(1) *In general.* Except as provided in paragraph (d) of this section, §§ 235.3, 235.4, and 235.6 do not apply to an interchange transaction fee received or charged by an issuer with respect to an electronic debit transaction using a general-use prepaid card that is—

(i) Not issued or approved for use to access or debit any account held by or for the benefit of the cardholder (other than a subaccount or other method of recording or tracking funds purchased or loaded on the card on a prepaid basis);

(ii) Reloadable and not marketed or labeled as a gift card or gift certificate; and

(iii) The only means of access to the underlying funds, except when all remaining funds are provided to the cardholder in a single transaction.

(2) *Temporary cards.* For purposes of this paragraph (c), the term ''reloadable'' includes a temporary non-reloadable card issued solely in connection with a reloadable general-use prepaid card.

(d) *Exception.* The exemptions in paragraphs (b) and (c) of this section do not apply to any interchange transaction fee received or charged by an issuer on or after July 21, 2012, with respect to an electronic debit transaction if any of the following fees may be charged to a cardholder with respect to the card:

(1) A fee or charge for an overdraft, including a shortage of funds or a transaction processed for an amount exceeding the account balance, unless the fee or charge is imposed for transferring funds from another asset account to cover a shortfall in the account accessed by the card; or

(2) A fee imposed by the issuer for the first withdrawal per calendar month from an ATM that is part of the issuer's designated ATM network.

§ 235.6 Prohibition on circumvention, evasion, and net compensation.

(a) *Prohibition of circumvention or evasion.* No person shall circumvent or evade the interchange transaction fee restrictions in §§ 235.3 and 235.4.

(b) *Prohibition of net compensation.* An issuer may not receive net compensation from a payment card network with respect to electronic debit transactions or debit card-related activities within a calendar year. Net compensation occurs when the total amount of payments or incentives received by an issuer from a payment card network with respect to electronic debit transactions or debit card-related activities, other than interchange transaction fees passed through to the issuer by the network, during a calendar year exceeds the total amount of all fees paid by the issuer to the network with respect to electronic debit transactions or debit card-related activities during that calendar year. Payments and incentives paid by a network to an issuer, and fees paid by an issuer to a network, with respect to electronic debit transactions or debit card related activities are not limited to volume-based or transaction-specific payments, incentives, or fees, but also include other payments, incentives or fees related to an issuer's provision of debit card services.

§ 235.7 Limitations on payment card restrictions.

(a) *Prohibition on network exclusivity*—(1) *In general.* An issuer or payment card network shall not directly or through any agent, processor, or licensed member of a payment card network, by contract, requirement, condition, penalty, or otherwise, restrict the number of payment card networks on which an electronic debit transaction may be processed to less than two unaffiliated networks.

(2) *Permitted arrangements.* An issuer satisfies the requirements of paragraph (a)(1) of this section only if the issuer allows an electronic debit transaction to be processed on at least two unaffiliated payment card networks, each of which does not, by rule or policy, restrict the operation of the network to a limited geographic area, specific merchant, or particular type of merchant or transaction, and each of which has taken steps reasonably designed to enable the network to process the electronic debit transactions that the network would reasonably expect will be routed to it, based on expected transaction volume.

(3) *Prohibited exclusivity arrangements by networks.* For purposes of paragraph (a)(1) of this section, a payment card network may not restrict or otherwise limit an issuer's ability to contract with any other payment card network that may process an electronic debit transaction involving the issuer's debit cards.

(4) *Subsequent affiliation.* If unaffiliated payment card networks become affiliated as a result of a merger or acquisition such that an issuer is no longer in compliance with paragraph (a) of this section, the issuer must add an unaffiliated payment card network through which electronic debit transactions on the relevant debit card may be processed no later than six months after the date on which the previously unaffiliated payment card networks consummate the affiliation.

(b) *Prohibition on routing restrictions.* An issuer or payment card network shall not, directly or through any agent, processor, or licensed member of the network, by contract, requirement, condition, penalty, or otherwise, inhibit the ability of any person that accepts or honors debit cards for payments to direct the routing of electronic debit transactions for processing over any payment card network that may process such transactions.

(c) *Compliance dates*—(1) *General.* Except as otherwise provided in paragraphs (c)(2), (c)(3), and (c)(4) of this section, the compliance date of paragraph (a) of this section is April 1, 2012.

(2) *Restrictions by payment card networks.* The compliance date of paragraphs (a)(1) and (a)(3) of this section for payment card networks is October 1, 2011.

(3) *Debit cards that use transaction qualification or substantiation systems.* Issuers shall comply with the requirements of paragraph (a) of this section by April 1, 2013, for electronic debit transactions using debit cards that use point-of-sale transaction qualification or substantiation systems for verifying the eligibility of purchased goods or services.

(4) *General-use prepaid cards.* Issuers shall comply with the requirements of paragraph (a) of this section with respect to general-use prepaid cards as set out below.

(i) With respect to non-reloadable general-use prepaid cards, the compliance date is April 1, 2013. Non-reloadable general-use prepaid cards sold prior to April 1, 2013 are not subject to paragraph (a) of this section.

(ii) With respect to reloadable general-use prepaid cards, the compliance date is April 1, 2013. Reloadable general-use prepaid cards sold prior to April 1, 2013 are not subject to paragraph (a) of this section unless and until they are reloaded, in which case the following compliance dates apply:

(A) With respect to reloadable general-use prepaid cards sold and reloaded prior to April 1, 2013, the compliance date is May 1, 2013.

(B) With respect to reloadable general-use prepaid cards sold prior to April 1, 2013, and reloaded on or after April 1, 2013, the compliance date is 30 days after the date of reloading.

§ 235.8 Reporting requirements and record retention.

(a) *Entities required to report.* Each issuer that is not otherwise exempt from the requirements of this part under § 235.5(a) and each payment card network shall file a report with the Board in accordance with this section.

(b) *Report.* Each entity required to file a report with the Board shall submit data in a form prescribed by the Board for that entity. Data required to be reported may include, but may not be limited to, data regarding costs incurred with respect to an electronic debit transaction, interchange transaction fees, network fees, fraud-prevention costs, fraud losses, and transaction value, volume, and type.

(c) *Record retention.* (1) An issuer subject to this part shall retain evidence of compliance with the requirements imposed by this part for a period of not less than five years after the end of the calendar year in which the electronic debit transaction occurred.

(2) Any person subject to this part having actual notice that it is the subject of an investigation or an enforcement proceeding by its enforcement agency shall retain the records that pertain to the investigation, action, or proceeding until final disposition of the matter unless an earlier time is allowed by court or agency order.

§ 235.9 Administrative enforcement.

(a) (1) Compliance with the requirements of this part shall be enforced under—

(i) Section 8 of the Federal Deposit Insurance Act, by the appropriate Federal banking agency, as defined in section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)), with respect to—

(A) National banks, federal savings associations, and federal branches and federal agencies of foreign banks;

(B) Member banks of the Federal Reserve System (other than national banks), branches and agencies of foreign banks (other than federal branches, federal Agencies, and insured state branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25A of the Federal Reserve Act;

(C) Banks and state savings associations insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System), and insured state branches of foreign banks;

(ii) The Federal Credit Union Act (12 U.S.C. 1751 *et seq.*), by the Administrator of the National Credit Union Administration (National Credit

Union Administration Board) with respect to any federal credit union;

(iii) The Federal Aviation Act of 1958 (49 U.S.C. 40101 *et seq.*), by the Secretary of Transportation, with respect to any air carrier or foreign air carrier subject to that Act; and

(iv) The Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*), by the Securities and Exchange Commission, with respect to any broker or dealer subject to that Act.

(2) The terms used in paragraph (a)(1) of this section that are not defined in this part or otherwise defined in section 3(s) of the Federal Deposit Insurance Act (12 U.S.C. 1813(s)) shall have the meaning given to them in section 1(b) of the International Banking Act of 1978 (12 U.S.C. 3101).

(b) *Additional powers.* (1) For the purpose of the exercise by any agency referred to in paragraphs (a)(1)(i) through (a)(1)(iv) of this section of its power under any statute referred to in those paragraphs, a violation of this part is deemed to be a violation of a requirement imposed under that statute.

(2) In addition to its powers under any provision of law specifically referred to in paragraphs (a)(1)(i) through (a)(1)(iv) of this section, each of the agencies referred to in those paragraphs may exercise, for the purpose of enforcing compliance under this part, any other authority conferred on it by law.

(c) *Enforcement authority of Federal Trade Commission.* Except to the extent that enforcement of the requirements imposed under this title is specifically granted to another government agency under paragraphs (a)(1)(i) through (a)(1)(iv) of this section, and subject to subtitle B of the Consumer Financial Protection Act of 2010, the Federal Trade Commission has the authority to enforce such requirements. For the purpose of the exercise by the Federal Trade Commission of its functions and powers under the Federal Trade Commission Act, a violation of this part shall be deemed a violation of a requirement imposed under the Federal Trade Commission Act. All of the functions and powers of the Federal Trade Commission under the Federal Trade Commission Act are available to the Federal Trade Commission to enforce compliance by any person subject to the jurisdiction of the Federal Trade Commission with the requirements of this part, regardless of whether that person is engaged in commerce or meets any other jurisdictional tests under the Federal Trade Commission Act.

§ 235.10 Effective and compliance dates.

Except as provided in § 235.7, this part becomes effective and compliance is mandatory on October 1, 2011.

Appendix A to Part 235—Official Board Commentary on Regulation II

Introduction

The following commentary to Regulation II (12 CFR part 235) provides background material to explain the Board's intent in adopting a particular part of the regulation. The commentary also provides examples to aid in understanding how a particular requirement is to work.

Section 235.2 Definitions

2(a) Account

1. *Types of accounts.* The term ''account'' includes accounts held by any person, including consumer accounts (*i.e.,* those established primarily for personal, family or household purposes) and business accounts. Therefore, the limitations on interchange transaction fees and the prohibitions on network exclusivity arrangements and routing restrictions apply to all electronic debit transactions, regardless of whether the transaction involves a debit card issued primarily for personal, family, or household purposes or for business purposes. For example, an issuer of a business-purpose debit card is subject to the restrictions on interchange transaction fees and is also prohibited from restricting the number of payment card networks on which an electronic debit transaction may be processed under § 235.7.

2. *Bona fide trusts.* This part does not define the term bona fide trust agreement; therefore, institutions must look to state or other applicable law for interpretation. An account held under a custodial agreement that qualifies as a trust under the Internal Revenue Code, such as an individual retirement account, is considered to be held under a trust agreement for purposes of this part.

3. *Account located in the United States.* This part applies only to electronic debit transactions that are initiated to debit (or credit, for example, in the case of returned goods or cancelled services) an account located in the United States. If a cardholder uses a debit card to debit an account held outside the United States, then the electronic debit transaction is not subject to this part.

2(b) Acquirer

1. *In general.* The term ''acquirer'' includes only the institution that contracts, directly or indirectly, with a merchant to provide settlement for the merchant's electronic debit transactions over a payment card network (referred to as acquiring the merchant's electronic debit transactions). In some acquiring relationships, an institution provides processing services to the merchant and is a licensed member of the payment card network, but does not settle the transactions with the merchant (by crediting the merchant's account) or with the issuer. These institutions are not ''acquirers'' because they do not provide credit to the merchant for the transactions or settle the merchant's transactions with the issuer. These institutions are considered processors and in some circumstances may be considered payment card networks for purposes of this part (*See* §§ 235.2(m), 235.2(o), and commentary thereto).

2(c) Affiliate

1. *Types of entities.* The term ''affiliate'' includes any bank and nonbank affiliates located in the United States or a foreign country.

2. *Other affiliates.* For commentary on whether merchants are affiliated, see comment 2(f)–7.

2(d) Cardholder

1. *Scope.* In the case of debit cards that access funds in transaction, savings, or other similar asset accounts, ''the person to whom a card is issued'' generally will be the named person or persons holding the account. If the account is a business account, multiple employees (or other persons associated with the business) may have debit cards that can access the account. Each employee that has a debit card that can access the account is a cardholder. In the case of a prepaid card, the cardholder generally is either the purchaser of the card or a person to whom the purchaser gave the card, such as a gift recipient.

2(e) Control [Reserved]

2(f) Debit Card

1. *Card, or other payment code or device.* The term ''debit card'' as defined in § 235.2(f) applies to any card, or other payment code or device, even if it is not issued in a physical form. Debit cards include, for example, an account number or code that can be used to access funds in an account to make Internet purchases. Similarly, the term ''debit card'' includes a device with a chip or other embedded mechanism, such as a mobile phone or sticker containing a contactless chip that links the device to funds stored in an account, and enables an account to be debited. The term ''debit card,'' however, does not include a one-time password or other code if such password or code is used for the purposes of authenticating the cardholder and is used in addition to another card, or other payment code or device, rather than as the payment code or device.

2. *Deferred debit cards.* The term ''debit card'' includes a card, or other payment code or device, that is used in connection with deferred debit card arrangements in which transactions are not immediately posted to and funds are not debited from the underlying transaction, savings, or other asset account upon settlement of the transaction. Instead, the funds in the account typically are held and made unavailable for other transactions for a period of time specified in the issuer-cardholder agreement. After the expiration of the time period, the cardholder's account is debited for the value of all transactions made using the card that have been submitted to the issuer for settlement during that time period. For example, under some deferred debit card arrangements, the issuer may debit the consumer's account for all debit card

transactions that occurred during a particular month at the end of the month. Regardless of the time period between the transaction and account posting, a card, or other payment code or device, that is used in connection with a deferred debit arrangement is considered a debit card for purposes of the requirements of this part.

3. *Decoupled debit cards.* Decoupled debit cards are issued by an entity other than the financial institution holding the cardholder's account. In a decoupled debit arrangement, transactions that are authorized by the card issuer settle against the cardholder's account held by an entity other than the issuer, generally via a subsequent ACH debit to that account. The term ''debit card'' includes any card, or other payment code or device, issued or approved for use through a payment card network to debit an account, regardless of whether the issuer holds the account. Therefore, decoupled debit cards are debit cards for purposes of this part.

4. *Hybrid cards.*

i. Some cards, or other payment codes or devices, may have both credit- and debit-like features (''hybrid cards''). For example, these cards may enable a cardholder to access a line of credit, but select certain transactions for immediate repayment (*i.e.,* prior to the end of a billing cycle) via a debit to the cardholder's account, as the term is defined in § 235.2(a), held either with the issuer or at another institution. If a card permits a cardholder to initiate transactions that debit an account or funds underlying a prepaid card, the card is considered a debit card for purposes of this part. Not all transactions initiated by such a hybrid card, however, are electronic debit transactions. Rather, only those transactions that debit an account as defined in this part or funds underlying a prepaid card are electronic debit transactions. If the transaction posts to a line of credit, then the transaction is a credit transaction.

ii. If an issuer conditions the availability of a credit or charge card that permits pre-authorized repayment of some or all transactions on the cardholder maintaining an account at the issuer, such a card is considered a debit card for purposes of this part.

5. *Virtual wallets.* A virtual wallet is a device (*e.g.,* a mobile phone) that stores several different payment codes or devices (''virtual cards'') that access different accounts, funds underlying the card, or lines of credit. At the point of sale, the cardholder may select from the virtual wallet the virtual card he or she wishes to use for payment. The virtual card that the cardholder uses for payment is considered a debit card under this part if the virtual card that initiates a transaction meets the definition of debit card, notwithstanding the fact that other cards in the wallet may not be debit cards.

6. *General-use prepaid card.* The term ''debit card'' includes general-use prepaid cards. See § 235.2(i) and related commentary for information on general-use prepaid cards.

7. *Store cards.* The term ''debit card'' does not include prepaid cards that may be used at a single merchant or affiliated merchants. Two or more merchants are affiliated if they are related by either common ownership or by common corporate control. For purposes of the ''debit card'' definition, franchisees are considered to be under common corporate control if they are subject to a common set of corporate policies or practices under the terms of their franchise licenses.

8. *Checks, drafts, and similar instruments.* The term ''debit card'' does not include a check, draft, or similar paper instrument or a transaction in which the check is used as a source of information to initiate an electronic payment. For example, if an account holder provides a check to buy goods or services and the merchant takes the account number and routing number information from the MICR line at the bottom of a check to initiate an ACH debit transfer from the cardholder's account, the check is not a debit card, and such a transaction is not considered an electronic debit transaction. Likewise, the term ''debit card'' does not include an electronic representation of a check, draft, or similar paper instrument.

9. *ACH transactions.* The term ''debit card'' does not include an account number when it is used by a person to initiate an ACH transaction that debits that person's account. For example, if an account holder buys goods or services over the Internet using an account number and routing number to initiate an ACH debit, the account number is not a debit card, and such a transaction is not considered an electronic debit transaction. However, the use of a card to purchase goods or services that debits the cardholder's account that is settled by means of a subsequent ACH debit initiated by the card issuer to the cardholder's account, as in the case of a decoupled debit card arrangement, involves the use of a debit card for purposes of this part.

2(g) Designated Automated Teller Machine (ATM) Network

1. *Reasonable and convenient access clarified.* Under § 235.2(g)(2), a designated ATM network includes any network of ATMs identified by the issuer that provides reasonable and convenient access to the issuer's cardholders. Whether a network provides reasonable and convenient access depends on the facts and circumstances, including the distance between ATMs in the designated network and each cardholder's last known home or work address, or if a home or work address is not known, where the card was first issued.

2(h) Electronic Debit Transaction

1. *Debit an account.* The term ''electronic debit transaction'' includes the use of a card to debit an account. The account debited could be, for example, the cardholder's asset account or the account that holds the funds used to settle prepaid card transactions.

2. *Form of payment.* The term ''electronic debit transaction'' includes the use of a card as a form of payment that may be made in exchange for goods or services, as a charitable contribution, to satisfy an obligation (*e.g.,* tax liability), or for other purposes.

3. *Subsequent transactions.* The term ''electronic debit transaction'' includes both the cardholder's use of a debit card for the initial payment and any subsequent use by the cardholder of the debit card in connection with the initial payment. For example, the term ''electronic debit transaction'' includes using the debit card to return merchandise or cancel a service that then results in a debit to the merchant's account and a credit to the cardholder's account.

4. *Cash withdrawal at the point of sale.* The term ''electronic debit transaction'' includes a transaction in which a cardholder uses the debit card both to make a purchase and to withdraw cash (known as a ''cash-back transaction'').

5. *Geographic limitation.* This regulation applies only to electronic debit transactions that are initiated at a merchant located in the United States. If a cardholder uses a debit card at a merchant located outside the United States to debit an account held in the United States, the electronic debit transaction is not subject to this part.

2(i) General-Use Prepaid Card

1. *Redeemable upon presentation at multiple, unaffiliated merchants.* A prepaid card is redeemable upon presentation at multiple, unaffiliated merchants if such merchants agree to honor the card.

2. *Selective authorization cards.* Selective authorization cards, (*e.g.,* mall cards) are generally intended to be used or redeemed for goods or services at participating retailers within a shopping mall or other limited geographic area. Selective authorization cards are considered general-use prepaid cards, regardless of whether they carry the mark, logo, or brand of a payment card network, if they are redeemable at multiple, unaffiliated merchants.

2(j) Interchange Transaction fee

1. *In general.* Generally, the payment card network is the entity that establishes and charges the interchange transaction fee to the acquirers or merchants. The acquirers then pay to the issuers any interchange transaction fee established and charged by the network. Acquirers typically pass the interchange transaction fee through to merchant-customers.

2. *Compensating an issuer.* The term ''interchange transaction fee'' is limited to those fees that a payment card network establishes, charges, or receives to compensate the issuer for its role in the electronic debit transaction. By contrast, payment card networks generally charge issuers and acquirers fees for services the network performs. Such fees are not interchange transaction fees because the payment card network is charging and receiving the fee as compensation for services it provides.

3. *Established, charged, or received.* Interchange transaction fees are not limited to those fees for which a payment card network sets the value. A fee that compensates an issuer is an interchange transaction fee if the fee is set by the issuer but charged to acquirers by virtue of the network determining each participant's net settlement position.

2(k) Issuer

1. *In general.* A person issues a debit card by authorizing the use of debit card by a

cardholder to perform electronic debit transactions. That person may provide the card directly to the cardholder or indirectly by using a third party (such as a processor, or a telephone network or manufacturer) to provide the card, or other payment code or device, to the cardholder. The following examples illustrate the entity that is the issuer under various card program arrangements. For purposes of determining whether an issuer is exempted under § 235.5(a), however, the term issuer is limited to the entity that holds the account being debited.

2. *Traditional debit card arrangements.* In a traditional debit card arrangement, the bank or other entity holds the cardholder's funds and authorizes the cardholder to use the debit card to access those funds through electronic debit transactions, and the cardholder receives the card directly or indirectly (*e.g.,* through an agent) from the bank or other entity that holds the funds (except for decoupled debit cards, discussed below). In this system, the bank or entity holding the cardholder's funds is the issuer.

3. *BIN-sponsor arrangements.* Payment card networks assign Bank Identification Numbers (BINs) to member-institutions for purposes of issuing cards, authorizing, clearing, settling, and other processes. In exchange for a fee or other financial considerations, some members of payment card networks permit other entities to issue debit cards using the member's BIN. The entity permitting the use of its BIN is referred to as the ''BIN sponsor'' and the entity that uses the BIN to issue cards is often referred to as the ''affiliate member.'' BIN sponsor arrangements can follow at least two different models:

i. *Sponsored debit card model.* In some cases, a community bank or credit union may provide debit cards to its account holders through a BIN sponsor arrangement with a member institution. In general, the bank or credit union will authorize its account holders to use debit cards to perform electronic debit transactions that access funds in accounts at the bank or credit union. The bank or credit union's name typically will appear on the debit card. The bank or credit union may directly or indirectly provide the cards to cardholders. Under these circumstances, the bank or credit union is the issuer for purposes of this part. If that bank or credit union, together with its affiliates, has assets of less than $10 billion, then that bank or credit union is exempt from the interchange transaction fee restrictions. Although the bank or credit union may distribute cards through the BIN sponsors, the BIN sponsor does not enter into the agreement with the cardholder that authorizes the cardholder to use the card to perform electronic debit transactions that access funds in the account at the bank or credit union, and therefore the BIN sponsor is not the issuer.

ii. *Prepaid card model.* A member institution may also serve as the BIN sponsor for a prepaid card program. Under these arrangements, a program manager distributes prepaid cards to the cardholders and the BIN-sponsoring institution generally holds the funds for the prepaid card program in an omnibus or pooled account. Either the BIN sponsor or the prepaid card program manager may keep track of the underlying funds for each individual prepaid card through subaccounts. While the cardholder may receive the card directly from the program manager or at a retailer, the BIN sponsor authorizes the cardholder to use the card to perform electronic debit transactions that access the funds in the pooled account and the cardholder's relationship generally is with the BIN sponsor. Accordingly, under these circumstances, the BIN sponsor, or the bank holding the pooled account, is the issuer.

4. *Decoupled debit cards.* In the case of decoupled debit cards, an entity other than the bank holding the cardholder's account enters into a relationship with the cardholder authorizing the use of the card to perform electronic debit transactions. The entity authorizing the use of the card to perform electronic debit transaction typically arranges for the card to be provided directly or indirectly to the cardholder and has a direct relationship with the cardholder with respect to the card. The bank holding the cardholder's account has agreed generally to permit ACH debits to the account, but has not authorized the use of the debit card to access the funds through electronic debit transactions. Under these circumstances, the entity authorizing the use of the debit card, and not the account-holding institution, is considered the issuer. An issuer of a decoupled debit card is not exempt under § 235.5(a), even if, together with its affiliates, it has assets of less than $10 billion, because it is not the entity holding the account to be debited.

2(l) Merchant [Reserved]

2(m) Payment Card Network

1. *In general.* An entity is a considered a payment card network with respect to an electronic debit transaction for purposes of this rule if it routes information and data to the issuer from the acquirer to conduct authorization, clearance, and settlement of the electronic debit transaction. By contrast, if an entity receives transaction information and data from a merchant and authorizes and settles the transaction without routing the information and data to another entity (*i.e.,* the issuer or the issuer's processor) for authorization, clearance, or settlement, that entity is not considered a payment card network with respect to the electronic debit transaction.

2. *Three-party systems.* In the case of a three-party system, electronic debit transactions are processed by an entity that acts as system operator and issuer, and may also act as the acquirer. The entity acting as system operator and issuer that receives the transaction information from the merchant or acquirer also holds the cardholder's funds. Therefore, rather than directing the transaction information to a separate issuer, the entity authorizes and settles the transaction based on the information received from the merchant. As these entities do not connect (or ''network'') multiple issuers and do not route information to conduct the transaction, they are not ''payment card networks'' with respect to these transactions.

3. *Processors as payment card networks.* A processor is considered a payment card network if, in addition to acting as processor for an acquirer and issuer, the processor routes transaction information and data received from a merchant or the merchant's acquirer to an issuer. For example, if a merchant uses a processor in order to accept any, some, or all brands of debit cards and the processor routes transaction information and data to the issuer or issuer's processor, the merchant's processor is considered a payment card network with respect to the electronic debit transaction. If the processor establishes, charges, or receives a fee for the purpose of compensating an issuer, that fee is considered an interchange transaction fee for purposes of this part.

4. *Automated clearing house (ACH) operators.* An ACH operator is not considered a payment card network for purposes of this part. While an ACH operator processes transactions that debit an account and provides for interbank clearing and settlement of such transactions, a person does not use the ACH system to accept as a form of payment a brand of debit card.

5. *ATM networks.* An ATM network is not considered a payment card network for purposes of this part. While ATM networks process transactions that debit an account and provide for interbank clearing and settlement of such transactions, a cash withdrawal from an ATM is not a payment because there is no exchange of money for goods or services, or payment made as a charitable contribution, to satisfy an obligation (*e.g.,* tax liability), or for other purposes.

2(n) Person [Reserved]

2(o) Processor

1. *Distinction from acquirers.* A processor may perform all transaction-processing functions for a merchant or acquirer, but if it does not acquire (that is, settle with the merchant for the transactions), it is not an acquirer. The entity that acquirers electronic debit transactions is the entity that is responsible to other parties to the electronic debit transaction for the amount of the transaction.

2. *Issuers.* A processor may perform services related to authorization, clearance, and settlement of transactions for an issuer without being considered to be an issuer for purposes of this part.

2(p) Route

1. An entity routes information if it both directs and sends the information to an unaffiliated entity (or affiliated entity acting on behalf of the unaffiliated entity). This other entity may be a payment card network or processor (if the entity directing and sending the information is a merchant or an acquirer) or an issuer or processor (if the entity directing and sending the information is a payment card network).

2(q) United States [Reserved]

Section 235.3 Reasonable and Proportional Interchange Transaction Fees

3(a) [Reserved]

3(b) Determining Reasonable and Proportional Fees

1. *Two components.* The standard for the maximum permissible interchange transaction fee that an issuer may receive consists of two components: a base component that does not vary with a transaction's value and an *ad valorem* component. The amount of any interchange transaction fee received or charged by an issuer may not exceed the sum of the maximum permissible amounts of each component and any fraud-prevention adjustment the issuer is permitted to receive under § 235.4 of this part.

2. *Variation in interchange fees.* An issuer is permitted to charge or receive, and a network is permitted to establish, interchange transaction fees that vary in their base component and *ad valorem* component based on, for example, the type of transaction or merchant, provided the amount of any interchange transaction fee for any transaction does not exceed the sum of the maximum permissible base component of 21 cents and 5 basis points of the value of the transaction.

3. *Example.* For a $39 transaction, the maximum permissible interchange transaction fee is 22.95 cents (21 cents plus 5 basis points of $39). A payment card network may, for example, establish an interchange transaction fee of 22 cents without any *ad valorem* component.

Section 235.4 [Reserved]

Section 235.5 Exemptions for Certain Electronic Debit Transactions

1. *Eligibility for multiple exemptions.* An electronic debit transaction may qualify for one or more exemptions. For example, a debit card that has been provided to a person pursuant to a Federal, State, or local government-administered payment program may be issued by an entity that, together with its affiliates, has assets of less than $10 billion as of the end of the preceding calendar year. In this case, an electronic debit transaction made using that card may qualify for the exemption under § 235.5(a) for small issuers or for the exemption under § 235.5(b) for government-administered payment programs. A payment card network establishing interchange fees for transactions that qualify for more than one exemption need only satisfy itself that the issuer's transactions qualify for at least one of the exemptions in order to exempt the electronic debit transaction from the interchange fee restrictions.

2. *Certification process.* Payment card networks that plan to allow issuers to receive higher interchange fees than permitted under §§ 235.3 and 235.4 pursuant to one of the exemptions in § 235.5 could develop their own processes for identifying issuers and products eligible for such exemptions. Section 235.5(a)(2) permits payment card networks to rely on lists published by the Board to help determine eligibility for the small issuer exemption set forth in § 235.5(a)(1).

5(a) Exemption for Small Issuers

1. *Asset size determination.* An issuer would qualify for the small-issuer exemption if its total worldwide banking and nonbanking assets, including assets of affiliates, other than trust assets under management, are less than $10 billion, as of December 31 of the preceding calendar year.

2. *Change in status.* If an exempt issuer becomes covered based on its and its affiliates assets at the end of a calendar year, that issuer must begin complying with the interchange fee standards (§ 235.3), the fraud-prevention adjustment standards (to the extent the issuer wishes to receive a fraud-prevention adjustment) (§ 235.4), and the provisions prohibiting circumvention, evasion, and net compensation (§ 235.6) no later than July 1.

5(b) Exemption for Government-Administered Payment Programs

1. *Government-administered payment program.* A program is considered government-administered regardless of whether a Federal, State, or local government agency operates the program or outsources some or all functions to third parties so long as the program is operated on behalf of the government agency. In addition, a program may be government-administered even if a Federal, State, or local government agency is not the source of funds for the program it administers. For example, child support programs are government-administered programs even though a Federal, State, or local government agency is not the source of funds. A tribal government is considered a local government for purposes of this exemption.

5(c) Exemption for Certain Reloadable Prepaid Cards

1. *Subaccount clarified.* A subaccount is an account within an account, opened in the name of an agent, nominee, or custodian for the benefit of two or more cardholders, where the transactions and balances of individual cardholders are tracked in such subaccounts. An account that is opened solely in the name of a single cardholder is not a subaccount.

2. *Reloadable.* A general-use prepaid card is ''reloadable'' if the terms and conditions of the agreement permit funds to be added to the general-use prepaid card at any time after the initial purchase or issuance. A general-use prepaid card is not ''reloadable'' merely because the issuer or processor is technically able to add functionality that would otherwise enable the general-use prepaid card to be reloaded.

3. *Marketed or labeled as a gift card or gift certificate.* i. Electronic debit transactions made using a reloadable general-use prepaid card are not exempt from the interchange fee restrictions if the card is marketed or labeled as a gift card or gift certificate. The term ''marketed or labeled as a gift card or gift certificate'' means directly or indirectly offering, advertising or otherwise suggesting the potential use of a general-use prepaid card as a gift for another person. Whether the exclusion applies generally does not depend on the type of entity that makes the promotional message. For example, a card may be marketed or labeled as a gift card or gift certificate if anyone (other than the purchaser of the card), including the issuer, the retailer, the program manager that may distribute the card, or the payment network on which a card is used, promotes the use of the card as a gift card or gift certificate. A general-use prepaid card is marketed or labeled as a gift card or gift certificate even if it is only occasionally marketed as a gift card or gift certificate. For example, a network-branded general purpose reloadable card would be marketed or labeled as a gift card or gift certificate if the issuer principally advertises the card as a less costly alternative to a bank account but promotes the card in a television, radio, newspaper, or Internet advertisement, or on signage as ''the perfect gift'' during the holiday season.

ii. The mere mention of the availability of gift cards or gift certificates in an advertisement or on a sign that also indicates the availability of exempted general-use prepaid cards does not by itself cause the general-use prepaid card to be marketed as a gift card or a gift certificate. For example, the posting of a sign in a store that refers to the availability of gift cards does not by itself constitute the marketing of otherwise exempted general-use prepaid cards that may also be sold in the store along with gift cards or gift certificates, provided that a person acting reasonably under the circumstances would not be led to believe that the sign applies to all cards sold in the store. (*See, however,* comment 5(c)–4.ii.)

4. *Examples of marketed or labeled as a gift card or gift certificate.*

i. The following are examples of marketed or labeled as a gift card or gift certificate:

A. Using the word ''gift'' or ''present'' on a card or accompanying material, including documentation, packaging and promotional displays;

B. Representing or suggesting that a card can be given to another person, for example, as a ''token of appreciation'' or a ''stocking stuffer,'' or displaying a congratulatory message on the card or accompanying material;

C. Incorporating gift-giving or celebratory imagery or motifs, such as a bow, ribbon, wrapped present, candle, or a holiday or congratulatory message, on a card, accompanying documentation, or promotional material;

ii. The term does not include the following:

A. Representing that a card can be used as a substitute for a checking, savings, or deposit account;

B. Representing that a card can be used to pay for a consumer's health-related expenses—for example, a card tied to a health savings account;

C. Representing that a card can be used as a substitute for travelers checks or cash;

D. Representing that a card can be used as a budgetary tool, for example, by teenagers, or to cover emergency expenses.

5. *Reasonable policies and procedures to avoid marketing as a gift card.* The exemption for a general-use prepaid card that is reloadable and not marketed or labeled as a gift card or gift certificate in § 235.5(c) applies if a reloadable general-use prepaid

card is not marketed or labeled as a gift card or gift certificate and if persons involved in the distribution or sale of the card, including issuers, program managers, and retailers, maintain policies and procedures reasonably designed to avoid such marketing. Such policies and procedures may include contractual provisions prohibiting a reloadable general-use prepaid card from being marketed or labeled as a gift card or gift certificate, merchandising guidelines or plans regarding how the product must be displayed in a retail outlet, and controls to regularly monitor or otherwise verify that the general-use prepaid card is not being marketed as a gift card. Whether a general-use prepaid card has been marketed as a gift card or gift certificate will depend on the facts and circumstances, including whether a reasonable person would be led to believe that the general-use prepaid card is a gift card or gift certificate. The following examples illustrate the application of § 235.5(c):

i. An issuer or program manager of prepaid cards agrees to sell general-purpose reloadable cards through a retailer. The contract between the issuer or program manager and the retailer establishes the terms and conditions under which the cards may be sold and marketed at the retailer. The terms and conditions prohibit the general-purpose reloadable cards from being marketed as a gift card or gift certificate, and require policies and procedures to regularly monitor or otherwise verify that the cards are not being marketed as such. The issuer or program manager sets up one promotional display at the retailer for gift cards and another physically separated display for exempted products under § 235.5(c), including general-purpose reloadable cards, such that a reasonable person would not believe that the exempted cards are gift cards. The exemption in § 235.5(c) applies because policies and procedures reasonably designed to avoid the marketing of the general-purpose reloadable cards as gift cards or gift certificates are maintained, even if a retail clerk inadvertently stocks or a consumer inadvertently places a general-purpose reloadable card on the gift card display.

ii. Same facts as in comment 5(c)–5.i, except that the issuer or program manager sets up a single promotional display at the retailer on which a variety of prepaid cards are sold, including store gift cards and general-purpose reloadable cards. A sign stating ''Gift Cards'' appears prominently at the top of the display. The exemption in § 235.5(c) does not apply with respect to the general-purpose reloadable cards because policies and procedures reasonably designed to avoid the marketing of exempted cards as gift cards or gift certificates are not maintained.

iii. Same facts as in comment 5(c)–5.i, except that the issuer or program manager sets up a single promotional multi-sided display at the retailer on which a variety of prepaid card products, including store gift cards and general-purpose reloadable cards are sold. Gift cards are segregated from exempted cards, with gift cards on one side of the display and exempted cards on a different side of a display. Signs of equal prominence at the top of each side of the display clearly differentiate between gift cards and the other types of prepaid cards that are available for sale. The retailer does not use any more conspicuous signage suggesting the general availability of gift cards, such as a large sign stating ''Gift Cards'' at the top of the display or located near the display. The exemption in § 235.5(c) applies because policies and procedures reasonably designed to avoid the marketing of the general-purpose reloadable cards as gift cards or gift certificates are maintained, even if a retail clerk inadvertently stocks or a consumer inadvertently places a general-purpose reloadable card on the gift card display.

iv. Same facts as in comment 5(c)–5.i, except that the retailer sells a variety of prepaid card products, including store gift cards and general-purpose reloadable cards, arranged side-by-side in the same checkout lane. The retailer does not affirmatively indicate or represent that gift cards are available, such as by displaying any signage or other indicia at the checkout lane suggesting the general availability of gift cards. The exemption in § 235.5(c) applies because policies and procedures reasonably designed to avoid marketing the general-purpose reloadable cards as gift cards or gift certificates are maintained.

6. *On-line sales of prepaid cards.* Some web sites may prominently advertise or promote the availability of gift cards or gift certificates in a manner that suggests to a consumer that the web site exclusively sells gift cards or gift certificates. For example, a web site may display a banner advertisement or a graphic on the home page that prominently states ''Gift Cards,'' ''Gift Giving,'' or similar language without mention of other available products, or use a web address that includes only a reference to gift cards or gift certificates in the address. In such a case, a consumer acting reasonably under the circumstances could be led to believe that all prepaid products sold on the web site are gift cards or gift certificates. Under these facts, the web site has marketed all such products as gift cards or gift certificates, and the exemption in § 235.5(c) does not apply to any products sold on the web site.

7. *Temporary non-reloadable cards issued in connection with a general-use reloadable card.* Certain general-purpose prepaid cards that are typically marketed as an account substitute initially may be sold or issued in the form of a temporary non-reloadable card. After the card is purchased, the cardholder is typically required to call the issuer to register the card and to provide identifying information in order to obtain a reloadable replacement card. In most cases, the temporary non-reloadable card can be used for purchases until the replacement reloadable card arrives and is activated by the cardholder. Because the temporary non-reloadable card may only be obtained in connection with the reloadable card, the exemption in § 235.5(c) applies so long as the card is not marketed as a gift card or gift certificate.

5(d) Exception

1. *Additional ATM access.* Some debit cards may be used to withdraw cash from ATMs that are not part of the issuer's designated ATM network. An electronic debit card transaction may still qualify for the exemption under §§ 235.5(b) or (c) with a respect to a card for which a fee may be imposed for a withdrawal from an ATM that is outside of the issuer's designated ATM network as long as the card complies with the condition set forth in § 235.5(d)(2) for withdrawals within the issuer's designated ATM network. The condition with respect to ATM fees does not apply to cards that do not provide ATM access.

Section 235.6 Prohibition on Circumvention, Evasion, and Net Compensation

1. *No applicability to exempt issuers or electronic debit transactions.* The prohibition against circumventing or evading the interchange transaction fee restrictions or against net compensation does not apply to issuers or electronic debit transactions that qualify for an exemption under § 235.5 from the interchange transaction fee restrictions.

6(a) Prohibition of Circumvention or Evasion

1. *Finding of circumvention or evasion.* A finding of evasion or circumvention will depend on all relevant facts and circumstances. Although net compensation may be one form of circumvention or evasion prohibited under § 235.6(a), it is not the only form.

2. *Examples of circumstances that may constitute circumvention or evasion.*

The following examples do not constitute per se circumvention or evasion, but may warrant additional supervisory scrutiny to determine whether the totality of the facts and circumstances constitute circumvention or evasion:

i. A payment card network decreases network processing fees paid by issuers for electronic debit transactions by 50 percent and increases the network processing fees charged to merchants or acquirers with respect to electronic debit transactions by a similar amount. Because the requirements of this subpart do not restrict or otherwise establish the amount of fees that a network may charge for its services, the increase in network fees charged to merchants or acquirers and decrease in fees charged to issuers is not a per se circumvention or evasion of the interchange transaction fee standards, but may warrant additional supervisory scrutiny to determine whether the facts and circumstances constitute circumvention or evasion.

ii. An issuer replaces its debit cards with prepaid cards that are exempt from the interchange limits of §§ 235.3 and 235.4. The exempt prepaid cards are linked to its customers' transaction accounts and funds are swept from the transaction accounts to the prepaid accounts as needed to cover transactions made. Again, this arrangement is not per se circumvention or evasion, but may warrant additional supervisory scrutiny to determine whether the facts and circumstances constitute circumvention or evasion.

6(b) Prohibition of Net Compensation

1. *Net compensation.* Net compensation to an issuer through the use of network fees is prohibited.

2. *Consideration of payments or incentives provided by the network in net compensation determination.*

i. For purposes of the net compensation determination, payments or incentives paid by a payment card network to an issuer with respect to electronic debit transactions or debit card related activities could include, but are not limited to, marketing incentives; payments or rebates for meeting or exceeding a specific transaction volume, percentage share, or dollar amount of transactions processed; or other payments for debit card related activities. For example, signing bonuses paid by a network to an issuer for the issuer's debit card portfolio would also be included in the total amount of payments or incentives received by an issuer from a payment card network with respect to electronic debit transactions. A signing bonus for an entire card portfolio, including credit cards, may be allocated to the issuer's debit card business based on the proportion of the cards or transactions that are debit cards or electronic debit transactions, as appropriate to the situation, for purposes of the net compensation determination.

ii. Incentives paid by the network with respect to multiple-year contracts may be allocated over the life of the contract.

iii. For purposes of the net compensation determination, payments or incentives paid by a payment card network with respect to electronic debit transactions or debit card-related activities do not include interchange transaction fees that are passed through to the issuer by the network, or discounts or rebates provided by the network or an affiliate of the network for issuer-processor services. In addition, funds received by an issuer from a payment card network as a result of chargebacks, fines paid by merchants or acquirers for violations of network rules, or settlements or recoveries from merchants or acquirers to offset the costs of fraudulent transactions or a data security breach do not constitute incentives or payments made by a payment card network.

3. *Consideration of fees paid by an issuer in net compensation determination.*

i. For purposes of the net compensation determination, fees paid by an issuer to a payment card network with respect to electronic debit transactions or debit card related activities include, but are not limited to, membership or licensing fees, network administration fees, and fees for optional network services, such as risk management services.

ii. For purposes of the net compensation determination, fees paid by an issuer to a payment card network with respect to electronic debit transactions or debit card-related activities do not include network processing fees (such as switch fees and network connectivity fees) or fees paid to an issuer processor affiliated with the network for authorizing, clearing, or settling an electronic debit transaction.

4. *Example of circumstances not involving net compensation to the issuer.* The following example illustrates circumstances that would not indicate net compensation by the payment card network to the issuer:

i. Because of an increase in debit card transactions that are processed through a payment card network during a calendar year, an issuer receives an additional volume-based incentive payment from the network for that period. Over the same period, however, the total network fees (other than processing fees) the issuer pays the payment card network with respect to debit card transactions also increase so that the total amount of fees paid by the issuer to the network continue to exceed incentive payments by the network to the issuer. Under these circumstances, the issuer does not receive net compensation from the network for electronic debit transactions or debit card related activities.

Section 235.7 Limitations on Payment Card Restrictions

1. *Application of small issuer, government-administered payment program, and reloadable card exemptions to payment card network restrictions.* The exemptions under § 235.5 for small issuers, cards issued pursuant to government-administered payment programs, and certain reloadable prepaid cards do not apply to the limitations on payment card network restrictions. For example, debit cards for government-administered payment programs, although exempt from the restrictions on interchange transaction fees, are subject to the requirement that electronic debit transactions made using such cards must be capable of being processed on at least two unaffiliated payment card networks and to the prohibition on inhibiting a merchant's ability to determine the routing for electronic debit transactions.

7(a) Prohibition on Network Exclusivity

1. *Scope of restriction.* Section 235.7(a) requires a debit card subject to the regulation to be enabled on at least two unaffiliated payment card networks. This paragraph does not, however, require an issuer to have two or more unaffiliated networks available for each method of cardholder authentication. For example, it is sufficient for an issuer to issue a debit card that operates on one signature-based card network and on one PIN-based card network, as long as the two card networks are not affiliated. Alternatively, an issuer may issue a debit card that is accepted on two unaffiliated signature-based card networks or on two unaffiliated PIN-based card networks. *See also,* comment 7(a)–7.

2. *Permitted networks.* i. A smaller payment card network could be used to help satisfy the requirement that an issuer enable two unaffiliated networks if the network was willing to expand its coverage in response to increased merchant demand for access to its network and it meets the other requirements for a permitted arrangement, including taking steps reasonably designed to enable it to process the electronic debit transactions that it would reasonably expect to be routed to it. If, however, the network's policy or practice is to limit such expansion, it would not qualify as one of the two unaffiliated networks.

ii. A payment card network that is accepted only at a limited category of merchants (such as a particular grocery store chain, merchants located in a particular shopping mall, or a single class of merchants, such as grocery stores or gas stations) would not satisfy the rule.

iii. One of the steps a network can take to form a reasonable expectation of transaction volume is to consider factors such as the number of cards expected to be issued that are enabled on the network and expected card usage patterns.

3. *Examples of prohibited network restrictions on an issuer's ability to contract.* The following are examples of prohibited network restrictions on an issuer's ability to contract with other payment card networks:

i. Network rules or contract provisions limiting or otherwise restricting the other payment card networks that may be enabled on a particular debit card, or network rules or contract provisions that specify the other networks that may be enabled on a particular debit card.

ii. Network rules or guidelines that allow only that network's (or its affiliated network's) brand, mark, or logo to be displayed on a particular debit card, or that otherwise limit the ability of brands, marks, or logos of other payment card networks to appear on the debit card.

4. *Network logos or symbols on card not required.* Section 235.7(a) does not require that a debit card display the brand, mark, or logo of each payment card network over which an electronic debit transaction may be processed. For example, this rule does not require a debit card that is enabled for two or more unaffiliated payment card networks to bear the brand, mark, or logo for each card network.

5. *Voluntary exclusivity arrangements prohibited.* Section 235.7(a) requires the issuance of debit cards that are enabled on at least two unaffiliated payment card networks, even if the issuer is not subject to any rule of, or contract or other agreement with, a payment card network requiring that all or a specified minimum percentage of electronic debit transactions be processed on the network or its affiliated networks.

6. *Affiliated payment card networks.* Section 235.7(a) does not prohibit an issuer from including an affiliated payment card network among the networks that may process an electronic debit transaction with respect to a particular debit card, as long as at least two of the networks that are enabled on the card are unaffiliated. For example, an issuer may offer debit cards that are accepted on a payment card network for signature debit transactions and on an affiliated payment card network for PIN debit transactions as long as those debit cards may also be accepted on another unaffiliated payment card network.

7. *Application of rule regardless of form factor.* The network exclusivity provisions in § 235.7(a) require that all debit cards be enabled on at least two unaffiliated payment card networks for electronic debit transactions, regardless of whether the debit card is issued in card form. This applies to any supplemental device, such as a fob or token, or chip or application in a mobile

phone, that is issued in connection with a plastic card, even if that plastic card fully complies with the rule.

7(b) Prohibition on Routing Restrictions

1. *Relationship to the network exclusivity restrictions.* An issuer or payment card network is prohibited from inhibiting a merchant's ability to route or direct an electronic debit transaction over any of the payment card networks that the issuer has enabled to process an electronic debit transaction for that particular debit card. This rule does not permit a merchant to route the transaction over a network that the issuer did not enable to process transactions using that debit card.

2. *Examples of prohibited merchant restrictions.* The following are examples of issuer or network practices that would inhibit a merchant's ability to direct the routing of an electronic debit transaction that are prohibited under § 235.7(b):

i. Prohibiting a merchant from encouraging or discouraging a cardholder's use of a particular method of debit card authorization, such as rules prohibiting merchants from favoring a cardholder's use of PIN debit over signature debit, or from discouraging the cardholder's use of signature debit.

ii. Establishing network rules or designating issuer priorities directing the processing of an electronic debit transaction on a specified payment card network or its affiliated networks, or directing the processing of the transaction away from a specified network or its affiliates, except as a default rule in the event the merchant, or its acquirer or processor, does not designate a routing preference, or if required by state law.

iii. Requiring a specific payment card network based on the type of access device provided to the cardholder by the issuer.

3. *Merchant payments not prohibited.* A payment card network does not restrict a merchant's ability to route transactions over available payment card networks in violation of § 235.7(b) by offering payments or other incentives to encourage the merchant to route electronic debit card transactions to the network for processing.

4. *Real-time routing decision not required.* A merchant need not make network routing decisions on a transaction-by-transaction basis. A merchant and its acquirer or processor may agree to a pre-determined set of routing choices that apply to all electronic debit transactions that are processed by the acquirer or processor on behalf of the merchant.

5. *No effect on network rules governing the routing of subsequent transactions.* Section 235.7 does not supersede a network rule that requires a chargeback or return of an electronic debit transaction to be processed on the same network that processed the original transaction.

7(c) Effective Date

1. *Health care and employee benefit cards.* Section 235.7(c)(1) delays the effective date of the network exclusivity provisions for certain debit cards issued in connection with a health care or employee benefit account to the extent such cards use (even if not required) transaction substantiation or qualification authorization systems at point of sale to verify that the card is only used for eligible goods and services for purposes of qualifying for favorable tax treatment under Internal Revenue Code requirements. Debit cards that may qualify for the delayed effective date include, but may not be limited to, cards issued in connection with flexible spending accounts established under section 125 of the Internal Revenue Code for health care related expenses and health reimbursement accounts established under section 105 of the Internal Revenue Code.

Section 235.8 Reporting Requirements and Record Retention

[Reserved]

Section 235.9 Administrative Enforcement

[Reserved]

Section 235.10 Effective and Compliance Dates

[Reserved]

By order of the Board of Governors of the Federal Reserve System, June 30, 2011.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. 2011–16861 Filed 7–19–11; 8:45 am]

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Part III

Federal Reserve System

12 CFR Part 235
Debit Card Interchange Fees and Routing; Interim Final Rule

FEDERAL RESERVE SYSTEM

12 CFR Part 235

[Regulation II; Docket No. R–1404]

RIN 7100–AD 63

Debit Card Interchange Fees and Routing

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Interim final rule; request for public comment.

SUMMARY: The Board is adopting an interim final rule and requesting comment on provisions in Regulation II (Debit Card Interchange Fees and Routing) adopted in accordance with Section 920(a)(5) of the Electronic Fund Transfer Act, which governs adjustments to debit interchange transaction fees for fraud-prevention costs. The provisions allow an issuer to receive an adjustment of 1 cent to its interchange transaction fee if the issuer develops, implements, and updates policies and procedures reasonably designed to identify and prevent fraudulent electronic debit transactions; monitor the incidence of, reimbursements received for, and losses incurred from fraudulent electronic debit transactions; respond appropriately to suspicious electronic debit transactions so as to limit the fraud losses that may occur and prevent the occurrence of future fraudulent electronic debit transactions; and secure debit card and cardholder data. If an issuer meets these standards and wishes to receive the adjustment, it must certify its eligibility to receive the fraud-prevention adjustment to the payment card networks in which the issuer participates.

DATES: The interim final rule is effective October 1, 2011.

Comment Period: Comments must be submitted by September 30, 2011.

ADDRESSES: You may submit comments, identified by Docket No. R–1404 and RIN No. 7100 AD 63, by any of the following methods:

Agency Web Site: http://www.federalreserve.gov. Follow the instructions for submitting comments at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm.*

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

E-mail: regs.comments@federalreserve.gov. Include the docket number in the subject line of the message.

Fax: (202) 452–3819 or (202) 452–3102.

Mail: Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551.

You must use only one method when submitting comments. All public comments are available from the Board's Web site at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm* as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information.

Public comments may also be viewed electronically or in paper in Room MP–500 of the Board's Martin Building (20th and C Streets, NW.) between 9 a.m. and 5 p.m. on weekdays.

FOR FURTHER INFORMATION CONTACT: Dena Milligan, Attorney (202/452–3900), Legal Division, David Mills, Manager and Economist (202/530–6265), Division of Reserve Bank Operations & Payment Systems; for users of Telecommunications Device for the Deaf (TDD) only, contact (202/263–4869); Board of Governors of the Federal Reserve System, 20th and C Streets, NW., Washington, DC 20551.

SUPPLEMENTARY INFORMATION

I. Section 920 of the Electronic Fund Transfer Act

The Dodd-Frank Wall Street Reform and Consumer Protection Act (the ''Dodd-Frank Act'') (Pub. L. 111–203, 124 Stat. 1376 (2010)) was enacted on July 21, 2010. Section 1075 of the Dodd-Frank Act amends the Electronic Fund Transfer Act (''EFTA'') (15 U.S.C. 1693 *et seq.*) by adding a new Section 920 regarding interchange transaction fees and rules for payment card transactions.

Section 920 of the EFTA provides that, effective July 21, 2011, the amount of any interchange transaction fee that an issuer receives or charges with respect to an electronic debit transaction must be reasonable and proportional to the cost incurred by the issuer with respect to the transaction. This section requires the Board to establish standards for assessing whether an interchange transaction fee is reasonable and proportional to the cost incurred by the issuer with respect to the transaction. The Board has separately adopted a final rule implementing standards for assessing whether interchange transaction fees meet the requirements of Section 920(a) and establishing rules regarding routing choice and network exclusivity required by Section 920(b).[1]

Under EFTA Section 920(a)(5), the Board may allow for an adjustment to an interchange transaction fee amount received or charged by an issuer if (1) Such adjustment is reasonably necessary to make allowance for costs incurred by the issuer in preventing fraud in relation to electronic debit card transactions involving that issuer, and (2) the issuer complies with fraud-prevention standards established by the Board. Those standards must be designed to ensure that any adjustment is limited to the reasonably necessary fraud-prevention allowance described in clause (1) Above; takes into account any fraud-related reimbursements received from consumers, merchants, or payment card networks (including amounts from chargebacks) in relation to electronic debit transactions involving the issuer; and requires issuers to take effective steps to reduce the occurrence of, and costs from, fraud in relation to electronic debit transactions, including through the development and implementation of cost-effective fraud-prevention technology.[2]

In issuing the standards and prescribing regulations for the adjustment, the Board must consider (1) The nature, type, and occurrence of fraud in electronic debit transactions; (2) the extent to which the occurrence of fraud depends on whether the authentication in an electronic debit transaction is based on a signature, personal identification number (PIN), or other means; (3) the available and economical means by which fraud on electronic debit transactions may be reduced; (4) the fraud-prevention and data-security costs expended by each party involved in the electronic debit transactions (including consumers, persons who accept debit cards as a form of payment, financial institutions, retailers, and payment card networks); (5) the costs of fraudulent transactions absorbed by each party involved in such transactions (including consumers, persons who accept debit cards as a form of payment, financial institutions, retailers, and payment card networks); (6) the extent to which interchange transaction fees have in the past reduced or increased incentives for

[1] Regulation II (published elsewhere in the **Federal Register**), defines an interchange transaction fee (or ''interchange fee'') to mean any fee established, charged, or received by a payment card network and paid by a merchant or acquirer for the purpose of compensating an issuer for its involvement in an electronic debit transaction.

[2] Regulation II defines electronic debit transaction (or ''debit card transaction'') to mean the use of a debit card (which includes a general-use prepaid card), by a person as a form of payment in the United States to initiate a debit to an account. This term does not include transactions initiated at an automated teller machine (ATM), including cash withdrawals and balance transfers initiated at an ATM.

parties involved in electronic debit transactions to reduce fraud on such transactions; and (7) such other factors as the Board considers appropriate.

II. Outreach and Information Collection

Following the enactment of the Dodd-Frank Act, the Board gathered information about fraud-prevention programs in the debit card industry in several ways. Board staff held numerous meetings with debit card issuers, payment card networks, merchant acquirers, merchants, industry trade associations, and consumer groups to discuss these programs. Topics discussed in those meetings included technological innovation in fraud prevention, fraud loss allocation among parties to electronic debit transactions, and fraud risk associated with different types of electronic debit transactions (*e.g.,* signature and PIN debit transactions).

In September 2010, the Board surveyed 131 bank holding companies and other financial institutions that, together with affiliates, have assets of $10 billion or more, and 16 payment card networks. As part of those surveys, the Board gathered information about the nature, type, and occurrence of fraud in electronic debit transactions; the losses due to fraudulent transactions absorbed by parties involved in those transactions; and the fraud-prevention and data-security activities and costs and related research and development costs (herein, collectively, referred to as fraud-prevention activities and costs) incurred by issuers in 2009.[3] From these surveys, the Board was able to estimate industry-wide fraud losses to all parties of a debit card transaction and to perform a more detailed analysis of fraud losses by type of authentication method (*e.g.,* PIN or signature). The survey data also provided an estimate of the loss allocation among parties to the transaction.[4]

III. Proposal

In December 2010, the Board requested comment on proposed Regulation II, Debit Card Interchange Fees and Routing.[5] As part of that proposal, the Board requested comment on two approaches to designing a framework for the fraud-prevention adjustment to the interchange transaction fee: A technology-specific approach and a non-prescriptive approach.[6] The technology-specific approach would allow an issuer to recover some or all of its costs incurred for implementing major innovations that would likely result in substantial reductions in fraud losses. Under this approach, the Board would identify paradigm-shifting technologies that would reduce debit card fraud in a cost-effective manner. The alternative approach would establish a more general standard that an issuer must meet to be eligible to receive an adjustment for fraud-prevention costs.

The Board requested comment on various aspects of these approaches. For example, the Board requested information about the benefits and drawbacks of each approach, possible frameworks to implement the approaches, and the technologies or types of fraud-prevention activities whose costs should be considered under each approach. The Board also asked whether there were additional approaches that should be considered. Given survey data showing a substantially lower incidence of fraud for PIN debit transactions in comparison to signature-debit transactions, the Board also asked whether an adjustment should only be for PIN-based transactions.[7] The Board noted that comments received would be considered in the development of a specific proposal for further public comment.

IV. Overview of Comments and Interim Final Rule

The Board received numerous comments on the fraud-prevention adjustment from issuers, depository institution trade associations, payment card networks, merchants, merchant trade associations, individuals, consumer groups, technology companies, consultants, other government agencies, and members of Congress.

The comments were generally focused on four main topics: (1) Whether the overall framework for the adjustment should be technology-specific or non-prescriptive; (2) what form the fraud-prevention adjustment should take, *i.e.,* should the adjustment be tied to an eligible issuers' costs, perhaps up to a specific cap, or be uniform across eligible issuers; (3) whether the adjustment should apply only to particular authentication methods, such as for PIN-based authentication; and (4) the time frame for the effective date for the fraud-prevention adjustment. These comments are summarized below and are described in more detail in the Section Analysis.

Although there was not agreement on whether to pursue a technology-specific or non-prescriptive approach, commenters generally agreed that the Board should not mandate use of specific technologies. Merchant commenters generally favored the paradigm-shifting approach.[8] These commenters stated that the fraud-prevention adjustment should not cover costs associated with securing technologies that were known to be less effective at preventing fraud than other available technologies.[9]

In contrast, issuer commenters of all sizes and payment card networks preferred the non-prescriptive approach that would allow issuers to have the flexibility to tailor their fraud-prevention activities to address most effectively the risks they faced associated with changing fraud patterns. Issuer commenters also opposed a fraud-prevention adjustment only for particular authentication methods, noting that an adjustment favoring a particular authentication method may not provide sufficient incentives to invest in other potentially more effective authentication methods.

In addition, among all types of commenters, there was a general consensus that the fraud-prevention adjustment should be effective at the same time as the interchange fee

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[3] The surveys also requested information regarding the number of cards and accounts, the number and value of debit card transactions processed, interchange revenue received from networks, various costs associated with processing debit card transactions and operating a card program, and exclusivity arrangements and routing procedures.

[4] The Board reported preliminary survey results in the proposed rule (*See* 75 FR 81740–41, Dec. 28, 2010). Since that time, Board staff has further analyzed the data and addressed a number of minor problems, changing the number of usable responses. Fur example, some issuers provided fraud loss for certain types of fraud but did not report total fraud losses. In those instances, the sum of the reported fraud losses was used as that respondent's total fraud loss. In other instances, issuers misreported total fraud losses in a different field. Those totals were included in subsequent analysis of the data. In addition, prepaid fraud loss and fraud-prevention cost data have been included where appropriate. Therefore, in certain instances, some data reported in the initial proposal have changed. These data are reported separately (*see* ''2009 Interchange Revenue, Covered Issuer Cost, and Covered Issuer and Merchant Fraud Loss Related to Debit Card Transactions'' published on the Board's Web site at *http://www.federalreserve.gov*), and some data are discussed later in this notice.

[5] A final rule addressing other provisions in Regulation II is published elsewhere in the **Federal Register**.

[6] *See* 75 FR 81742–81743 (Dec. 28, 2010).

[7] Survey data shows that signature-debit fraud losses are approximately four times PIN-debit fraud losses.

[8] Merchants proposed a framework where an issuer receives an adjustment only if both the merchant and issuer use an eligible low-fraud technology.

[9] For example, merchant commenters argued that the fraud-prevention adjustment should not include activities aimed at securing signature debit transactions when PIN transactions are known to have lower incidence of fraud and lower average fraud loss per incident.

standard—either on July 21, 2011, or at a later date as suggested by some commenters. Many merchant commenters believed that the Board demonstrated that it had sufficient information to establish a fraud-prevention adjustment by the statutory effective date. Some commenters, particularly issuers and networks, argued that it was important to have the fraud-prevention adjustment in place alongside the rest of the interchange fee standards in order to avoid any gaps in the ability to fund certain fraud-prevention activities.

Under the interim final rule, if an issuer meets standards set forth by the Board, it may receive or charge a fraud-prevention adjustment of no more than 1 cent per transaction to any interchange transaction fee it receives or charges in accordance with § 235.3. To be eligible to receive the fraud-prevention adjustment, an issuer must develop and implement policies and procedures reasonably designed to (1) Identify and prevent fraudulent electronic debit transactions; (2) monitor the incidence of, reimbursements received for, and losses incurred from fraudulent electronic debit transactions; (3) respond appropriately to suspicious electronic debit transactions so as to limit the fraud losses that may occur and prevent the occurrence of future fraudulent electronic debit transactions; and (4) secure debit card and cardholder data. An issuer must review its fraud-prevention policies and procedures at least annually, and update them as necessary to address changes in the prevalence and nature of fraudulent electronic debit transactions and the available methods of detecting, preventing, and mitigating fraud. Finally, the issuer must certify, on an annual basis, its compliance with the Board's standards to the payment card networks in which the issuer participates.[10]

The interim final rule will be effective concurrent with the interchange fee standard on October 1, 2011. Issuers must comply with the Board's fraud-prevention standards by that date in order to receive or charge the fraud-prevention adjustment to the interchange transaction fee on that date. The Board requests comment on all aspects of the interim final rule and will consider these comments in developing the final rule.

V. Section Analysis

Section 235.4 sets forth the circumstances under which an issuer may receive or charge a fraud-prevention adjustment as an amount in addition to the amount permitted as an interchange transaction fee under § 235.3. Section 235.4 also prescribes the maximum amount of such adjustment.

A. Statutory Considerations

EFTA Section 920(a)(5) requires the Board to consider several different factors in prescribing regulations related to the fraud-prevention adjustment. This section discusses each of those factors.

Nature, type, and occurrence of fraud. The Board's survey of debit card issuers and payment card networks provided information about the nature, type, and occurrence of fraud in electronic debit transactions. From the card issuer and network surveys, the Board estimates that industry-wide fraud losses to all parties of debit (including prepaid) card transactions were approximately $1.34 billion in 2009.[11] Based on data provided by covered issuers, about 0.04 percent of purchase transactions were fraudulent, with an average loss per purchase transaction of about 4 cents, or about 9 basis points of transaction value.[12]

The most commonly-reported and highest cost fraud types were counterfeit card fraud, lost and stolen card fraud, and mail, telephone, and Internet order (*i.e.,* card-not-present) fraud.[13] For signature and PIN debit card (including prepaid card) transactions combined, counterfeit card fraud represented 0.01 percent of all purchases transactions with an average loss of 2 cents per transaction and 4 basis points of transaction value. Lost and stolen card fraud was less than 0.01 percent of all purchase transactions with an average loss of 1 cent per transaction and 1 basis point of transaction value. Mail, telephone, and Internet order fraud was 0.01 percent of all purchase transactions with an average loss of 1 cent per transactions and 2 basis points of transaction value.

Extent to which the occurrence of fraud depends on authentication mechanism. The issuer survey data also provided information about the extent to which the occurrence of fraud depends on whether the transaction is authenticated with a signature or a PIN. Of the approximately $1.34 billion estimated industry-wide fraud losses, about $1.11 billion of these losses arose from signature debit card transactions and about $181 million arose from PIN debit card transactions.[14] The higher losses for signature debit card transactions are attributable to both a higher rate of fraud and higher transaction volume for signature debit card transactions. The data showed that about 0.06 percent of signature debit and 0.01 percent of PIN debit purchase transactions were reported as fraudulent. For signature debit, the average loss was 5 cents per transaction, and represented about 13 basis points of transaction value. For PIN debit, the average loss was 1 cent per transaction, and was almost 3 basis points of transaction value. Thus, on a per-dollar basis, signature debit fraud losses are approximately 4 times PIN debit fraud losses.[15]

The different fraud loss rates for signature and PIN transactions reflect, in part, differences in the ease of fraud associated with the two authentication methods. A signature debit card transaction requires information that is typically contained on the card itself in order for card and cardholder authentication to take place. Therefore, a thief only needs to steal information on the card in order to commit fraud.[16] In contrast, a PIN debit card transaction requires not only information contained on the card itself, but also something only the cardholder should know, namely the PIN. In this case, a thief generally needs both the information on the card and the cardholder's PIN to commit fraud.

Virtually all Internet debit card transactions are routed over signature

[10] The interim final rule applies to issuers and cards that are covered under the interchange fee standards. See discussion of the exemptions to the interchange fee standards in § 235.5 of Regulation II, Debit Card Interchange Fee and Routing—Final Rule, published elsewhere in the **Federal Register**.

[11] Industry-wide fraud losses were extrapolated from data reported in the issuer and network surveys conducted by the Board. Of the 89 issuers that responded to the issuer survey, 52 issuers provided data on fraud losses related to their debit (including prepaid) card transactions. These issuers reported $726 million in fraud losses to all parties of card transactions and represented 54 percent of the total transactions reported by networks.

[12] The percent of purchase transactions that are fraudulent is the number of fraudulent transactions divided by the number of purchase transactions. The average loss per purchase transaction is the dollar amount of fraud losses divided by the number of purchase transactions. The average loss per purchase transaction in basis points is the dollar amount of fraud losses divided by the dollar amount of purchase transactions.

[13] Some issuers reported ATM fraud, which was excluded from fraud loss totals because ATM transactions are not defined in the statute or final rule as electronic debit transactions.

[14] The sum of card program fraud losses will not equal the industry-wide fraud losses due to different sample sizes and rounding.

[15] The survey data did not break out prepaid card PIN transactions from prepaid card signature transactions. For all prepaid debit transactions, about 0.03 percent of purchase transactions were fraudulent, the average loss was 1 cent per transaction, and 4 basis points of transaction value.

[16] Among other things, information on the card includes the card number, the cardholder's name, and the cardholder's signature.

debit networks. Card issuers responding to the Board's survey reported that, in signature debit systems, fraud losses for all parties to card-not-present transactions were higher than fraud losses for card-present transactions. On a transactions-weighted average, card-not-present fraud losses represented 17 basis points of the value of card-not-present signature debit transactions. Card-present fraud losses represented 11 basis points of the value of card-present signature debit transactions and were over 3 times greater than the fraud loss value, in basis points, associated with PIN debit card-present transactions.

Available and economical means by which fraud may be reduced. The Board requested information about issuers' fraud-prevention activities and costs in its survey. Issuers identified several categories of activities used to detect, prevent, and mitigate fraudulent electronic debit transactions, including transaction monitoring; merchant blocking; card activation and authentication systems; PIN customization; system and application security measures, such as firewalls and virus protection software; and ongoing research and development focused on making an issuer's fraud-prevention practices more effective.

The median amount spent by issuers on all reported fraud-prevention activities was approximately 1.8 cents per transaction. The most commonly reported fraud-prevention activity was transaction monitoring, which generally includes activities related to the authorization of a particular electronic debit transaction, such as the use of neural networks and automated fraud risk scoring systems that may lead to the denial of a suspicious transaction. At the median, issuers reported spending approximately 0.7 cents per transaction on transactions monitoring activity.[17]

Fraud-prevention costs expended by different parties. All parties to debit card transactions incur fraud-prevention costs. For example, some consumers routinely monitor their accounts for unauthorized debit card purchases; however, consumer costs are difficult to quantify. Some issuers, merchants, and acquirers pay networks, processors, or third-party vendors for fraud-prevention tools such as neural networks and access to databases about compromised cards and accounts. In addition to services they may purchase from others, merchants may develop their own fraud-prevention tools. For example, many large online merchants implement extra security measures to verify the legitimacy of a purchase. Typically these checks occur between the time a card is authorized by the issuer and the product is shipped to the purchaser. In their comments, several online merchants noted that they have developed sophisticated fraud risk management systems that include both manual review and automated processes, which have reduced fraud rates to levels at or below card-present rates at other merchants. In addition to these investments, merchants also take steps to secure data and comply with Payment Card Industry Data Security Standards (PCI–DSS).[18] In their comments, several merchants noted that these compliance costs can be substantial. As discussed more fully elsewhere in this notice, issuers incur costs for a variety of fraud-prevention activities.

Costs of fraudulent transactions absorbed by the different parties. Using the issuer survey data, the Board estimated the cost of fraudulent transactions absorbed by different parties to a debit card transaction. Based on the issuer survey responses, almost all of the reported fraud losses associated with debit card transactions fall on the issuers and merchants.[19] In particular, across all types of transactions, 62 percent of reported fraud losses were borne by issuers and 38 percent were borne by merchants.

The distribution of fraud losses between issuers and merchants depends, in part, on the authentication method used in a debit card transaction. Issuers and payment card networks reported that nearly all the fraud losses associated with PIN debit card transactions (96 percent) were borne by issuers. In contrast, reported fraud losses were distributed much more evenly between issuers and merchants for signature debit card transactions. Specifically, issuers and merchants bore 59 percent and 41 percent of signature debit fraud losses, respectively.[20]

In general, merchants are subject to greater liability for fraud in card-not-present transactions than in card-present transactions. According to the survey data, merchants assume approximately 74 percent of signature debit card fraud for card-not-present transactions, compared to 23 percent for card-present signature debit card fraud.[21]

Extent to which interchange transaction fees have in the past affected fraud-prevention incentives. Issuers have a strong incentive to protect cardholders and reduce fraud independent of interchange fees received. Competition for cardholders suggests that protecting their cardholders from fraud is good business practice for issuers. Higher interchange revenues may have allowed issuers to offset both their fraud losses and fraud-prevention costs and fund innovation on fraud-prevention tools and activities. Merchant commenters argued that, historically, the higher interchange revenue for signature debit relative to PIN debit has encouraged issuers to promote the use of signature debit over PIN debit, even though signature debit has substantially higher rates of fraud.

B. Section 235.4(a) Adjustment Amount

Section 235.4(a) permits an issuer to increase the amount of the interchange transaction fee it may receive or charge under § 235.3 by no more than 1 cent if the issuer complies with the standards in § 235.4(b). Section 235.4(a) does not differentiate the adjustment by authentication method or by type of transaction.[22]

1. Request for Comment and Comments Received

To inform its rulemaking, the Board's December 2010 proposal requested comment on whether the fraud-prevention adjustment should use the same implementation approach as the interchange fee standard; that is, either (1) An issuer-specific adjustment, with a safe harbor and a cap, or (2) a cap regardless of an issuer's costs. In a

[17] Transaction monitoring costs were included in the costs used as the basis for the interchange fee standard rather than the fraud-prevention adjustment. *See* discussion of § 235.4(a) below.

[18] The Payment Card Industry (PCI) Security Standards Council was founded in 2006 by five card networks—Visa, Inc., MasterCard Worldwide, Discover Financial Services, American Express, and JCB International. These card brands share equally in the governance of the organization, which is responsible for development and management of PCI Data Security Standards (PCI–DSS). PCI–DSS is a set of security standards that all payment system participants, including merchants and processors, are required to meet in order to participate in payment card systems.

[19] Most issuers reported that they offer zero or very limited liability to cardholders, in addition to the EFTA limits on consumer liability for unauthorized electronic fund transfers afforded to consumers, such that the fraud loss borne by cardholders is negligible. *See* 15 U.S.C. 1693g and 12 CFR 205.6. Payment card networks and merchant acquirers also reported very limited fraud losses for themselves.

[20] For prepaid card transactions, issuers bore two-thirds and merchants bore one-third of fraud losses.

[21] These percentages may differ from those noted in the Board's proposal (*See* 75 FR 81741, Dec. 28, 2010) because the number of usable survey responses has changed.

[22] For example, an issuer that complies with the fraud-prevention standards would be eligible to receive an interchange fee equal to the sum of the 21 cent base component, the 5 basis point *ad valorem* component, and the 1 cent fraud-prevention adjustment, equaling a total of 22 cents plus 5 basis points of the transaction's value for each electronic debit transaction.

related question, the Board also asked whether the adjustment should apply only to PIN-based transactions, in light of the fact that, as reported above in the statutory considerations section, signature debit fraud losses are approximately four times PIN debit fraud losses on a per-dollar basis.

In considering the implementation approach, many commenters referred to the statutory language that an adjustment should be ''reasonably necessary to make allowance for costs incurred by the issuer in preventing fraud in relation to electronic debit card transactions involving that issuer.'' They pointed to the term ''reasonably necessary'' as their basis for making arguments both for and against a cap on the amount of the adjustment. For example, most merchant commenters argued that it would be reasonably necessary for individual issuers to recover their initial capital costs for certain technologies, up to a cap equal to the cost associated with PIN debit card fraud-prevention activities.[23] They supported a process where issuers offered technologies with fraud loss rates lower than that for PIN debit transactions and merchants could choose whether or not to adopt these technologies. One merchant commenter opposed both a fixed amount and a cap as being counter to fair market price negotiation between the issuers offering technologies and merchants choosing to adopt these technologies. This commenter also argued that allowing recovery up to a cap ignored the statutory language to make allowance for costs ''incurred by the issuer'' and that the relevant cost measure should be an individual issuer's costs.

On the other hand, several issuer, network, and depository institution trade association commenters opposed a cap on the basis that it limited the recovery of costs that could be determined to be reasonably necessary to prevent fraud. Some of these commenters noted that any cap might reduce incentives to invest in innovative fraud-prevention techniques. A few of them supported a safe harbor to reduce compliance and supervisory burden and to encourage effective fraud prevention.

In response to the Board's question regarding whether a fraud-prevention adjustment should be only for PIN debit transactions, merchant commenters highlighted the survey data indicating that signature-debit transactions experience higher average fraud losses than PIN-debit transactions. They expressed a concern that, in the past, interchange fees supported incentives for issuers to promote a less secure form of authentication. Both issuer and merchant commenters acknowledged that some types of sales environments preclude use of PIN authentication. However, merchant commenters asserted that, when signature and PIN methods are available both on the card and at the sales terminal, issuers often encourage cardholders to route the transaction using their signature rather than their PIN so that issuers could receive higher interchange revenue.

A few issuers and networks commented that an adjustment only for PIN-based transactions would limit incentives to invest in potentially more effective authentication methods, such as dynamic data, that might not require a PIN. Some issuers commented that a fraud-prevention adjustment only for PIN debit transactions may limit fraud-prevention investments for non-PIN transactions, making these transactions less secure. According to these commenters, issuers may manage this risk by assessing cardholder fees on non-PIN transactions or by limiting the value allowed per transaction. These practices, asserted some issuers, may reduce sales or increase payment costs, especially for merchants that do not accept PIN debit cards. Merchant commenters, on the other hand, urged the Board to consider an adjustment only for technologies or methods with fraud loss rates lower than the rate for PIN debit card programs. These commenters argued that debit card transactions authorized with a PIN have a much lower fraud loss rate than those authorized with a signature. In particular, merchants did not want issuers to be reimbursed for efforts to better secure an inherently less secure authentication method.

2. Interim Final Rule

Section 920(a)(5) permits the Board to allow an adjustment to the amount of an interchange fee that an issuer may receive if ''such adjustment is reasonably necessary to make allowance for costs incurred by the issuer in preventing fraud in relation to electronic debit transactions involving that issuer.'' Section 920(a)(5) of the EFTA does not specify what amount, or range of amounts, is considered ''reasonably necessary to make allowance for'' an issuer's fraud-prevention costs. The phrasing ''reasonably necessary to make allowance for'' fraud-prevention costs does not require a direct connection between the fraud-prevention adjustment and actual issuer costs; the statute requires only that the adjustment be ''reasonably necessary'' and ''make an allowance for'' fraud-prevention costs. Moreover, the statute does not require the Board to set the adjustment so that each (or any) issuer fully recovers its fraud-prevention costs. Instead, the statute provides for an ''allowance for'' fraud-prevention costs. The Board believes that an amount that makes allowance for an issuer's fraud-prevention costs is one that gives consideration to those costs, and allows a reasonable recovery of those costs based on the considerations in Section 920(a)(5)(B)(ii) described above.[24]

The statute also allows the Board, in setting a fraud-prevention adjustment, to consider such other factors as the Board considers appropriate.[25] As explained below, the Board has considered the fraud-prevention costs of parties to electronic debit transactions, the incentives created by the adjustment, and other factors in setting the adjustment.

The Board considered the fraud-prevention costs incurred by all parties to an electronic debit transaction: Consumers, merchants, payment card networks, processors, and issuers. The Board narrowed its focus to costs expended by merchants and issuers because most fraud-prevention costs are ultimately borne by these parties, and the fraud-prevention adjustment to the interchange transaction fee is effectively paid by merchants to issuers.

The Board recognizes that both merchants and issuers incur costs associated with fraud prevention including, for example, costs to comply with PCI–DSS and network rules related to fraud prevention. In addition, several merchant commenters stated that they, like issuers, have natural incentives to protect customer information and to safeguard their reputations as careful trustees of this information. To maintain these reputations and to reduce their exposure to fraud losses, these commenters noted that they have made substantial investments in fraud-prevention measures, including, as one online merchant noted, analysis of Internet Protocol address, Internet service provider, and device ID information.

For these reasons, the Board has adopted an interim final rule with a fraud-prevention adjustment set at issuer survey respondents' median fraud-prevention costs, minus those

[23] *See* comment from Merchants Payments Coalition.

[24] ''Allow for'' may be defined as ''to give consideration to circumstances or contingencies.'' *Merriam-Webster Dictionary* (''allow'' used with ''for'') (online edition).

[25] *See* EFTA Section 920(a)(5)(B)(ii)(VII).

fraud-prevention costs that are already part of the interchange fee standards.[26] The median issuer's per-transaction fraud-prevention cost as reported in response to the Board's survey is 1.8 cents. In its final rule for the interchange fee standards, the Board has included costs of transaction-monitoring systems that are integral to the authorization of a transaction in its setting of the interchange transaction fee standards. Transaction monitoring systems assist in the authorization process by providing information to the issuer before the issuer decides to approve or decline the transaction. Because these costs are already included for all covered issuers as a basis for establishing the interchange fee standards, they are excluded from the costs used to determine the fraud-prevention adjustment.[27] Issuers were instructed to separately report the costs of each type of fraud-prevention activity to the extent possible, and the median issuer's transactions-monitoring cost is 0.7 cents per transaction. The fraud-prevention adjustment of 1 cent represents the difference between the median fraud-prevention cost of 1.8 cents less the median transactions-monitoring cost of 0.7 cents, rounded to the nearest cent.

The median of the remaining fraud-prevention costs provides some issuers with recovery of all of these costs and other issuers with recovery of some of these costs. The Board believes that the median allowance helps to offset the costs of implementing activities that are effective at reducing fraud losses while placing cost discipline on issuers to ensure that those fraud-prevention activities are also cost effective and recognizing that fraud-prevention costs are incurred by both merchants and issuers. An issuer that meets the Board standards (discussed below) may receive the adjustment, even if its fraud-prevention costs are below the median, and no issuer may receive more than the median, regardless of its fraud-prevention costs.

The Board is concerned that limiting an adjustment to authentication methods available today, or a subset of those methods, may not allow flexibility for issuers to develop other methods of authentication that may be more effective than today's alternatives and may not require a PIN. It may also reduce the incentives for issuers to improve fraud-prevention techniques for systems that, for a variety of reasons, experience higher fraud rates. Further, the interchange fee standards set a maximum permissible interchange fee that an issuer may receive for electronic debit transactions, irrespective of authentication method. Because issuers are less likely to receive a higher interchange fee for signature-based transactions, issuer processing costs for PIN debit transactions are generally less than those for signature debit transactions, and fraud losses are significantly lower for PIN debit transactions than for signature debit transactions, the Board believes that issuers' incentives to encourage cardholders to use their signature rather than their PIN to authenticate transactions at the point of sale will diminish.

For these reasons, the Board has adopted a fraud-prevention adjustment that is the same for each type authentication method.

C. Section 235.4(b)—Adoption of Non-Prescriptive Standards

1. Request for Comment and Comments Received

As discussed above, the Board's proposed rule did not contain a specific proposal for the fraud-prevention adjustment. Instead, the Board requested comment on two general approaches to the adjustment: A technology-specific approach and a non-prescriptive approach. The technology-specific approach was described as allowing issuers to recover some or all of its costs, perhaps up to a cap, incurred for implementing major innovations that would likely result in substantial reductions in fraud losses. As described in the proposed rule, the Board would identify paradigm-shifting technologies that would reduce debit card fraud in a cost-effective manner. The Board noted this approach might help spur adoption of technologies eligible for a fraud-prevention adjustment. At the same time, it might also reduce issuer incentives to invest in more effective and less costly technologies not identified by the Board.

Although neither merchant nor issuer commenters supported the Board mandating specific technologies, merchants and their trade associations preferred the technology-specific approach. Many merchants proposed that issuers be required to make specific technologies available to merchants that reduce fraud losses to a level lower than that associated with PIN debit transactions. They asserted that their proposal allowed the market, and not the Board, to determine technologies that are eligible for a fraud-prevention adjustment.[28] A merchant commenter suggested that this test could be further conditioned based on the riskiness of particular merchants. For example, the calculation of the fraud-prevention adjustment could consider the rate of fraud-related chargebacks to merchants, and those merchants with higher rates would pay a higher fraud-prevention adjustment than would those with lower rates, still up to a cap. One commenter noted that a metrics-based approach could be applied at the issuer level rather than at the technology level. For example, only issuers with a rate of fraud losses lower than the industry average may be eligible to receive or charge a fraud-prevention adjustment.

Alternatively, the non-prescriptive approach would entail a more general set of standards that an issuer must meet to be eligible to receive an adjustment for fraud-prevention costs. Such standards could require issuers to take steps reasonably necessary to maintain an effective fraud-prevention program but not prescribe specific technologies that must be employed as part of the program. This approach maintains issuer flexibility in responding to emerging and changing fraud risks.[29]

In their comments, issuers of all sizes, depository institution trade associations, payment card networks, and a federal regulatory agency preferred the non-prescriptive approach for a variety of reasons. Many of these commenters argued that debit card fraud is dynamic and requires issuers and networks to innovate on an ongoing basis in order to develop new responses to existing and emerging fraud risks. The flexibility to develop creative and timely responses, they noted, is important for detecting and preventing debit card fraud. Moreover, several of these commenters noted that the industry is better positioned than the Board to adapt fraud-prevention programs in a timely manner to respond effectively to changing fraud patterns.[30]

[26] The fraud-prevention adjustment does not include an allowance for fraud losses. EFTA Section 920(a)(5)(A)(i) limits the adjustment to ''costs incurred by the issuer in preventing fraud.'' Fraud losses are not costs incurred to prevent fraud. The Board includes issuer fraud losses as a basis for the establishment of the interchange fee standards in § 235.3 of the final rule. *See* notice elsewhere in the **Federal Register.**

[27] The median cost of fraud-prevention activities tied to authorization is about 0.7 cents.

[28] *See* letter from Merchants Payments Coalition. Although the Merchants Payments Coalition did not propose that the Board identify technologies in its standards, it did propose that any technologies issuers want to offer to merchants undergo an application and approval process, including a public comment period, managed by the Board.

[29] For a more detailed description of the two approaches proposed by the Board, see 75 FR 81742–81743 (Dec. 28, 2010).

[30] A few commenters, primarily technology vendors, consultants, and technology associations,

Continued

Many of these commenters expressed concerns with the identification, in any context, of particular technologies eligible for a fraud-prevention adjustment under a possible technology-specific approach. For example, several commenters suggested that this approach assumes that a single or limited set of technologies is more effective at reducing fraud losses than implementing a variety of technologies, practices, and methods in combination. To the extent that a set of technologies is identified, these commenters believed issuers would most likely invest in the set of technologies for which they can recover their costs. As a result, they asserted, competition among issuers (and networks) in fraud prevention will most likely be reduced. These commenters also echoed a concern noted by the Board in its December 2010 proposal—a risk that issuers would underinvest in new, non-eligible technologies, which may be more effective and less costly than those identified in the standard. Finally, a few of these commenters suggested that defining a list of eligible technologies would provide valuable information to fraudsters in their efforts to weaken mechanisms designed to strengthen security in the payment system. According to these commenters, such a list would also provide fraudsters with a good sense of the technologies most likely to be adopted, if they were not already, by the industry. Ultimately, these commenters argued that this information could make technologies that have been identified less effective over the long term.

2. Non-Prescriptive Approach

EFTA Section 920(a)(5) states that the Board's standards must require an issuer to take effective steps to reduce the occurrence of, and costs from, fraudulent electronic debit transactions and must ensure that an issuer implement ''cost-effective'' fraud-prevention technologies. As explained below, the Board is adopting standards for assessing whether the fraud-prevention program for an issuer is designed to reduce fraudulent debit card activity effectively. In assessing whether a program is effective, the Board does not believe that Section 920(a)(5) requires that the program prevent all fraud in order for an issuer to qualify for the fraud-prevention adjustment.

The dynamic nature of the debit card fraud environment requires standards that permit issuers to determine themselves the best methods to detect, prevent, and mitigate fraud losses for the size and scope of their debit card program and to respond to frequent changes in fraud patterns. Standards that incorporate a technology-specific approach do not provide sufficient flexibility to issuers to design and adapt policies and procedures that best meet a particular issuer's needs and that would most effectively reduce fraud losses for all parties to a transaction.

A variety of factors may affect the incidence of fraudulent electronic debit transactions and losses from those transactions, not all of which can be addressed solely by actions taken by issuers. For example, an acquirer or merchant processor used by merchants frequented by an issuer's cardholders may experience a data breach that increases the number of fraudulent transactions and losses for an issuer. An issuer's policies and procedures, however, may be able to mitigate the occurrence of, and costs from, fraudulent electronic debit transactions resulting from such a data breach. In this circumstance, an issuer's fraud-prevention policies and procedures may be effective, notwithstanding the fact that the issuer may have incurred a higher incidence of fraudulent electronic debit transactions than in more typical years.

Another factor affecting fraud trends is the nature of the fraud environment as a ''cat and mouse'' game. For example, as new and more effective fraud-prevention practices are employed by issuers, these practices will become targets for fraudsters wanting to compromise card and cardholder data. As technologies become less effective because of these efforts by fraudsters, issuers will be expected to find new ways to strengthen their fraud-prevention measures. To encourage improvement in fraud-prevention efforts, the interim final rule requires an issuer to review its policies and procedures, at least annually, and update them to address changes in the prevalence and nature of fraudulent electronic debit transactions and available fraud-prevention methods.

Specifying, and limiting the set of, technologies for which issuers recover their costs may weaken the long-term effectiveness of these technologies. For example, the risk that fraudsters may use this list as a way to focus their efforts to compromise card and cardholder data is material. For these reasons, the Board is adopting as an interim final rule, and requesting comment on, a non-prescriptive approach for the fraud-prevention adjustment. The Board invites public comment on all aspects of the interim final rule, including the questions specifically raised throughout the notice, and will adjust the rule as appropriate after consideration of comments received.

3. Develop and Implement Policies and Procedures

Section 235.4(b)(1) requires that in order to be eligible to receive a fraud-prevention adjustment, an issuer must develop and implement policies and procedures reasonably designed to (1) Identify and prevent fraudulent electronic debit transactions; (2) monitor the incidence of, reimbursements received for, and losses incurred from fraudulent electronic debit transactions; (3) respond appropriately to suspicious electronic debit transactions so as to limit the fraud losses that may occur and prevent the occurrence of future fraudulent electronic debit transactions; and (4) secure debit card and cardholder data.

Procedures may include practices, activities, methods, or technologies that are used to implement and make effective an institution's fraud-prevention policies. Together, these policies and procedures shall be reasonably designed to detect, prevent, and mitigate fraudulent electronic debit transactions and as provided for in § 235.4(b)(1)(i–iv). Comment 4(b)–1 clarifies that an issuer must both develop and implement effective policies and procedures.

Comment 4(b)–2 discusses the types of fraud that an issuer's policies and procedures should address. In its proposal, the Board did not include regulatory language to define ''fraudulent electronic debit transaction'' but suggested in the preamble that fraud in the debit card context should be defined as ''the use of a debit card (or information associated with a debit card) by a person, other than the cardholder, to obtain goods, services, or cash without authority for such use.[31] This definition is derived from the EFTA's definition of ''unauthorized electronic fund transfer.'' (15 U.S.C. 1693a(11)). One commenter stated that the definition of ''fraud'' should be expanded to include so-called ''friendly fraud'' where the cardholder authorizes the transaction and later claims the transaction cardholder did not engage in the transaction.

In contrast to elsewhere in the EFTA, Section 920 uses the term ''fraud'' rather than ''unauthorized'' transaction. Accordingly, for purposes of Section 920(a)(5), fraud in relation to electronic debit transaction may encompass more

supported the Board mandating particular technologies, such as chip and PIN or biometrics.

[31] *See* 75 FR 81722, 81740 (Dec. 28, 2010).

than ''unauthorized'' use of the card. For example, a cardholder may authorize payment to a fraudulent or ''phony'' merchant that does not deliver the expected goods or services to the cardholder. Another transaction that could be considered fraudulent, as suggested by commenters, is one in which the cardholder authorized the transaction and received the goods or services, but subsequently alleges fraudulently that the cardholder never received the goods or services. The Board has considered the comments and believes that fraud in electronic debit transactions is broader than unauthorized use and that whether a transaction is in fact fraudulent will depend on the facts and circumstances of the transaction.

All types of fraud impose costs on system participants, and the issuer's costs associated with preventing all types of fraud may be considered when determining the fraud-prevention adjustment. Under the interim final rule, the policies and procedures that an issuer must implement in order to qualify for the fraud-prevention adjustment need not necessarily address types of fraud, such as authorized transactions with a fraudulent merchant, that issuers generally have very limited ability to control. The issuer may choose, however, to include policies and procedures to minimize such fraudulent transactions if it learns of a specific fraudulent merchant or scam that its cardholders have experienced or are likely to experience. In such cases, the issuer could, for example, alert its cardholders as to the existence of the particular fraud. The Board requests comment on whether the rule should include a definition of ''fraud'' or ''fraudulent electronic debit transaction,'' and if so, what would be an appropriate definition.

Comment 4(b)(1)(i)–1 provides examples of practices that may be part of an issuer's policies and procedures to identify and prevent fraudulent electronic debit transactions. Comment 4(b)(1)(i)–2 clarifies that an issuer should assess the effectiveness of different authentication methods used by its cardholders, including the rate of fraudulent transactions for each method and consider practices to encourage the use of more effective authentication methods. This comment also clarifies that issuers should monitor industry developments and consider adopting, where practical, new methods of authentication that are materially more effective than the methods currently used by its cardholders. The Board requests comment on whether an issuer's policies and procedures should require an issuer to assess whether its customer rewards or similar programs provide inappropriate incentives to use an authentication method that is demonstrably less effective in preventing fraud.

Comment 4(b)(1)(ii)–1 provides that an issuer must have policies and procedures designed to monitor the types, number, and value of its fraudulent electronic debit transactions. The issuer must also track its and its cardholders' losses from fraudulent electronic debit transactions, its fraud-related chargebacks to merchant acquirers, and reimbursements from other parties to the transaction.

Comment 4(b)(1)(iii)–1 provides that an issuer must implement appropriate responses to suspicious transactions or transactions likely to be fraudulent. The comment clarifies that the response may be different depending on the nature of the transaction and may require the issuer to coordinate with industry organizations, law enforcement agencies, and other parties to the transaction. Comment 4(b)(1)(iii)–2 clarifies that it is not an appropriate response for the issuer to merely shift the loss to another party, other than the party that committed the fraud.

Comment 4(b)(1)(iv)–1 provides that an issuer's policies and procedures should be designed to secure debit card and cardholder data that are transmitted to or from an issuer (or its service provider) during transaction processing, stored by the issuer (or its service provider), and carried on media by employees or agents of the issuer. The comment also notes that this standard may be incorporated into an issuer's information security program as required by Section 501(b) of the Gramm-Leach-Bliley Act.

4. Review and Update Policies and Procedures

Section 235.4(b)(2) requires that an issuer review and update its fraud-prevention policies and procedures as least annually. In certain circumstances, more frequent updates may be necessary if there are significant changes in fraud types, fraud patterns, or fraud-prevention techniques or technologies.

Comment 4(b)(2)–1 provides that an issuer should review and update its policies and procedures if a significant change occurs even if the issuer reviewed and updated its policies and procedures within the preceding year.

5. Section 235.4(c) Certification

Section 235.4(c) requires an issuer to certify to its payment card networks that its fraud-prevention standards comply with the Board's standards as provided for in § 235.4(b). Issuers that are eligible for the adjustment should certify their compliance annually to each payment card network in which the issuer participates that allows issuers to receive or charge a fraud-prevention adjustment to their interchange transaction fee as permitted under §§ 235.3 and 235.4. The Board expects that these payment card networks will develop their own processes for identifying issuers eligible for this adjustment. (*See* comment 4(c)–1.)

The Board requests comment on whether the rule should establish a consistent certification process and reporting period for an issuer to certify to a payment card network that the issuer meets the Board's fraud-prevention standards and is eligible to receive or charge the fraud-prevention adjustment.

Form of Comment Letters

Comment letters should refer to Docket No. R–1404 and RIN No. 7100 AD 63 and when possible, should use a standard typeface with a font size of 10 or 12, to enable the Board to convert text submitted in paper form to machine-readable form through electronic scanning that will facilitate automated retrieval of comments for review. Comments may be mailed electronically to *regs.comments@federalreserve.gov*.

Solicitation of Comments Regarding Use of ''Plain Language''

Section 772 of the Gramm-Leach-Bliley Act of 1999 (12 U.S.C. 4809) requires the Board to use ''plain language'' in all proposed and final rules published after January 1, 2000. The Board invites comment on whether the interim final rule is clearly stated and effectively organized, and how the Board might make the text of the rule easier to understand.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3521; 5 CFR 1320 Appendix A.1), the Board reviewed the interim final rule under the authority delegated to the Board by the Office of Management and Budget (OMB). The Board may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid OMB control number. The OMB control number will be assigned.

The interim final rule contains requirements subject to the PRA. The collection of information required by this interim final rule is found in § 235.4 of Regulation II (12 CFR part 235). Under the interim final rule, if an issuer meets standards set forth by the Board, it may receive or charge an adjustment of no more than 1 cent per transaction to any interchange transaction fee it receives or charges in accordance with § 235.3.

To be eligible to receive the fraud-prevention adjustment under § 235.4(a)(1), an issuer shall develop and implement policies and procedures reasonably designed to (1) Identify and prevent fraudulent electronic debit transactions; (2) monitor the incidence of, reimbursements received for, and losses incurred from fraudulent electronic debit transactions; (3) respond appropriately to suspicious electronic debit transactions so as to limit the fraud losses that may occur and prevent the occurrence of future fraudulent electronic debit transactions; and (4) secure debit card and cardholder data. An issuer must review its fraud prevention policies and procedures at least annually, and update them as necessary to address changes in prevalence and nature of fraudulent electronic debit transactions and available methods of detecting, preventing, and mitigating fraud. Finally, the issuer must certify, on an annual basis, its compliance with the Board's standards to the payment card networks in which the issuer participates. The interim final rule will be effective concurrent with the interchange fee standard on October 1, 2011.

The interim final rule would apply to issuers that, together with their affiliates, have consolidated assets of $10 billion. The Board estimates that there are 380 issuers [32] regulated by the Federal financial regulatory agencies required to comply with the recordkeeping and reporting provisions under § 235.4.

The Board estimates that the 380 issuers would take, on average, 160 hours (one month) to develop and implement policies and train appropriate staff to comply with the recordkeeping provisions under § 235.4. This one-time annual PRA burden is estimated to be 60,800 hours. On a continuing basis, the Board estimates issuers would take, on average, 40 hours (one business week) annually to review its fraud prevention policies and procedures, updating them as necessary, and estimates the annual PRA burden to be 15,200 hours. The Board estimates 380 issuers would take, on average, 5 minutes to comply with the reporting provision under § 235.4(c) (annual certification), and estimates the annual reporting burden to be 32 hours. The total annual PRA burden for this information collection is estimated to be 73,032 hours.

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the Board's functions, including whether the information has practical utility; (2) the accuracy of the Board's estimate of the burden of the proposed information collection, including the cost of compliance; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of information collection on respondents, including through the use of automated collection techniques or other forms of information technology. Comments on the collection of information should be sent to Cynthia Ayouch, Acting Federal Reserve Clearance Officer, Division of Research and Statistics, Mail Stop 95–A, Board of Governors of the Federal Reserve System, Washington, DC 20551, with copies of such comments sent to the Office of Management and Budget, Paperwork Reduction Project (7100–to be assigned), Washington, DC 20503.

[32] For purposes of the PRA, the Board is estimating the burden for entities currently regulated by the Board, Office of the Comptroller of the Currency, Federal Deposit Insurance Corporation, Office of Thrift Supervision, and National Credit Union Administration (collectively, the ''Federal financial regulatory agencies''). Such entities may include, among others, State member banks, national banks, insured nonmember banks, savings associations, and Federally-chartered credit unions.

Regulatory Flexibility Act

The Board incorporates by reference the final Regulatory Flexibility Act analysis published with the Board's Regulation II, published elsewhere in the **Federal Register**. That analysis applies to the Regulation II as a whole, including the fraud-prevention adjustment adopted in this interim final rule.

Administrative Procedure Act

The Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.,* generally requires public notice before promulgation of regulations. *See* 5 U.S.C. 553(b). Unless notice or a hearing is specifically required by statute, however, the APA also provides an exception ''when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.'' 5 U.S.C. 553(b)(B).

As an initial matter, Section 920 of the EFTA, as amended by the Dodd-Frank Act, does not specifically require the Board to provide notice or a hearing with respect to this rulemaking. In addition, the Board finds that there is good cause to conclude that providing notice and an opportunity to comment before issuing this interim final rule would be contrary to the public interest. As noted above, the Board received numerous comments that addressed questions posed by the Board regarding the fraud-prevention adjustment to the interchange transaction fee. Among all types of commenters, there was a general consensus that the fraud-prevention adjustment should be effective at the same time as the interchange fee standard in order to prevent any gaps in the ability to fund certain fraud-prevention activities. Without adequate funding, fraud-prevention activities could be reduced, thereby causing harm to consumers, merchants, and issuers. Moreover, the Board's data gathering effort provided the Board with sufficient information to develop and make a fraud-prevention adjustment effective concurrent with the interchange fee standard. Consequently, the Board finds that use of notice and comment procedures before issuing these rules would not be in the public interest. Interested parties will still have an opportunity to submit comments in response to this interim final rule. The interim final rule may be modified accordingly.

List of Subjects in 12 CFR Part 235

Banks, banking, Debit card routing, Electronic debit transactions, and Interchange transaction fees.

Authority and Issuance

For the reasons set forth in the preamble, the Board is amending 12 CFR part 235 as follows:

PART 235—DEBIT CARD INTERCHANGE FEES AND ROUTING

■ 1. The authority citation for part 235 continues to read as follows:

Authority: 15 U.S.C. 1693o–2.

■ 2. Add § 235.4 to read as follows:

§ 235.4 Fraud–prevention adjustment.

(a) *In general.* If an issuer meets the standards set forth in paragraph (b) of this section, it may receive or charge an additional amount of no more than 1 cent per transaction to any interchange transaction fee it receives or charges in accordance with § 235.3.

(b) *Issuer standards.* To be eligible to receive the fraud-prevention adjustment, an issuer shall—

(1) Develop and implement policies and procedures reasonably designed to—

(i) Identify and prevent fraudulent electronic debit transactions;

(ii) Monitor the incidence of, reimbursements received for, and losses incurred from fraudulent electronic debit transactions;

(iii) Respond appropriately to suspicious electronic debit transactions so as to limit the fraud losses that may occur and prevent the occurrence of future fraudulent electronic debit transactions; and

(iv) Secure debit card and cardholder data; and

(2) Review its fraud-prevention policies and procedures at least annually, and update them as necessary to address changes in prevalence and nature of fraudulent electronic debit transactions and available methods of detecting, preventing, and mitigating fraud.

(c) *Certification.* To be eligible to receive or charge a fraud-prevention adjustment, an issuer that meets the standards set forth in paragraph (b) of this section must certify such compliance to its payment card networks on an annual basis.

■ 3. Appendix A to part 235 is amended to add new Section 235.4 to read as follows:

Appendix A to Part 235—Official Board Commentary on Regulation II

* * * * *

Section 235.4 Fraud-Prevention Adjustment

4(b) Issuer Standards

1. *In general.* Section 235.4(b) does not specify particular policies and procedures that an issuer must implement. Rather, an issuer must determine which policies and procedures are reasonably designed to achieve the objectives set forth in the standards. An issuer's policies and procedures must include fraud-prevention technologies and other methods or practices reasonably designed to detect, prevent, and mitigate fraudulent electronic debit transactions. An issuer does not satisfy the standards in § 235.4(b) if it merely develops policies and procedures; the issuer also must implement those policies and procedures. Implementing an issuer's fraud-prevention policies and procedures should include training the issuer's employees and agents, as appropriate.

2. An issuer's policies and procedures should address, among other things, fraud related to debit card use by unauthorized persons, which is a type of fraud that can be effectively addressed by the issuer, as the entity with the direct relationship with the cardholder and that authorizes the transaction. Examples of use by unauthorized persons include the following:

i. A thief steals a cardholder's wallet and uses the debit card to purchase goods, without the authority of the cardholder.

ii. A cardholder makes a $100 purchase at a merchant. Subsequently, the merchant's employee uses information from the debit card to initiate a subsequent transaction for an additional $100, without the authority of the cardholder.

iii. A hacker steals cardholder account information from a merchant processor and uses that information to make unauthorized purchases of goods or services.

Paragraph 4(b)(1)(i). *Identify and prevent fraudulent debit card transactions.*

1. *In general.* An issuer shall develop and implement policies and procedures reasonably designed to identify and prevent fraudulent electronic debit transactions. These policies and procedures should include activities to prevent, detect, and mitigate fraud even if the costs of these activities are not recoverable as part of the fraud-prevention adjustment. The issuer's policies and procedures may include the following:

i. An automated mechanism to assess the risk that a particular electronic debit transaction is fraudulent during the authorization process (*i.e.,* before the issuer approves or declines an authorization request). For example, an issuer may use neural networks to identify transactions that present increased risk of fraud. As a result of this analysis, the issuer may decide to decline to authorize these transactions. An issuer may not be able to determine whether a given transaction in isolation is fraudulent at the time of authorization, and therefore may have policies and procedures that monitor sets of transactions initiated with a cardholder's debit card. For example, an issuer could compare a set of transactions initiated with the card to a customer's typical transactions in order to determine whether a transaction is likely to be fraudulent. Similarly, an issuer could compare a set of transactions initiated with a debit card and common fraud patterns in order to determine whether a transaction or future transaction is likely to be fraudulent.

ii. Practices to support reporting of lost and stolen cards or suspected incidences of fraud by cardholders or other parties to a transaction. As an example, an issuer may promote customer awareness by providing text alerts of transactions in order to detect fraudulent transactions in a timely manner. An issuer may also report debit cards suspected of being fraudulent to their networks for inclusion in a database of compromised cards.

iii. Practices to help determine whether a user is authorized to use the card at the time of a transaction. For example, an issuer may specify the use of particular technologies or methods, such as dynamic data, to better authenticate a cardholder at the point of sale.

2. *Review of authentication methods.* The issuer's policies and procedures should include an assessment of the effectiveness of the different authentication methods that the issuer enables its cardholders to use, including a review of the rate of fraudulent transactions for each authentication method. If one method of authentication results in significantly lower fraud losses than other method(s) of authentication enabled on the issuer's debit cards, the issuer should consider practices to encourage its cardholders to use the more effective authentication method. It should also consider methods for reducing fraud related to the authentication method that experiences higher fraud rates. In addition, the issuer should monitor industry developments and consider adopting, where practical, new method(s) of authentication that are materially more effective than the methods currently available to its cardholders.

Paragraph 4(b)(1)(ii). *Monitor the incidence of, reimbursements received for, and losses incurred from fraudulent electronic debit transactions.*

1. In order to inform its policies and procedures, an issuer must be able to track its fraudulent electronic debit transactions over time. Accordingly, an issuer must have policies and procedures designed to monitor the types, number, and value of fraudulent electronic debit transactions. In addition, an issuer must track its and its cardholders' losses from fraudulent electronic debit transactions, its fraud-related chargebacks to acquirers, and any reimbursements from other parties. Other reimbursements could include payments made to issuers as a result of fines assessed to merchants for noncompliance with Payment Card Industry (PCI) Data Security Standards or other industry standards.

Paragraph 4(b)(1)(iii). *Respond to suspicious electronic debit transactions.*

1. An issuer may identify transactions that it suspects to be fraudulent after it has authorized or settled the transaction. For example, a cardholder may inform the issuer that the cardholder did not authorize a transaction or transactions, or the issuer may learn of a fraudulent transaction or possibly compromised debit cards from the network, the acquirer, or other parties. An issuer must have policies and procedures in place designed to implement an appropriate response once an issuer has identified suspicious transactions or transactions likely to be fraudulent. The appropriate response is likely to differ depending on the circumstances and the risk of future fraudulent electronic debit transactions. For example, in some circumstances, it may be sufficient for an issuer to monitor more closely the account with the suspicious transactions. In other circumstances, it may be necessary to reissue cards or close the account. An appropriate response may also require coordination with industry organizations, law enforcement agencies, and other parties, such as payment card networks, merchants, and issuer or merchant processors. An appropriate response would be reasonably designed to mitigate fraud losses due to suspicious transactions and transactions alleged to be fraudulent across all parties to such transactions.

2. An issuer's policies and procedures do not provide an appropriate response if they merely shift the loss to another party, other than the party that committed the fraud.

Paragraph 4(b)(1)(iv). *Secure debit card and cardholder data.*

1. An issuer must have policies and procedures designed to secure debit card and cardholder data that are transmitted by the issuer (or its service provider) during transaction processing, that are stored by the

issuer (or its service provider), and that are carried on media (*e.g.,* laptops, transportable data storage devices) by employees or agents of the issuer. This standard may be incorporated into an issuer's information security program, as required by Section 501(b) of the Gramm-Leach-Bliley Act.

Paragraph 4(b)(2) *Annual review*

1. *Periodic updates of policies and procedures.* In general, an issuer must review its policies and procedures at least annually. In certain circumstances, however, an issuer may need to review and update its policies and procedures more frequently than once a year. For example, during a particular year, there may be significant changes in fraud types, fraud patterns, or fraud-prevention methods or technologies. If a significant change occurs, an issuer must review and, if necessary, update its fraud-prevention policies and procedures to address the significant change, even if the issuer has reviewed its policies and procedures within the preceding year.

4(c) Certification.

1. To be eligible to receive the fraud-prevention adjustment, each issuer must certify its compliance with the Board's fraud-prevention standards to the payment card networks in which it participates on an annual basis. Payment card networks that plan to allow issuers to receive or charge a fraud-prevention adjustment will develop their own processes for identifying issuers eligible for this adjustment. An issuer need not certify if it chooses not to receive any fraud-prevention adjustment available through a network.

By order of the Board of Governors of the Federal Reserve System, June 30, 2011.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. 2011–16860 Filed 7–19–11; 8:45 am]

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Part IV

Environmental Protection Agency

40 CFR Parts 51, 52, 70, et al.

Deferral for CO_2 Emissions From Bioenergy and Other Biogenic Sources Under the Prevention of Significant Deterioration (PSD) and Title V Programs; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51, 52, 70, and 71

[EPA–HQ–OAR–2011–0083; FRL–9431–6]

RIN 2060–AQ79

Deferral for CO_2 Emissions From Bioenergy and Other Biogenic Sources Under the Prevention of Significant Deterioration (PSD) and Title V Programs

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This action defers for a period of three (3) years the application of the Prevention of Significant Deterioration (PSD) and Title V permitting requirements to biogenic carbon dioxide (CO_2) emissions from bioenergy and other biogenic stationary sources. This action is being taken as part of the process of granting the Petition for Reconsideration filed by the National Alliance of Forest Owners (NAFO) on August 3, 2010, related to the PSD and Title V Greenhouse Gas Tailoring Rule. The result of this action is that during this three year period biogenic CO_2 emissions are not required to be counted for applicability purposes under the PSD and Title V permitting programs. State, local, and tribal permitting authorities may adopt the deferral at their option but the deferral is effective upon publication for the PSD and Title V permit programs that are implemented by EPA.

DATES: This action is effective on July 20, 2011.

ADDRESSES: EPA has established a docket for this rulemaking under Docket ID No. EPA–HQ–OAR–2011–0083. All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* confidential business information (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 at *http://www.regulations.gov* or in hard copy at the Air Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal 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: Carole Cook, Climate Change Division, Office of Atmospheric Programs (MC–6207J), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (202) 343–9334; fax number: (202) 343–2342; e-mail address: *biodeferralPSD@epa.gov.*

SUPPLEMENTARY INFORMATION: *Regulated Entities.* The Administrator determined that this action is subject to the provisions of Clean Air Act (CAA) section 307(d). See CAA section 307(d)(1)(V) (the provisions of section 307(d) apply to ''such other actions as the Administrator may determine''). These are final amendments to existing regulations. This action applies to stationary sources that emit biogenic CO_2.

TABLE 1—EXAMPLES OF AFFECTED ENTITIES BY CATEGORY

Category	NAICS	Examples of affected facilities
Biomass combustion	221	Electric utilities burning biomass fuels.
	321	Wood products manufacturing, and wood pellet fuel manufacturing.
	322	Pulp and paper manufacturing.
Municipal solid waste combustion	562213	Solid waste combustors and incinerators.
Sources/users of biogas	112	Animal production manure management operations.
	221320	Sewage treatment facilities.
	562212	Solid waste landfills.
Fermentation processes	325193	Ethanol manufacturing.
	325411	Medicinal and botanical manufacturing.
Other	311/312	Food/Beverage processors burning agricultural biomass residues, using fermentation processes, or producing/using biogas from anaerobic digestion of waste materials.

Table 1 of this preamble lists the types of entities that potentially could be affected by the deferral covered by this action. This list is not intended to be exhaustive, but rather provides a guide for readers regarding facilities likely to be affected by this action. Note that this rule does not make or infer any policy determination on the part of EPA whether any emissions from any of these sources may be determined ''fugitive'' emissions for the purposes of accounting and applicability under air permitting requirements. Such determinations are not within the scope of this rule and are part of the case-by-case application and review process established under the regulations covering these permitting requirements. If you have questions regarding the applicability of this action to a particular facility, consult the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

What is the effective date? The final rule is effective on July 20, 2011. Section 553(d) of the Administrative Procedure Act (APA), 5 U.S.C. Chapter 5, generally provides that rules may not take effect earlier than 30 days after they are published in the **Federal Register.** EPA is issuing this final rule under section 307(d)(1) of the Clean Air Act, which states: ''The provisions of section 553 through 557 *** of Title 5 shall not, except as expressly provided in this section, apply to actions to which this subsection applies.'' Thus, section 553(d) of the APA does not apply to this rule. EPA is nevertheless acting consistently with the purposes of the underlying APA section 553(d) in making this rule effective on July 20, 2011. Section 5 U.S.C. 553(d)(3) allows an effective date less than 30 days after publication ''as otherwise provided by the agency for good cause found and published with the rule.'' As explained below, EPA finds that there is good cause for this rule to become effective on July 20, 2011, even through this results in fewer than 30 days from the date of publication in the **Federal Register**.

EPA announced its intent to undertake this rulemaking on January 12, 2011, in order to provide the Agency time to conduct a detailed examination of the science and technical issues associated with biogenic CO_2 emissions from stationary sources. The Agency intended to complete the rulemaking before sources would be subject to the PSD and Title V programs for GHG emissions because at that time it was possible that a source could be subject to those requirements based on biogenic CO_2 emissions. The Agency determined it could be burdensome for both permitting authorities and sources to assess those emissions until our detailed examination was complete. In a January 12, 2011, letter to several members of Congress, the Administrator wrote, ''No source will be subject to the pre-construction permitting requirement solely because of its greenhouse gas emissions until after July 1, 2011. With the approach of July 1 in mind, I am announcing today that, by that date, EPA will complete a rulemaking to defer for three years the application of the pre-construction permitting requirement to biomass and other biogenic CO_2 emissions.''

One purpose of the 30-day waiting period prescribed in 5 U.S.C. 553(d) is to give affected parties a reasonable time to adjust their behavior and prepare before the final rule takes effect. Whereas here, the affected parties are anticipating this rule and requesting the flexibility it provides, and any delay in its effectiveness will result in uncertainty in the permitting process. In order to ensure that the final rule is available to the public by July 1, 2011, the final rule will be signed and made available on the EPA Web site. Publication may follow one to two weeks after that date. A shorter effective date is also consistent with the purposes of APA section 553(d)(1), which provides an exception for any action that grants or recognizes an exemption or relieves a restriction. Here, this action relieves a burden because it defers the applicability of the PSD and Title V permitting requirements for biogenic stationary sources for a period of three years. Accordingly, we find good cause exists to make this rule effective on July 20, 2011, consistent with the purposes of 5 U.S.C. 553(d)(1) and (3).

Judicial Review. Under section 307(b)(1) of the CAA, judicial review of this final rule is available only by filing a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit (the Court) by September 19, 2011. Under CAA section 307(d)(7)(B), only an objection to this final rule that was raised with reasonable specificity during the period for public comment can be raised during judicial review. CAA section 307(d)(7)(B) also provides a mechanism for EPA to convene a proceeding for reconsideration, ''[i]f the person raising an objection can demonstrate to EPA that it was impracticable to raise such objection within [the period for public comment] or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule.'' Any person seeking to make such a demonstration to us should submit a Petition for Reconsideration to the Office of the Administrator, Environmental Protection Agency, Room 3000, Ariel Rios Building, 1200 Pennsylvania Ave., NW., Washington, DC 20460, with a copy to the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section, and the Associate General Counsel for the Air and Radiation Law Office, Office of General Counsel (Mail Code 2344A), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20004. Note, under CAA section 307(b)(2), the requirements established by this final rule may not be challenged separately in any civil or criminal proceedings brought by EPA to enforce these requirements.

Acronyms and Abbreviations. The following are acronyms and abbreviations of terms used in this preamble.

BACT best available control technology
BAU business as usual
CAA Clean Air Act
CBI confidential business information
CFI Call for Information
CFR Code of Federal Regulations
CH_4 methane
CO_2 carbon dioxide
CO_2e carbon dioxide equivalents
EO Executive Order
EPA U.S. Environmental Protection Agency
FR Federal Register
GHG/GHGs greenhouse gas/greenhouse gases
GWP global warming potential
LULUCF Land-Use, Land-Use Change and Forestry
MSW municipal solid waste
NAFO National Alliance of Forest Owners
NAAQS National Ambient Air Quality Standards
NO_X nitrogen oxides
NSPS New Source Performance Standards
NSR New Source Review
NTTAA National Technology Transfer and Advancement Act of 1995
PSD Prevention of Significant Deterioration
PTE potential to emit
RFA Regulatory Flexibility Act
SAB Science Advisory Board
SILs significant impact levels
SIP State Implementation Plan
SMCs significant monitoring concentrations
tpy tons per year
U.S. United States
UMRA Unfunded Mandates Reform Act
UNFCCC United Nations Framework Convention on Climate Change

Outline. The information presented in this preamble is organized as follows:

I. Background

On June 3, 2010, EPA published the final Prevention of Significant Deterioration (PSD) and Title V Greenhouse Gas Tailoring Rule (herein referred to as the Tailoring Rule; 75 FR 31514), setting thresholds for GHG emissions that define when permits under these programs are required for new and existing industrial facilities. Beginning January 2, 2011, sources currently subject to PSD or Title V permitting programs were required to determine the best available control technology (BACT) for their GHG emissions, but only for GHG increases of 75,000 short tons per year (tpy) or more of total GHGs, on a carbon dioxide equivalents (CO_2e) basis and any increase on a mass basis. At that time, no sources would be subject to CAA permitting requirements due solely to GHG emissions.

Beginning July 1, 2011, the PSD permitting requirements will for the first time cover new construction projects that will emit GHGs of at least 100,000 tpy on a CO_2e basis even if they do not exceed the permitting thresholds for any other pollutant. Modifications at existing facilities that increase GHG emissions by at least 75,000 tpy, and any amount on a mass basis, will be subject to permitting requirements, even if they do not significantly increase emissions of any other pollutant. Operating permit requirements will, for the first time, apply to sources based on their GHG emissions even if they would not apply based on emissions of any other pollutant. Facilities that emit at least 100,000 tpy CO_2e will be subject to Title V permitting requirements.

As discussed in the final Tailoring Rule, EPA decided not to provide exemptions from applicability determinations (major source and major modification) under PSD and Title V for certain GHG emission sources, including biogenic emissions. EPA decided instead to address the need for tailoring through a uniform threshold-based approach, rather than through a collection of various specific exclusions. At that time, EPA also noted that it planned to seek further comment on how it might address biogenic CO_2 emissions under the PSD and Title V programs through a future action.

On July 15, 2010, EPA published a Call for Information (CFI) to solicit information and viewpoints from interested parties on approaches to accounting for GHG emissions from bioenergy and other biogenic sources (75 FR 41173). The purpose of this CFI was to request comment on possible accounting approaches for biogenic CO_2 emissions under the PSD and Title V programs, as well as to receive data submissions about these sources and their GHG emissions, general technical comments on accounting for these emissions, and comments on the underlying science that should inform any such accounting approach.

On August 3, 2010, NAFO petitioned the EPA to reconsider and stay the implementation of the PSD and Title V GHG Tailoring Rule. The petition alleged that the final Tailoring Rule declared, for the first time and without any prior proposal or notice to industry, that EPA would count CO_2 emissions from combustion of biomass toward the applicability thresholds established for the PSD and Title V permitting programs of the CAA. Petitioners further alleged that EPA's proposed rule had provided for the appropriate and opposite conclusion: That CO_2 emissions from combustion of biomass should not be counted. Petitioners stated that there is near-universal recognition that CO_2 emitted from combustion of fuels derived from biomass should be excluded from GHG regulations because production and combustion of such fuels do not increase atmospheric CO_2 levels. Pending reconsideration, petitioners requested that the application of the PSD and Title V permitting programs to emissions of CO_2 from biomass be stayed.

We considered carefully the petitioners' assertions and noted that we also received comments through the CFI supporting the exclusion of biogenic CO_2 from stationary source permitting requirements. Through the CFI, however, EPA also received information supporting the position that biogenic CO_2 should not be excluded from permitting programs, and that the use of certain types of biomass as fuel could increase atmospheric CO_2 levels. Based on consideration of the petitioners' arguments, together with the weight of the comments received through the CFI, EPA concluded that the issue of accounting for the net atmospheric impact of biogenic CO_2 emissions is complex enough that further consideration of this important issue is warranted. Therefore, EPA granted the NAFO petition on January 12, 2011.[1]

On January 12, 2011, EPA also announced in letters to Members of Congress and NAFO its intent to take a number of steps to address the issues associated with biogenic CO_2 emissions from stationary sources. Pursuant to this announcement, on March 21, 2011, EPA published a notice of proposed rulemaking to defer for three years the application of the PSD and Title V permitting requirements to biogenic CO_2 emissions from stationary sources (76 FR 15249). Concurrent with this rulemaking, EPA also issued interim guidance entitled, ''Guidance for Determining Best Available Control Technology for Reducing Carbon Dioxide Emissions from Bioenergy Production'' to help permitting authorities establish a basis for concluding that under the PSD Program the combustion of biomass fuels can be considered BACT for biogenic CO_2 emissions at stationary sources until such time as the deferral becomes effective. During the three-year deferral period, EPA will conduct a detailed examination of the science associated with biogenic CO_2 emissions from stationary sources, including engaging with Federal partners, technical experts, and an independent scientific panel to consider technical issues. Based on the feedback from the scientific and technical review, EPA will then undertake a rulemaking to determine how biogenic CO_2 emissions should be treated and accounted for in PSD and Title V permitting.

[1] *http://www.epa.gov/NSR/actions.html#mar11.*

On April 27, 2011, EPA's Science Advisory Board (SAB) published a notice soliciting experts for a peer review of EPA's science and technical work on biogenic CO_2 emissions. 76 FR 23587. EPA intends to provide its study that examines the science and technical issues associated with biogenic CO_2 emissions from stationary sources and accompanying accounting framework to the SAB for peer review later in 2011.

II. Summary of Final Action

A. Overview of the Final Rule

This action defers for a period of three (3) years the consideration of CO_2 emissions from bioenergy and other biogenic sources (hereinafter referred to as ''biogenic CO_2 emissions'') when determining whether a stationary source meets the PSD and Title V applicability thresholds, including those for the application of BACT. Stationary sources that combust biomass (or otherwise emit biogenic CO_2 emissions) and construct or modify during the deferral period will avoid the application of PSD to the biogenic CO_2 emissions resulting from those actions. This deferral applies only to biogenic CO_2 emissions and does not affect non-GHG pollutants or other GHGs (e.g., methane (CH_4) and nitrous oxide (N_2O)) emitted from the combustion of biomass fuel. Also, this deferral only pertains to biogenic CO_2 emissions in the PSD and Title V programs and does not pertain to any other EPA programs such as the GHG Reporting Program.

EPA recognizes that use of certain types of biomass can be part of the national strategy to reduce dependence on fossil fuels, efforts are underway at the Federal, State and regional level to foster the expansion of renewable resources and promote bioenergy projects when they are a way to address climate change, increasing domestic alternative energy production, enhancing forest management and creating related employment opportunities. We believe part of fostering this development is to ensure that those feedstocks with negligible net atmospheric impact not be subject to unnecessary regulation. At the same time, it is important that EPA have time to conduct its detailed examination of the science and technical issues related to accounting for biogenic CO_2 emissions and therefore have finalized this deferral.

This deferral is intended to be a temporary measure, in effect for no more than three years, to allow the Agency time to complete its work and determine what, if any, treatment of biogenic CO_2 emissions should be in the PSD and Title V programs. This is not EPA's final determination on the treatment of biogenic CO_2 emissions in those programs. The Agency plans to complete its science and technical review and any follow-on rulemakings within the three-year deferral period and further believes that three years is ample time to complete these tasks. It is possible that the subsequent rulemaking, depending on the nature of EPA's determinations, would supersede this rulemaking and become effective in fewer than three years.

Biogenic CO_2 emissions are defined as emissions of CO_2 from a stationary source directly resulting from the combustion or decomposition of biologically-based materials other than fossil fuels and mineral sources of carbon. Examples of ''biogenic CO_2 emissions'' include, but are not limited to:

- CO_2 generated from the biological decomposition of waste in landfills, wastewater treatment or manure management processes;
- CO_2 from the combustion of biogas collected from biological decomposition of waste in landfills, wastewater treatment or manure management processes;
- CO_2 from fermentation during ethanol production or other industrial fermentation processes;
- CO_2 from combustion of the biological fraction of municipal solid waste or biosolids;
- CO_2 from combustion of the biological fraction of tire-derived fuel; and
- CO_2 derived from combustion of biological material, including all types of wood and wood waste, forest residue, and agricultural material.

For stationary sources co-firing fossil fuel and biologically-based fuel, and/or combusting mixed fuels (*e.g.,* tire-derived fuels, municipal solid waste (MSW)), the biogenic CO_2 emissions from that combustion are included in this deferral. However, the fossil CO_2 emissions are not. Emissions of CO_2 from processing of mineral feedstocks (*e.g.,* calcium carbonate) are also not included in this deferral. Various methods are available to calculate both the biogenic and fossil portions of CO_2 emissions, including those methods contained in the GHG Reporting Program (40 CFR Part 98). Consistent with the other pollutants in PSD and Title V, there are no requirements to use a particular method in determining your biogenic and fossil CO_2 emissions.

B. Legal Authority

1. Applicability of PSD and Title V to Biogenic CO_2 Emissions From Major Stationary Sources

As currently written, the PSD and Title V regulations apply to biogenic CO_2 emissions from major sources or major modifications at such sources according to the limitation included under the definition of ''subject to regulation'' in the State Implementation Plan (SIP) regulations at 40 CFR 51.166 and the Title V state program regulations at 40 CFR 70.2, as well as the Federal Implementation Plan requirements at 40 CFR 52.21 and the Title V Federal program regulations at 40 CFR 71.2. Thus, revisions to these regulations are necessary to defer application of the PSD and Title V programs to such sources of biogenic CO_2.

Stationary sources of air pollutants, including sources of biogenic CO_2 emissions, are currently subject to PSD requirements if they emit more than 100 or 250 tpy of a regulated NSR pollutant other than GHGs and have triggered PSD as a result of these emissions, subject to the permitting thresholds established in the Final Tailoring Rule described below. The 100/250 tpy thresholds previously described originate from section 169 of the CAA, which applies PSD to any ''major emitting facility'' and defines the term to include any source with a potential to emit (PTE) ''any air pollutant'' in an amount over 100 or 250 tpy, depending on source category.

EPA's long-standing regulations limit the PSD applicability provision that refers to ''any air pollutant'' to refer to any ''regulated NSR pollutant,'' which in turn includes any air pollutant ''subject to regulation'' under the CAA. Similarly, under sections 165(a)(4) and 169(3) of the CAA, the BACT requirement applies to ''each pollutant subject to regulation'' under the CAA. As noted in other recent EPA actions, GHGs are currently ''subject to regulation'' under the CAA; subject, for PSD purposes, to specific limitations reflected in the definition of that term that EPA adopted in the Tailoring Rule. Thus, emissions of GHGs (including CO_2) must be considered in determining whether a source is a major emitting facility subject to PSD, as a result of construction or modification, and whether the BACT requirement applies to GHGs (including CO_2 as a component of GHGs). In light of the way these regulations are currently written, EPA is unable to exclude biogenic CO_2 emissions from PSD review without amending the regulations.

With respect to Title V, as noted previously, Title V applies to sources, among others, that emit 100 tons per year of specified quantities of ''any air pollutant,'' see CAA section 502(a), 501(2)(B) and 302(g).

2. Tailoring Rule

a. Rationale and Requirements

In the Tailoring Rule, EPA codified its interpretation that ''subject to regulation'' only extends to major sources of air pollutants subject to a requirement for actual control of the quantity of emissions of that pollutant, and that such a control requirement has taken effect and is operative to control, limit or restrict the quantity of emissions of that pollutant released from the regulated activity, see 75 FR at 31606–07, and further defined ''subject to regulation'' such that GHGs are only ''subject to regulation'' under certain circumstances defined in the Tailoring Rule.

In the Tailoring Rule, EPA recognized that if the applicability provisions of the PSD and Title V programs were applied literally so that PSD and Title V requirements applied to GHG-emitting sources at the 100/250 tpy levels provided in the CAA, then the permitting authorities would be overwhelmed by the large numbers of permittees and many small sources would be unduly encumbered by the permitting demands. In light of those impacts, EPA concluded that, as a legal matter, Congress did not intend that the PSD and Title V applicability requirements be applied literally to all sources emitting GHGs over the major source thresholds as of January 2, 2011, the date by which EPA determined that GHGs become subject to regulation under the CAA as a result of the motor vehicle rule. Instead, EPA concluded that it is authorized to tailor those applicability requirements to apply PSD and Title V to such sources in a phased-in manner, starting with the largest sources first.

Specifically, in the Tailoring Rule, EPA has implemented these PSD and Title V applicability provisions by applying the familiar two-step framework for interpreting administrative statutes recognized by the Supreme Court in *Chevron U.S.A. Inc.* v. *NRDC,* 467 U.S. 837 (1984), taking into account certain legal doctrines. Those doctrines, insofar as relevant to the Tailoring Rule, are (1) the ''absurd results'' doctrine, which authorizes agencies to apply statutory requirements differently than a literal reading would indicate, as necessary to effectuate congressional intent and avoid absurd results; (2) the ''administrative necessity'' doctrine, which authorizes agencies to apply statutory requirements in a way that avoids impossible administrative burdens; and (3) the ''one-step-at-a-time'' doctrine, which authorizes agencies to implement a regulatory scheme in a deliberate, step-wise fashion. See 75 FR 31541–31579.

Under *Chevron,* the agency must, at step 1, determine whether Congress' intent as to the specific matter at issue is clear, and, if so, the agency must give effect to that intent. 467 U.S. at 842. If congressional intent is not clear, then, at step 2, the agency has discretion to fashion an interpretation that is a reasonable construction of the statute. 467 U.S. at 865. To determine congressional intent, the agency must first consider the words of the statutory requirements, and if their literal meaning answers the question at hand, then, in most cases, the agency must implement those requirements by those terms.

However, under the ''absurd results'' doctrine, the literal meaning of statutory requirements should not be considered to indicate congressional intent if that literal meaning would produce a result that is senseless or that is otherwise inconsistent with — and especially one that undermines — underlying congressional purpose. In these cases, if congressional intent for how the requirements apply to the question at hand is clear, the agency should implement the statutory requirements not in accordance with their literal meaning, but rather in a manner that most closely effectuates congressional intent. If congressional intent is not clear, then an agency may select an interpretation that is reasonable under the statute.

Under the ''administrative necessity'' doctrine, Congress is presumed, at *Chevron* step 1, to intend that its statutory directives to agencies be administrable, and not to have intended to have written statutory requirements that are impossible to administer. Therefore, under this doctrine, an agency may depart from statutory requirements that, by their terms, are impossible to administer, but the agency may depart no more than necessary to render the requirements administrable.

In addition to the ''absurd results'' and ''administrative necessity'' doctrines, another judicial doctrine supports at least part of EPA's Tailoring Rule, and that is the doctrine that agencies may implement statutory mandates one step at a time, which we will call the ''one-step-at-a-time'' doctrine. The U.S. Supreme Court recently described the doctrine in *Massachusetts* v. *EPA,* 549 U.S. 497, 524 (2007), as follows: ''Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop;'' and instead they may permissibly implement such regulatory programs over time, ''refining their preferred approach as circumstances change and as they develop a more nuanced understanding of how best to proceed.''

In the Tailoring Rule, EPA closely considered the burdens to the permitting authorities of applying PSD and Title V to GHG-emitting sources. For example, EPA calculated, on a national basis, the workload that GHG permit applications would entail, and compared that to the existing workload of permitting authorities. EPA concluded that permitting authorities would be overwhelmed by permit applications if the PSD and Title V applicability thresholds were applied literally as of January 2, 2011, to the GHG emissions from stationary sources. In addition, EPA calculated the cost to the sources of permitting requirements and concluded that many small sources would become subject to unduly high expenses.

Accordingly, in applying the *Chevron* analytical framework, in conjunction with the absurd results and administrative necessity doctrines, EPA concluded that Congress intended that PSD and Title V apply to the GHG emissions from stationary sources, but that, in light of the burdens to the permitting authority and the costs to the sources of determining applicability of permitting requirements by applying the statutory thresholds to GHG emissions, the application of the permitting programs should be phased in, starting with the largest sources of GHG emissions first. EPA also concluded that the calculation for determining which sources emit the ''largest'' amount of GHG emissions should be based on the amount of GHG pollutant emitted in tons per year, weighted by the global warming potential (GWP) of the particular GHG pollutant.

Accordingly, in the Tailoring Rule, EPA established two steps to implement PSD and Title V. At step 1, beginning January 2, 2011, sources currently subject to PSD or Title V permitting programs were required to determine the BACT for their GHG emissions, but only for GHG increases of 75,000 short tons per year (tpy) or more of total GHGs, on a CO_2e basis and any increase on a mass basis. At that time, no sources would be subject to CAA permitting requirements due solely to GHG emissions. At step 2, beginning July 1, 2011, the PSD permitting requirements will for the first time cover new construction projects that will emit GHG emissions of at least 100,000 tpy on a CO_2e basis (and 250 tons on a mass basis) even if they do not exceed the permitting thresholds for any other pollutant. Modifications at existing facilities that emit at that level and increase GHG emissions by at least 75,000 tpy CO2e and by any amount on a mass basis will be subject to permitting requirements, even if they do not significantly increase emissions of any other pollutant.

In addition, EPA committed to promulgate by July 1, 2012, another rulemaking—in effect, step 3 of the Tailoring Rule—that would consider whether to reduce the thresholds further. EPA also committed to promulgate another rulemaking after that, by April 1, 2016, that would consider still further action. As EPA stated in the Tailoring Rule, part of the purpose of the phase-in approach embodied in the Tailoring Rule is to allow permitting authorities time to acquire additional resources and to allow EPA time to develop streamlining methods and thereby enable the application of PSD and Title V to more sources in subsequent rulemakings.

As noted previously, in the Tailoring Rule, EPA determined that the amount of each GHG emitted by a facility should be calculated by reference to the weight of the GHG emissions, in tons of CO_2e per year for determining if GHGs were ''subject to regulation'' for a particular facility and project. The Tailoring Rule proposal referenced EPA's *Inventory of U.S. Greenhouse Gas Emissions and Sinks* (Inventory) [2] submitted annually to the United Nations Framework Convention on Climate Change (UNFCCC), for the applicable GWP values and guidance on how to calculate a source's GHG emissions in tpy CO_2e. 75 FR 31514–31608. The Inventory includes emissions of the six GHGs in terms of CO_2e units. By linking the calculation of CO_2e for GHGs to GWP values, a facility could evaluate its total GHG emissions contribution based on a single metric. We solicited comment on the benefits and limitations of this proposed metric.

While we referred to the Inventory for GWP identification purposes only, several commenters appeared to misunderstand our intent, claiming that the Inventory excludes CO_2 emitted from biomass. These commenters

[2] ''Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990–2008,'' U.S. Environmental Protection Agency, EPA 430–R–10–006 (April 15, 2010). *http://www.epa.gov/climatechange/emissions/usinventoryreport.html.*

requested that, in calculations of emissions for determining applicability of PSD and Title V, EPA exempt emissions from biogenic activities or biomass combustion or oxidation activities, including solid waste landfills, waste-to-energy projects, fermentation processes, combustion of renewable fuels, ethanol manufacturing, biodiesel production, and other alternative energy production that uses biomass feedstocks (*e.g.,* crops or trees). In particular, these commenters urged that EPA exclude emissions from biomass combustion in determining the applicability of PSD to such sources based on the notion that such combustion is ''carbon neutral'' (*i.e.,* that combustion or oxidation of such materials would cause no net increase in GHG emissions on a lifecycle basis).

b. Treatment of Biogenic Emissions

In response, when finalizing the Tailoring Rule, we acknowledged the role that biomass or biogenic fuels and feedstocks could play in reducing anthropogenic GHG emissions, and did not dispute the commenters' observations that many state, Federal, and international rules and policies treat biogenic and fossil sources of CO_2 emissions differently (75 FR 31514). Regarding commenters' claims that the Inventory excludes CO_2 emissions from biomass, EPA noted that the Inventory does not exclude these emissions (see section II.A.2 of the preamble to the proposed deferral rule). Rather, they are included in the Land-Use, Land-Use Change and Forestry (LULUCF) Sector rather than the Energy Sector to avoid double-counting at the national scale. The narrow reference to the use of the Inventory's GWP values for estimating GHG emissions was provided to offer consistent guidance on how to calculate these emissions and not as an indication, direct or implied, that biomass emissions would be excluded from permitting applicability merely by association with the national inventory, see 74 FR 55351, under the definition for ''carbon dioxide equivalent.''

We determined that our application of the ''absurd results,'' ''administrative necessity,'' and one-step-at-a-time legal rationales supporting the Tailoring Rule, based on the expected overwhelming permitting burdens in its absence, did not provide sufficient basis to exclude emissions of CO_2 from biogenic sources in determining permitting applicability provisions at that time. We reasoned that such an exclusion alone, while reducing burdens for some sources, would not address the overwhelming permitting burdens, and a threshold-based approach would still be needed. At that time, we had not examined burdens with respect to specific source categories impacted by the rule and thus had not analyzed the administrative burden of permitting projects that specifically involve biogenic CO_2 emissions taking account of the threshold-based approach. Commenters also did not provide information to demonstrate that an overwhelming permitting burden would still exist, justifying a temporary exclusion for biomass sources.

In the final Tailoring Rule, we indicated that the decision not to provide this type of an exclusion at that time did not foreclose EPA's ability to either (1) provide this type of exclusion at a later time with additional information about overwhelming permitting burdens due to biomass sources, or (2) provide another type of exclusion or other treatment based on some other rationale. Although we did not take a final position, we noted that some commenters' observations about a different treatment of biomass combustion warranted further exploration as a possible rationale.

Therefore, although we did not establish a permanent exclusion from PSD or Title V applicability based on specific characteristics of biogenic CO_2, we indicated our intent to seek further comment on how we might address emissions of biogenic CO_2 under the PSD and Title V programs through a future action.

We further noted that, while not promulgating an applicability exclusion for biogenic emissions and biomass fuels or feedstocks in the final Tailoring Rule, flexibility exists to apply the existing regulations and policies regarding BACT in ways that take into account their net effects on atmospheric GHG concentrations. Without prejudging the outcome of our process to seek comment on whether and how we might address emissions of biogenic carbon under the PSD and Title V programs through a future action, we indicated that this issue warranted further exploration.

As mentioned earlier in the preamble, in order to explore the issue further following the promulgation of the Tailoring Rule, on July 15, 2010, EPA solicited views from the public through a CFI on approaches to accounting for biogenic CO_2 emissions, on the means to estimate and measure CO_2 emissions from a variety of biogenic CO_2 sources and other information on biogenic sources that may be affected but not identified in the CFI.

With promulgation of the Tailoring Rule we committed to issue technical and policy guidance for permitting of GHGs. Subsequently, the information gathered from stakeholders in response to the CFI provided diverse perspectives on treatment of biogenic CO_2 emissions in pre-construction and operating permit reviews, including many requests to exclude, either partially or wholly, biogenic CO_2 sources from PSD applicability determinations and BACT analyses on the basis of Inventory results and other considerations. On November 10, 2010, EPA issued the draft ''PSD and Title V Permitting Guidance for Greenhouse Gases'' which provides the basic information that permit writers and applicants need to address GHG emissions in permits. Within the November guidance, EPA acknowledged the numerous stakeholder comments on biogenic CO_2 BACT analyses and provided general guidance to permitting authorities to consider environmental, energy, and economic benefits that may accrue from the use of certain types of biomass (*e.g.,* biogas from landfills for energy generation), consistent with existing air quality standards. We also committed to provide more detailed technical and policy guidance early in 2011 for completing step 4 of a ''top-down'' BACT analysis for GHG emissions from certain types of biomass sources to enable permitting authorities to simplify and streamline BACT determinations for such sources. EPA provided interim guidance on this topic in March 2011, concurrent with the proposal of this rule to assist permitting authorities before the deferral becomes effective.[3]

Noting that a variety of Federal and state policies have recognized that some types of biomass can be part of a national strategy to reduce dependence on fossil fuels and to reduce emissions of GHGs, EPA has determined that it is appropriate for permitting authorities to account for both existing Federal and state policies and their underlying objectives in evaluating the environmental, energy and economic benefits of biomass fuel. Based on these considerations, permitting authorities might determine that the use of certain types of biomass alone meets the BACT requirement for GHGs.

As described in the Background section of this preamble, NAFO petitioned the EPA on August 3, 2010 to reconsider and stay the implementation of the PSD and Title V GHG Tailoring Rule. Pending reconsideration, petitioners requested that the application of the PSD and Title V

[3] ''Guidance for Determining Best Available Control Technology for Reducing Carbon Dioxide Emissions from Bioenergy Production,'' U.S. EPA Office of Air and Radiation, March 2011. (*http://www.epa.gov/nsr/ghgdocs/bioenergyguidance.pdf*)

permitting programs to emissions of CO_2 from biomass be stayed.

Based on consideration of the petitioners' arguments, together with the weight of the comments received on the CFI, EPA concluded that the issue of accounting for the net atmospheric impact of biogenic CO_2 emissions is complex enough that further consideration of this important issue is warranted. Therefore, EPA granted the petition on January 12, 2011.

However, EPA did not grant the request for an administrative stay of the Tailoring Rule, because the rule is critical for making overall implementation of the PSD program feasible. Furthermore, an administrative stay of the statements in the preamble of the Tailoring Rule that describe EPA's initial determination not to exempt emissions of CO_2 from biomass would not provide the requested relief of excluding emissions of CO_2 from biomass from the PSD and Title V permitting programs. The effect of a stay of this or any other aspect of the Tailoring Rule would be to return to the legal regime that existed before EPA's issuance of a final Tailoring Rule. As no exemption for emissions of CO_2 from biomass existed prior to the final rule, an administrative stay would not result in an exemption from the requirements of PSD and Title V.

3. Rationale in Support of Interim Biomass Deferral

a. Regulation at This Time Is Not Justified

Since finalizing the Tailoring Rule, EPA has gathered additional information concerning biomass through the CFI and in response to the proposal for this rule. The information collected to this point underscores the complexity and uncertainty associated with accounting for biogenic emissions of CO_2 and indicates that at present attempting to determine the net carbon cycle impact of particular facilities combusting particular types of biomass feedstocks would require extensive analysis and would therefore entail extensive workload requirements by many of the permitting authorities. In contrast to other sources of GHG emissions, these uncertainties and complexities are exacerbated because of the unique role and impact biogenic sources of CO2 have in the carbon cycle. Further, methodologies are not sufficiently developed to assure that various permitting authorities would be able to perform the necessary calculations reasonably and consistently to determine the net atmospheric impact in many, if not all, instances.

The extensive workload requirements required to understand the net biogenic CO_2 emissions from bioenergy facilities and other sources of biogenic CO_2 emissions, as part of the PSD and Title V permit process, including specifically how to measure and account for biogenic CO_2 emissions, would unnecessarily strain the resources of the affected permitting authorities and result in delays in processing permits for other applicants. Moreover, at present, devoting these limited permitting authority resources to biomass sources would not be productive in light of the possibility that EPA may ultimately determine that the utilization of some or all biomass feedstocks for bioenergy has a negligible (or *de minimis*), negative, or positive net impact on the carbon cycle.

Therefore, the information EPA has collected since promulgating the Tailoring Rule indicates that it is consistent with the rationale of the Tailoring Rule for affected permitting authorities to defer on a temporary basis biogenic CO_2 emissions from PSD and Title V applicability. During this deferral, EPA will conduct a detailed examination of the science associated with biogenic CO_2 emissions from stationary sources, which will include a peer review by the SAB, and resolve technical issues in order to account for biogenic CO_2 emissions in ways that are scientifically sound and also manageable in practice.

As noted previously, EPA based the Tailoring Rule on the extreme administrative burdens to permitting authorities, and undue costs to sources, that would result from a literal application of the PSD and Title V 100/250 tpy statutory thresholds, as of January 2, 2011, when those requirements first applied to GHGs. EPA reasoned that, in accordance with the *Chevron* analytical framework for statutory construction, taking into account the ''absurd results'' and ''administrative necessity'' lines of cases, Congress did not intend that the PSD and Title V requirements apply at the 100/250 tpy statutory thresholds to GHG-emitting sources as of January 2, 2011, but rather that those requirements could be limited, at least initially, through a phase-in approach, to higher-emitting sources.

Just as the extensive workload of processing permit applications from sources below the Tailoring Rule thresholds justified exempting those sources at least from the initial steps in the Tailoring Rule phase-in program, so too the extensive workload associated with analyzing and accounting for biogenic CO_2 emissions as part of processing permit applications from biomass facilities justifies exempting those sources for a period of time, in the affected states, pending EPA's development of a consistent and practical framework for determining net carbon cycle impacts. The three-year deferral EPA is finalizing in this action is reasonable to allow time for the development of the accounting framework and subsequent rulemaking.

In effect, this deferral is a step back from the Tailoring Rule's approach but the decision to defer the applicability of PSD and Title V to biogenic CO_2 emissions is nonetheless supported, in part, on the same rationale as EPA used to justify the Tailoring Rule's phase-in approach. This action constitutes a refinement of the approach EPA has taken to regulate GHG emissions from stationary sources through a phased-in approach, based on an evolving understanding of the complexities, uncertainties, and nuances associated with biogenic emissions.

An alternative way to reduce the permitting burden would be to apply PSD and Title V to all facilities with biogenic CO_2 emissions that emit at or above the Tailoring Rule thresholds, but without making any effort to take into account net carbon cycle impacts. However, we believe that it is conceivable that as a result of the scientific examination of biogenic CO_2 emissions, we could conclude that the net carbon cycle impact for some biomass feedstocks is trivial, negative, or positive. Accordingly, this could result in regulation of sources with trivial or positive impacts on the net carbon cycle, as previously discussed. To avoid this outcome, given our current state of knowledge, we believe a case-by-case net carbon cycle impact analysis would be required in the course of reviewing each permit application. This burden would be in addition to the currently existing burden associated with obtaining a PSD or Title V permit. In light of the permitting burdens assessed in the Tailoring Rule, adding to that burden in many states would frustrate the goals we sought to accomplish in the Tailoring Rule to ensure that the PSD and Title V programs can be administered in each state.

Furthermore, given the potential that the utilization of at least some biomass feedstocks may have a negligible impact on the net carbon cycle, engaging in this type of burdensome analysis may not be an optimal use of the limited resources of PSD and Title V permitting authorities. The additional scientific examination being undertaken by the EPA could ultimately conclude that such resources could have been more effectively utilized to target CO_2 emissions that clearly have a detrimental impact on the net carbon cycle. Establishing a three-year deferral period for biogenic CO_2 emissions will enable EPA to consider the results of the detailed examination of the science of these emissions and undertake a rulemaking to determine the best way to account for biogenic CO_2 emissions when determining PSD applicability.

Another important reason for the three-year deferral period is to allow sufficient time to consider the unique characteristics and attributes of biogenic CO_2 feedstocks, as opposed to other sources of GHG, using the results from the detailed examination mentioned previously, within both the state permitting agencies and affected facilities. While the interim BACT guidance described previously will help alleviate some of this burden before the deferral becomes effective, we expect that more and more diverse users of biomass combustion or other biogenic CO_2 sources are likely to be affected under step 2 of the Tailoring Rule because, under step 2, these sources can trigger permitting requirements based solely on their GHG emissions with no prerequisite requirement that they otherwise trigger PSD or Title V permitting requirements for a non-GHG pollutant. We believe, absent the deferral period and the completion of EPA's full analysis of the unique technical issues associated with these diverse facilities emitting biogenic CO_2, that it would be particularly challenging for many of the permitting authorities and facilities to process permits involving these emissions. Also, as described elsewhere in this preamble, this interim deferral is intended to temporarily exclude biogenic CO_2 emissions from the definition of ''subject to regulation,'' as that term was defined for purposes of the Tailoring Rule, for a period of three years, while EPA further considers, through notice and comment rulemaking, the approach to accounting for these emissions on a permanent basis.

b. One-Step-at-a-Time Doctrine

EPA relied, in part, on the ''one-step-at-a-time'' doctrine, which authorizes agencies to implement statutory requirements a step at a time, in finalizing the Tailoring Rule. 75 FR 31514, 31578 (June 3, 2010). As described in the Tailoring Rule and earlier in the preamble, the case law recognizing the ''one-step-at-a-time'' doctrine, within the *Chevron* framework, justifies an agency's step-by-step approach under the following circumstances or conditions: (1) The agency's ability to comply with a statutory directive depends on facts, policies, or future events that are uncertain; (2) the agency has estimated the extent of its remaining obligation; (3) the agency's incremental actions are structured in a manner that is reasonable in light of the uncertainties; and (4) the agency is on track to full compliance with the statutory requirements.

In the proposed rule, EPA stated in footnote 13 that the ''one-step-at-a-time'' doctrine was not relevant to this rulemaking. This statement was made without explanation. One commenter (EPA–HQ–OAR–2011–0083–0084) stated ''[b]ased on EPA's statements in the Tailoring Rule, which does rely on the 'one-step-at-a-time' doctrine, it appears that the doctrine would apply equally well to EPA's decision to delay regulation of biogenic CO_2 emissions under the PSD and Title V programs.'' For the reasons stated below, EPA now agrees that, because of the complexity and uncertainty of the science associated with accounting for biogenic sources of CO_2, the interim deferral of the PSD and Title V program for such emissions would be a reasonable exercise of the ''one-step-at-a-time'' doctrine.

First, as the DC Circuit stated in *National Association of Broadcasters* v. *FCC,* 740 F.2d 1190, 1210 (DC Cir. 1984) (''National Association of Broadcasters''), incremental agency action is most readily justifiable ''against a shifting background in which facts, predictions, and policies are in flux and in which an agency would be paralyzed if all the necessary answers had to be in before any action at all could be taken.'' Those circumstances are present here, and so is the fact that the task at hand is extraordinarily demanding. As discussed previously, EPA is in the process of conducting a detailed examination of the science associated with biogenic CO_2 emissions from stationary sources to better understand their role on the carbon cycle and to develop an accounting framework for use by permitting authorities and sources. This examination will include discussion with partners and scientists both inside and outside the Federal government, as well as engagement with the Science Advisory Board, to consider technical issues that the Agency must resolve in order to account for biogenic CO_2 emissions in ways that are scientifically sound and also manageable in practice.

Second, as the Court stated in *National Association of Broadcasters,* ''the agency [should] ma[k]e some estimation, based upon evolving economic and technological conditions, as to the nature and magnitude of the problem it will have to confront when it comes to [undertake the remaining steps]'' and that estimation must be ''plausible and flow from the factual record compiled.'' *Id.* at 1210. Here, EPA has done this by deferring the applicability of PSD and Title V to biogenic emissions of CO_2 from stationary sources for only as long as necessary for EPA to complete the needed scientific study of these emissions, develop an accounting framework, and as appropriate conduct rulemaking specific to the unique nature and characteristics of these emission sources.

In order to explore the issues further following the promulgation of the Tailoring Rule, on July 15, 2010, EPA solicited views from the public through the CFI on approaches to accounting for biogenic CO_2 emissions, including whether some or all of a source's biogenic CO_2 emissions could be discounted based on a determination that they are canceled out by the CO_2 absorption associated with growing the fuel (75 FR 41173). Also, we solicited information on the means to estimate and measure CO_2 emissions from a variety of biogenic CO_2 sources that typically have not been part of emission inventories (*e.g.,* CO_2 from landfills, livestock management, and fermentation processes), as well as information on other biogenic sources that may be affected but which were not identified specifically in the CFI.

With promulgation of the Tailoring Rule, we committed to issue technical and policy guidance for permitting of GHGs. Subsequently, the information gathered from stakeholders in response to the CFI provided diverse perspectives on treatment of biogenic CO_2 emissions in pre-construction and operating permit reviews, including many requests to exclude, either partially or wholly, biogenic CO_2 sources from PSD applicability determinations and BACT analyses on the basis of Inventory results and other considerations.

Third, again as the Court stated in *National Association of Broadcasters,* it must be ''reasonable, in the context of the decisions made in the proceeding under review, for the agency to have deferred the issue to the future. With respect to that question, postponement will be most easily justified when an agency acts against a background of rapid technical and social change and when the agency's initial decision as a practical matter is reversible should the future proceedings yield drastically unexpected results.'' *Id.* at 1211. Here, our deferral is reasonable in light of the technical and scientific questions that are raised by biogenic emissions from stationary sources, which will be addressed by EPA's ongoing study, development of an accounting framework, and any subsequent rulemaking. As explained in the proposal and elsewhere in the preamble to this final rule, EPA believes it has the authority to exclude biogenic CO_2 emissions from the PSD and Title V requirements for the proposed three-year deferral period and will be exploring whether a permanent exemption is appropriate for at least some and perhaps all types of feedstocks.

However, the possibility also remains that more detailed examination of the science of biogenic CO_2 will demonstrate that the utilization of some biomass feedstocks for bioenergy production will have a significant impact on the net carbon cycle, making literal application of the PSD program requirements to such emissions, consistent with the Tailoring Rule, necessary to fulfill congressional intent. Thus, EPA is finalizing only a temporary, rather than a permanent, deferral of PSD requirements for such sources at this time. EPA notes that the issue of subsequent applicability of the PSD and Title V programs to facilities that may be permitted during the deferral period is discussed in more detail in section II.C.

Finally, as the DC Circuit stated in *Grand Canyon Air Tour Coalition* v. *F.A.A.,* 154 F.3d 455, 477–78 (DC Cir. 1998), the Courts will accept an initial step towards full compliance with a statutory mandate, as long as the agency is headed towards full compliance, and we now believe that the doctrine is applicable here.

As we have described in the CFI, the preamble to the proposed deferral and elsewhere in the preamble for this final rule, there is little question as to the complexity in accounting for and understanding the impact of biogenic CO_2 emissions from stationary sources on net atmospheric CO_2 emissions such that sources and permitting authorities may not reasonably be expected to comply with or implement PSD and Title V applicability requirements in the near term. As described elsewhere in this preamble, the deferral is limited to three years, and EPA may, before the expiration of the deferral, undertake additional rulemaking to clarify the applicability of PSD and Title V permitting requirements for specific categories of biogenic emissions as may be appropriate based on the scientific record EPA is currently developing. See *Grand Canyon Air Tour,* 891 F.2d at 476–77 (upholding agency action as a step towards full compliance with statutory mandate when the agency expected full compliance to occur some 20 years after the deadline in the statute).

This rulemaking constitutes an initial step toward full compliance, and, seen in that light, is supported by the ''one-step-at-a-time'' doctrine.

c. EPA Not Required to Regulate Where Benefits of Regulation Would Be Trivial

EPA believes it has the authority to exclude biogenic CO_2 emissions from the PSD and Title V requirements, if scientific analysis supports conclusions about the nature of biogenic CO_2 in question that in turn support such an exclusion; the agency will be using the three-year deferral period to better understand the science associated with biogenic CO_2 emissions and to explore whether or not a permanent exemption is permissible for at least some and perhaps all types of feedstocks.

Courts have recognized that administrative agencies have the implied authority to establish exemptions ''when the burdens of regulation yield a gain of trivial or no value.'' *Alabama Power Co.* v. *Costle,* 636 F.2d 323, 360 (DC Cir. 1980). In this decision that specifically addressed the requirements of the PSD program, the DC Circuit described this principle as follows:

> Categorical exemptions may also be permissible as an exercise of agency power, inherent in most statutory schemes, to overlook circumstances that in context may fairly be considered *de minimis.* It is commonplace, of course, that the law does not concern itself with trifling matters, and this principle has often found application in the administrative context. Courts should be reluctant to apply the literal terms of a statute to mandate pointless expenditures of effort. *Id.* (internal citations omitted).

In an earlier case cited by the court in *Alabama Power,* the court described the doctrine as follows:

> The '*de minimis*' doctrine that was developed to prevent trivial items from draining the time of the courts has room for sound application to administration by the Government of its regulatory programs. * * * The ability, which we describe here, to exempt *de minimis* situations from a statutory command is not an ability to depart from the statute, but rather a tool to be used in implementing the legislative design. *District of Columbia* v. *Orleans,* 406 F.2d 957, 959 (1968).

In this respect, the *Alabama Power* opinion observed in a footnote that the *de minimis* principle ''is a cousin of the doctrine that, notwithstanding the 'plain meaning' of a statute, a court must look beyond the words to the purpose of the act where its literal terms lead to 'absurd or futile results.' '' *Id.* at 360 n. 89 (citations omitted).

To apply an exclusion based on the *de minimis* doctrine, ''the agency will bear the burden of making the required showing'' that a matter is truly *de minimis* which naturally will turn on the assessment of particular circumstances. *Id.* The *Alabama Power* opinion concluded that ''most regulatory statutes, including the CAA, permit such agency showings in appropriate cases.'' *Id.*

A notable limitation on the *de minimis* doctrine is that it does not authorize the agency to exclude something on the basis of a cost-benefit analysis. As the court explained, this ''implied authority is not available for a situation where the regulatory function does provide benefits, in the sense of furthering the regulatory objectives, but the agency concludes that the acknowledged benefits are exceeded by the costs.'' *Id.* The court held that any ''implied authority to make cost-benefit decisions must be based not on a general doctrine but on a fair reading of the specific statute, its aims and legislative history.'' *Id.*

Since *Chevron,* several courts have recognized *de minimis* exceptions (1) so long as they are not contrary to the express terms of the statute and (2) the agency's interpretation of the exception is a permissible reading of the statute. See e.g., *Ober* v. *Whitman,* 243 F.3d 1190 (9th Cir. 2001); see also *Ohio* v. *EPA,* 997 F.2d 1520 (D.C. Cir. 1993).

The CAA is not so rigid as to preclude a *de minimis* exception. Since the early years of the PSD program, EPA has applied this *de minimis* principle to establish various types of values in the PSD regulations that may be used to exempt categories of source from all or part of the PSD program requirements.

EPA also relied on the *de minimis* doctrine to establish values that permitting authorities can use to show that a source that requires a PSD permit meets the necessary criteria to obtain a permit. Significant impact levels may be used in particular ways identified in prior EPA rules and guidance as part of an assessment of whether a source causes or contributes to a violation of air quality standards. Significant monitoring concentrations may be used to exempt sources from pre-construction monitoring requirements. See 75 FR 64864, 64890–97 (October 20, 2010).

Due to the complexity and uncertainty of the science associated with accounting for biogenic CO_2 emissions and their impact on the carbon cycle and net atmospheric CO_2

levels, requiring regulation of biogenic sources of CO_2 at this time may lead to only trivial environmental benefits while exacerbating the regulatory burdens and absurd results the Tailoring Rule was intended to avoid because the subsequent scientific study may show that certain biogenic feedstocks have a trivial or even positive impact on net atmospheric CO_2 levels.

d. Potential for Some Biomass Feedstocks To Have a *de minimis,* Neutral or Positive Impact on Net CO_2 Levels in the Atmosphere

As discussed previously in this preamble, EPA believes based on information currently before the Agency that at least some biomass feedstocks that may be utilized to produce energy or other products have a negligible impact on the net carbon cycle, or possibly even a positive net effect. Within the context of the PSD and Title V programs, the argument for treating CO_2 emissions from bioenergy and biogenic sources differently from fossil-based CO_2 emissions at the facility relies on the premise that sequestration occurs offsite, outside the boundaries of the facility. Such a negligible or positive impact on the carbon cycle and net atmospheric CO_2 levels should not count towards the PSD and Title V applicability requirements. It appears that the potential may exist for EPA to determine that other types of biomass feedstocks would have a negligible impact on the net carbon cycle impact after further detailed examination of the science associated with biogenic CO_2 emissions.

Thus, if EPA were to require all bioenergy facilities or other sources of biogenic CO_2 emissions to limit emissions of CO_2 before this assessment is complete, it may later determine that such actions have required regulation of a trivial amount of emissions or even potentially of emissions that are associated with a net CO_2 emissions benefit. To avoid this outcome, and because of the scientific uncertainty and administrative burdens associated with accounting for net biogenic CO_2 emissions relative to the carbon cycle, EPA believes an initial deferral of the PSD requirements for bioenergy and other biogenic sources is justified at this time to conduct the detailed scientific evaluation described elsewhere in the preamble. However, the possibility also remains that EPA's detailed examination of the science of biogenic CO_2 will demonstrate that the utilization of some biomass feedstocks for bioenergy production will have a significant impact on the net carbon cycle, making application of the PSD program requirements to such emissions necessary to fulfill congressional intent. Thus, EPA is finalizing only a temporary, rather than a permanent, deferral of PSD requirements at this time in order for EPA to conduct a study of the science surrounding biogenic CO_2 emissions and their role in the carbon cycle and to develop an accounting framework to help further relieve the burdens faced by permitting authorities. EPA is also seeking an independent peer review of the science and accounting framework by the Science Advisory Board to resolve the uncertainties that have been highlighted by commenters in response to the CFI and the proposal to this action.

C. Facilities Permitted During Deferral

The final rule is an interim deferral for biogenic CO_2 emissions only and does not relieve sources of the obligation to meet the PSD and Title V permitting requirements for other pollutant emissions that are otherwise applicable to the source during the deferral period or that may be applicable to the source at a future date pending the results of EPA's study and subsequent rulemaking action.

This means, for example, that if the deferral is applicable to biogenic CO_2 emissions from a particular source during the three-year effective period and the study and future rulemaking do not provide for a permanent exemption from PSD and Title V permitting requirements for the biogenic CO_2 emissions from a source with particular characteristics, then the deferral would end for that type of source and its biogenic CO_2 emissions would have to be appropriately considered in any applicability determinations that the source may need to conduct for future stationary source permitting purposes, consistent with that subsequent rulemaking and the Final Tailoring Rule (*e.g.,* a major source determination for Title V purposes or a major modification determination for PSD purposes).

EPA also wishes to clarify that we did not propose and this rule does not require that a PSD permit issued during the deferral period be amended or that any PSD requirements in a PSD permit existing at the time the deferral takes effect, such as BACT limitations, be revised or removed from an effective PSD permit for any reason related to the deferral or when the deferral period expires.

Section 52.21(w) requires that any PSD permit shall remain in effect, unless and until it expires or it is rescinded, under the limited conditions specified in that provision. Also note that we did not specifically propose or make final any change to these rescission provisions, nor were they addressed to any extent in the proposal. Thus, a PSD permit that is issued to a source while the deferral was effective need not be reopened or amended if the source is no longer eligible to exclude its biogenic CO_2 emissions from PSD applicability after the deferral expires. However, if such a source undertakes a modification that could potentially require a PSD permit and the source is not eligible to continue excluding its biogenic CO_2 emissions after the deferral expires, the source will need to consider its biogenic CO_2 emissions in assessing whether it needs a PSD permit to authorize the modification. With respect to Title V, a source that becomes a major source subject to an approved Title V permit program as a result of biogenic emissions after the deferral expires would generally have one year from the date the source became subject to Title V to apply for an operating permit.

Any future actions to modify, shorten, or make permanent the deferral for biogenic sources are beyond the scope of this action and will be addressed through subsequent rulemaking, based on the scientific study and development of an accounting framework described elsewhere in this preamble. At this time, the results of EPA's review of the science related to net atmospheric impacts of biogenic CO_2 and the framework to properly account for such emissions in Title V and PSD permitting programs based on the study are prospective and unknown. Thus, we are unable to predict which biogenic CO_2 sources, if any, currently subject to the deferral would be subject to any permanent exemptions or which currently deferred sources would be potentially required to account for their emissions in the future rulemaking EPA has committed to undertake for such purposes in three or fewer years. Only in that rulemaking can EPA address the question of extending the deferral or putting in place requirements that would have the equivalent effect on sources covered by this deferral.

To the extent the deferral is not effective in a particular state at the time a PSD permit is issued, then the permit would need to include BACT limitations for GHGs if the source emits above levels that make GHGs subject to regulation under applicable rules. EPA issued interim guidance entitled, ''Guidance for Determining Best Available Control Technology for Reducing Carbon Dioxide Emissions from Bioenergy Production'' to help permitting authorities, during the interim period before the deferral is effective, establish a basis for concluding that under PSD Programs the combustion of biomass fuels can be considered BACT for biogenic CO_2 emissions at stationary sources. To be clear, this guidance would apply during the deferral period for those permitting authorities where the deferral was not effective until EPA revises it or it is superseded by future guidance or rules.

D. Mechanism for Deferral and State Implementation

Consistent with the proposed rule, EPA is implementing the deferral by amending the definition of ''subject to regulation'' in its PSD and Title V regulations. The adoption of the deferral for biogenic CO_2 emissions from Title V and PSD permitting programs under 40 CFR part 70 and 40 CFR 51.166 is optional for any state, local, or tribal (state) permitting authority, but is effective immediately upon publication for Title V and PSD permitting programs under 40 CFR part 71 and 40 CFR 52.21 that EPA implements.

The proposal did not specifically require each state to revise its PSD and Title V permitting programs (required under parts 51.166 and 70) to impose the deferral for three years, although it was clear that the proposal was intended to revise the permitting programs that EPA implements (required under parts 52.21 and part 71) for this purpose, and it was clear that EPA intended to implement the deferral by changing its implementing regulations. Many state commenters on the proposal seemed to assume that the deferral was mandatory for the states and questioned how they would revise their SIPs and Title V programs by July 1, 2011, as they read EPA's proposal to require.

For the purposes of this final rule, EPA is clarifying that each state may decide if it wishes to adopt the deferral and proceed accordingly, with appropriate program changes, if needed. Also, EPA suggests that each state communicate with its stationary sources its intent in this regard. Because the deferral is not required, states that do not wish to revise their current permit programs do not need to make any program changes in response to this final rule. Also, states that do wish to adopt the deferral do not need to make any changes that would otherwise be necessary by July 1, 2011, the start of step 2 under the Tailoring Rule. Although the preamble for the proposal did discuss the beginning of step 2 of the Tailoring Rule as a time when more sources would be subject to permitting, because sources could be subject to Title V without a prerequisite that they also be subject to PSD and because they could be subject to PSD for GHGs without being subject first for another regulated NSR pollutant, it did not discuss any requirement for any state deferral to be effective by July 1, 2011, and we are not requiring this in this final rule.

However, although state program changes are not required under today's final rule, EPA sees several reasons that a state should adopt the deferral in its state programs and, based on comments received, EPA expects that many states will adopt the deferral. Many of these reasons are the same reasons prompting EPA to adopt the deferral for the permit programs we implement. That is, states that expect to receive permit applications from a number of biomass facilities, and, in particular, a number of different types of biomass facilities, are likely to need more time to determine how best to address technical, scientific, and practical issues related to biogenic CO_2 without disrupting the proper functioning and timeliness of the permitting programs. Of course, it is at least in theory possible that such a state may, on its own, be able to address those issues, or may for other reasons have adequate resources to address those issues. Even so, we expect that many states will need to, and therefore should, adopt the deferral, and therefore, like the proposal, this final rule strongly encourages states that wish to adopt the three-year deferral to submit SIP revisions or Title V program revisions. However, like the proposal, this final rule does not mandate such submittals, recognizing that some states may not have any (or may have only a few) sources that combust biomass, and may have adequate information and resources regarding the nature of biogenic emissions from those sources, or may for other reasons be able to conduct permitting of bioenergy sources without straining their permitting resources.

Furthermore, the justification that supports this deferral for including biogenic CO_2 in PSD applicability determinations is not applicable in the case of a PSD permit that was issued before completion of this rule during step 1 of the phase in of GHG requirements under the Tailoring Rule. If a permit has been issued, then the burden described above has already been experienced and overcome by the permitting authority. Furthermore, this burden will have been experienced in the context of step 1 of the GHG permitting phase under the Tailoring Rule, and thus was easier to accommodate as part of the more limited increase in workload that permitting authorities have faced in addressing GHG requirements during step 1. In the context of step 2 where permitting authorities will have to process a greater number of permit applications, the incremental burden of evaluating the net atmospheric impacts of biogenic CO_2 has a more significant impact on the ability of permitting authorities to administer the permitting programs. This analysis adds a burden that EPA had not considered when it completed the Tailoring Rule.

EPA also issued interim guidance entitled, ''Guidance for Determining Best Available Control Technology for Reducing Carbon Dioxide Emissions from Bioenergy Production'' to help permitting authorities establish a basis for concluding that under the PSD Program the combustion of biomass fuels can be considered BACT for biogenic CO_2 emissions at stationary sources until such time as the deferral becomes effective. EPA wishes to clarify that the guidance is non-binding and case-by-case BACT determinations made in accordance with the guidance may nonetheless be subject to challenge in each permitting action. Accordingly, the interim guidance does not provide the same level of certainty to sources and decrease in administrative burdens to permitting authorities and sources that the deferral does.

EPA developed the interim BACT guidance primarily for application during step 1 of the phase of GHG permitting requirements under the Tailoring Rule. While the guidance suggests reasoning that may serve to reduce the resource demands of conducting a net carbon cycle analysis in the context of permitting, it does not eliminate the need for permitting authorities to conduct some evaluation of energy, environmental, and economic impacts in step 4 of the BACT analysis. The guidance discusses the complexities of conducting a net carbon cycle analysis, but places the emphasis on showing the economic and energy benefits of utilizing biomass. Permitting authorities that apply this approach still need to identify the specific energy and economic benefits of utilizing particular biomass feedstocks to apply this rationale. To the extent these benefits cannot be identified or shown to override other considerations, a permitting authority may need to explore the net carbon cycle impact in more depth to justify the conclusion that utilization of a biomass feedstock is BACT by itself. In states that do not elect to adopt the deferral, the incremental burden of conducting the analysis described in the guidance will have a more significant impact on the overall ability to administrate the permitting program in the context of step 2 of the GHG permitting than it did in step 1, in which the overall increase in workload from incorporating GHG requirements into PSD permit reviews was less than it will be in step 2.

This deferral may not be effective in any jurisdiction before EPA publishes a final rule and it takes effect. Also, for any state that found it necessary to revise its permitting programs to implement the Final Tailoring Rule, EPA believes it unlikely that such a state would be able to implement the deferral under its state rules without making additional changes to its program consistent with the regulatory changes in this final rule. For any state that was able to implement the Final Tailoring Rule through interpretation of the term ''subject to regulation'', consistent with the Final Tailoring Rule, without making any changes to state regulations, EPA believes it is likely they would be able to implement the deferral under their state rules without making additional revisions. In either of these cases, EPA recommends that states communicate with the stationary sources under their jurisdiction regarding whether they intend to adopt the deferral, and if they do, when it will become effective.

III. Response to Public Comments

A. Overview of Public Comments

We received a significant number of public comments on the proposed deferral. Some of these comments covered issues such as:

- Content of the Deferral (*e.g.,* pollutants and sources covered, start and end date, terminology);
- Implementation of the Deferral; and
- Legal Authority.

While those comments addressed the deferral itself, a large number of the comments actually raised issues outside the scope of this rulemaking and covered topics such as:

- Science, accounting, and economic issues related to biogenic CO_2 emissions (*e.g.,* carbon cycle dynamics, accounting methodologies, forest economics and sustainability);
- PSD, Title V and the Tailoring Rule; and
- The Interim Guidance, ''Guidance For Determining Best Available Control Technology for Reducing Carbon Dioxide Emissions From Bioenergy Production'' (March 21, 2011).

EPA acknowledges those comments that are outside the scope of this rulemaking and notes that many of the issues raised were similar, if not identical, to those presented in comments to the CFI last year. We will be considering those topics as part of the detailed examination of the science and technical issues associated with accounting for biogenic CO_2 emissions from stationary sources. We also may consider the issues in any subsequent rulemakings we undertake related to the PSD, Title V and other stationary source programs. However, we do not respond to them in this rulemaking.

The sections below contain a brief summary of the some of the major comments and responses we received on the proposal. Responses to the substantive comments can be found in the response to comments document entitled, ''Deferral for CO_2 Emissions from Bioenergy and Other Biogenic Sources under the Prevention of Significant Deterioration (PSD) and Title V Programs, Summary of Public Comments and Responses,'' available in docket EPA–HQ–OAR–2011–0083.

B. Comments on the Deferral

We received comments on different aspects of the deferral. They fit into several broad categories as discussed below.

Terminology. We received several comments requesting clarity on the terminology in the deferral, including the terms biogenic CO_2 emissions, biologically-based material and examples of the types of sources that these emissions can come from. As discussed in section II, we finalized the terms biogenic CO_2 emissions (described as, emissions of CO_2 from a stationary source directly resulting from the combustion or decomposition of biologically-based materials other than fossil fuels and mineral sources of carbon (*e.g.* calcium carbonate)) and biologically-based material (non-fossilized and biodegradable organic material originating from plants, animals or micro-organisms [including products, by-products, residues and waste from agriculture, forestry and related industries as well as the non-fossilized and biodegradable organic fractions of industrial and municipal wastes, including gases and liquids recovered from the decomposition of non-fossilized and biodegradable organic material]) with very little change. We added the clause about ''mineral sources'' of carbon to biogenic CO_2 emissions in response to requests for additional clarification on which sources of CO_2 were not included in the deferral. We also clarified that in the examples of sources of biogenic CO_2 emissions, CO_2 from fermentation includes CO_2 from ethanol production as well as other industrial processes.

Pollutants. We received comments on which pollutants are covered by the deferral, particularly methane (CH_4) and nitrous oxide (N_2O). A few comments requested that CH_4 and N_2O also be included in the deferral as they result when biomass is combusted. While CH_4 and N_2O are produced when biomass is combusted, the level of emissions and resulting impact on atmospheric concentrations of these gases are primarily related to the feedstock handling and combustion conditions at the specific plant rather than the source of the feedstocks. We finalized this rule as proposed and included only biogenic CO_2 emissions for this reason, and note that emissions of non-CO_2 GHGs are typically a small proportion of the total GHG emissions from combustion of biologically based material. Since the non-CO_2 GHGs are so small relative to CO_2, the deferral of biogenic CO_2 emissions will ensure the biomass combustion projects will likely not meet the applicability thresholds based on their CH_4 and N_2O emissions alone.

Duration. We received several comments on the duration of the deferral, including its start date and end date. Specifically, several comments recommended that EPA remove the three-year sunset date and make the deferral permanent until the Agency completes its study and takes further action. Others concluded EPA does not need three years to complete its work and should shorten the deferral.

EPA is conducting a detailed examination of the science and technical issues associated with biogenic CO_2 emissions and is developing an accounting framework. Once that work is complete, the Agency intends to undertake a notice-and-comment rulemaking to establish the treatment of these emissions in the PSD and Title V programs. We have determined that three years will be required to complete the scientific work as well as the follow-on rulemaking. As stated in section II of this preamble, the deferral is intended to be a temporary measure to allow the Agency time to complete its work and determine what, if any, treatment of biogenic CO_2 emissions should be in the PSD and Title V programs. Therefore, we did not agree to make the deferral permanent or to shorten it.

Sources covered by and permitted during the deferral. We received several comments requesting clarity on which sources of biogenic CO_2 emissions were covered by the deferral. This is related to the comments on definitions described above, and we provided clarity on those sources, where necessary. We also received several comments on the application of the PSD and Title V programs during the deferral, including the availability of grandfathering or a permitting moratorium for sources subject to the deferral and on the availability of authority to revise BACT.

The final rule is an interim deferral for biogenic CO_2 emissions only and does not relieve sources of the obligation to meet the PSD and Title V permitting requirements for other pollutant emissions that are otherwise applicable to the source during the deferral period or that may be applicable to the source at a future date pending the results of EPA's study and subsequent rulemaking action. At this time, we are unable to predict which biogenic CO_2 sources, if any, currently subject to the deferral would be subject to any permanent exemptions or which currently deferred sources would be potentially required to account for their emissions in relation to future permitting actions as a result of the future rulemaking EPA has committed to undertake for such purposes in three or fewer years. Only in that rulemaking can EPA address the question of extending the deferral or putting in place requirements that would have the equivalent effect on sources covered by this deferral.

This means, for example, that if the deferral is applicable to biogenic CO_2 emissions from a particular source during the three-year effective period and the study and future rulemaking do not provide for a permanent exemption from the PSD and Title V permitting requirements for the biogenic CO_2 emissions from a source with particular characteristics, then the deferral would end for that source and those biogenic CO_2 emissions would have to be appropriately considered in any applicability determinations that the source may need to conduct for future stationary source permitting purposes, consistent with that subsequent rulemaking and the Final Tailoring Rule (*e.g.,* a major source determination for Title V purposes or a major modification determination for PSD purposes).

Many commenters on the proposed deferral asked EPA to provide grandfathering from permitting requirements for sources that are currently not subject to permitting requirements but that in the future may be covered by the deferral. In addition, some commenters asked for the deferral to be made retroactively effective (*e.g.,* during step 1 of the Tailoring Rule or January 1, 2011 through June 30, 2011) in states prior to state adoption of any SIP revision or Title V program change that may be necessary to revise the programs to incorporate the deferral, or that the deferral permanently apply to any source subject to it at any time.

As explained in section II.C of this preamble, EPA has decided to not offer any kind of grandfathering or moratorium on future Title V and PSD permitting for biogenic CO_2 sources subject to the three-year deferral.

EPA wishes to clarify that we did not propose and this rule does not require that a PSD permit issued during the deferral period be amended or that any PSD requirements in a PSD permit existing at the time the deferral takes effect, such as BACT limitations, be revised or removed from an effective PSD permit for any reason related to the deferral or when the deferral period expires.

Section 52.21(w) requires that any PSD permit shall remain in effect, unless and until it expires or it is rescinded, under the limited conditions specified in that provision. To the extent the deferral is not effective in a particular state at the time a PSD permit is issued, then the permit would need to include BACT limitations for GHGs if the source emits above levels that make GHGs subject to regulation under applicable rules.

Thus, a PSD permit that is issued to a source while the deferral was effective need not be reopened or amended if the source is no longer eligible to exclude its biogenic CO_2 emissions from PSD applicability after the deferral expires. However, if such a source undertakes a modification that could potentially require a PSD permit and the source is not eligible to continue excluding its biogenic CO_2 emissions after the deferral expires, the source will need to consider its biogenic CO_2 emissions in assessing whether it needs a PSD permit to authorize the modification.

Any future actions to modify, shorten, or make permanent the deferral for biogenic sources are beyond the scope of this action and will be addressed through subsequent rulemaking, based on the scientific study and development of an accounting framework described elsewhere in this preamble.

Implementation of the Deferral. We received comments suggesting that adoption of the deferral must be mandatory for states, as well as comments saying that the states should have flexibility regarding adoption of the deferral. As explained in section II. D of this preamble, EPA is not making adoption of this deferral mandatory. Each state may decide if it wishes to adopt the deferral and proceed accordingly, with appropriate program changes, if needed. Based on the comments received, we recognize that some states may not have any, or may have only a few, sources that combust biomass, and may have adequate information and resources as to the nature of biogenic emissions from those sources. That said, EPA recommends that each state communicate with its stationary sources its intent in this regard and utilize the interim guidance document as appropriate.

Even though adoption of the deferral is not mandatory, EPA sees several reasons why a state might want to adopt the deferral in its state programs and many of these reasons are the same reasons why EPA is adopting the deferral for the permit programs we implement (*e.g.,* the need for more time to determine how to address technical, scientific, and practical issues related to biogenic CO_2 without disrupting the proper functioning and timeliness of the permitting programs).

However, although state program changes are not required under today's final rule, EPA sees several reasons that a state might want to adopt the deferral in its state programs; many of these reasons are the same reasons prompting EPA to adopt the deferral for the permit programs we implement (*e.g.,* the need for more time to determine how best to address technical, scientific, and practical issues related to biogenic CO_2 without disrupting the proper functioning and timeliness of the permitting programs). Also, like the proposal, this final rule strongly encourages states that wish to adopt the three-year deferral to submit SIP revisions or Title V program revisions, but does not mandate such submittals, recognizing that some states may not have any (or may have only a few) sources that combust biomass, and may have adequate information and resources regarding the nature of biogenic emissions from those sources.

Furthermore, the justification that supports this deferral for including biogenic CO_2 in PSD applicability determinations is not applicable in the case of a PSD permit that was issued before completion of this rule during step 1 of the phase-in of GHG requirements under the Tailoring Rule. If a permit has been issued, then the burden described above has already been experienced and overcome by the permitting authority. Furthermore, this burden will have been experienced in the context of step 1 of the GHG permitting phase in under the Tailoring Rule, and thus was easier to accommodate as part of the more limited increase in workload that permitting authorities have faced in addressing GHG requirements during step 1. In the context of step 2 where permitting authorities will have to process a greater number of permit applications, the incremental burden of evaluating the net atmospheric impacts of biogenic CO_2 has a more significant impact on the ability of permitting authorities to administer the permitting programs. This analysis adds a burden that EPA had not considered when it completed the Tailoring Rule.

As explained in section II.C of the preamble, EPA also issued interim guidance entitled, ''Guidance for Determining Best Available Control Technology for Reducing Carbon Dioxide Emissions from Bioenergy Production'' to help permitting authorities establish a basis for concluding that under PSD Program the combustion of biomass fuels can be considered BACT for biogenic CO_2 emissions at stationary sources until such time as the deferral becomes effective. This guidance may continue to assist permitting authorities where the deferral is not effective during the deferral period until EPA revises it or it is superseded by future guidance or rules. It should be noted that the guidance is non-binding, and case-by-case BACT determinations made in accordance with the guidance may nonetheless be subject to challenge in each permitting action. Accordingly, the interim guidance does not provide the same level of certainty to sources and decrease in administrative burdens to permitting authorities and sources that the deferral does.

EPA developed the interim BACT guidance primarily for application during step 1 of the phase-in of GHG permitting requirements under the Tailoring Rule. While the guidance suggests reasoning that may serve to reduce the resource demands of conducting a net carbon cycle analysis in the context of permitting, it does not eliminate the need for permitting authorities to conduct some evaluation of energy, environmental, and economic impacts in step 4 of the BACT analysis. The guidance discusses the complexities of conducting a net carbon cycle analysis, but places the emphasis on showing the economic and energy benefits of utilizing biomass. Permitting authorities that apply this approach still need to identify the specific energy and economic benefits of utilizing particular biomass feedstocks to apply this rationale. To the extent these benefits cannot be identified or shown to override other considerations, a permitting authority may need to explore the net carbon cycle impact in more depth to justify the conclusion that utilization of a biomass feedstock is BACT by itself. In states that do not elect to adopt the deferral, the incremental burden of conducting the analysis described in the guidance will have a more significant impact on the overall ability to administrate the permitting program in the context of step 2 of the GHG permitting than it did in step 1, where the overall increase in workload from incorporating GHG requirements into PSD permit reviews was less than it will be in step 2.

Legal Authority. We received several comments on EPA's legal authority to issue the deferral. A number of commenters expressed the view that EPA lacked the scientific basis to defer the applicability of PSD and Title V permitting requirements to biogenic emissions of CO_2.

A number of commenters argued that EPA had not demonstrated that the deferral was necessary to avoid administrative burden or impossibility, and that the science surrounding CO_2 emissions from biogenic sources and their role in the carbon cycle is settled enough to show that use of some or all biogenic feedstocks and emissions do have an impact on net atmospheric concentrations of CO_2, or are not *de minimis;* therefore, these commenters argued that such emissions should be regulated under the PSD and Title V permitting programs.

EPA disagrees with the commenters' characterization of the state of the science and administrative burdens facing permitting agencies and sources to account for biogenic sources of CO_2 emissions as part of permitting actions. EPA notes that it also received a number of comments expressing the opposing view that a permanent deferral or exclusion was necessary because biogenic emissions of CO_2 do not have an impact on atmospheric concentrations of CO_2, or that use of certain categories of feedstock do not have such an impact. EPA also received comments from a number of permitting authorities and sources expressing the view that the science surrounding the accounting of net atmospheric CO_2 emissions from biogenic sources, given the carbon cycle, warranted further study and development of an accounting framework to assist them with their permitting actions.

EPA believes this diversity of views reflects the complexity of the science associated with accounting for biogenic CO_2 emissions as part of the PSD and Title V permitting programs. EPA agrees, based on information currently before the Agency, including information provided in response to the CFI and the proposal for this rule, that emissions from certain biomass feedstocks may have a negligible effect on atmospheric concentrations of CO_2, but also believes based on the complexity of this evidence that the deferral to allow for further study is warranted. In addition, EPA is conducting an independent peer review by the Science Advisory Board of the science and accounting framework associated with biogenic CO_2 emissions, which will benefit permitting authorities.

While the interim BACT guidance described elsewhere in the preamble may help alleviate some of this uncertainty and burden for permitting authorities where the deferral is not effective, we expect that more and more diverse users of biomass combustion or other biogenic CO_2 sources are likely to be affected under step 2 of the Tailoring Rule because, under step 2, these sources can trigger permitting requirements based solely on their GHG emissions with no prerequisite requirement that they otherwise trigger PSD or Title V permitting requirements for a non-GHG pollutant. We believe, absent the deferral period and the completion of EPA's full analysis of the unique technical issues associated with these diverse facilities emitting biogenic CO_2, it would be particularly challenging for permitting authorities and facilities to process permits involving these emissions.

A number of commenters challenged EPA's authority to amend the regulatory definition of ''subject to regulation'' to exclude biogenic sources of CO_2 from regulation for three years under the administrative law doctrines and rationale articulated in the Tailoring Rule and elsewhere in this preamble. A number of commenters also expressed the view that the deferral would lead to significant development of the biomass industry during the deferral period and a permanent exclusion for these sources, in contradiction to the CAA's goal of protecting air quality.

EPA disagrees with these commenters' characterization of the legal authority and rationale in support of this interim deferral. As described in Section II.B. of this preamble, this interim deferral is intended only to temporarily exclude biogenic CO_2 emissions from the definition of ''subject to regulation,'' as that term was defined for purposes of the Tailoring Rule, for a period of three years, while EPA further considers, through notice and comment rulemaking, the approach to accounting for these emissions on a permanent basis. In response to commenters who speculate about the likelihood of significant development of the biomass industry or increases in the number of sources emitting biogenic CO_2 during the deferral period, EPA notes that a decision to move forward with development of a facility is based on many economic and business factors, not just permitting requirements, that are beyond the scope of this final action.

This interim deferral represents a permissible application of well-established administrative law doctrines, necessitated by the scientific uncertainty surrounding the accounting of biogenic CO_2 emissions, to develop a regulatory scheme that implements the CAA consistent with congressional intent in a step-wise fashion designed to minimize administrative burdens and avoid premature regulation of sources of air pollution whose biogenic CO_2 emissions could be shown to have *de minimis* impacts on a net carbon cycle basis after EPA completes further analysis. EPA notes that the issue of subsequent applicability of the PSD and Title V programs to facilities that may be permitted during the deferral period is addressed in sections II.C.

EPA's establishment of this deferral is permissible and, based upon the information currently before the Agency, narrowly tailored to effectuate congressional intent. It appears that the potential may exist for EPA to determine that some other types of biomass feedstocks would have a negligible impact on the net carbon cycle impact after further detailed examination of the science associated with biogenic CO_2 emissions. Thus, if EPA were to require all bioenergy facilities to limit emissions of biogenic CO_2 before this assessment is complete, it may later determine that such emissions have trivial impact on the net carbon cycle. To avoid this outcome, and because of the administrative burdens associated with accounting for net biogenic CO_2 emissions relative to the carbon cycle, EPA believes an initial deferral of the PSD requirements for bioenergy and other biogenic sources to allow for subsequent, phased-in regulations is justified at this time. However, the possibility also remains that EPA's detailed examination of the science of biogenic CO_2 will demonstrate that the utilization of some biomass feedstocks for bioenergy production will have a significant impact on the net carbon cycle, making application of the PSD program requirements to such emissions necessary to fulfill congressional intent.

The extensive workload requirements required to understand the net biogenic CO_2 emissions from bioenergy facilities and other sources of biogenic CO_2 emissions, as part of the PSD and Title V permit process, including specifically how to measure and account for biogenic CO_2 emissions, would unnecessarily strain the resources of many permitting authorities and result in delays in processing permits for other applicants. Moreover, at present, devoting these limited permitting authority resources to biomass would not be productive in light of the previously described possibility that EPA may ultimately determine that the utilization of some or all biomass feedstocks for bioenergy has a negligible or *de minimis* impact on the net carbon cycle.

EPA received a comment arguing that the deferral was also supported under the ''one-step-at-a-time'' doctrine, which authorizes agencies to implement statutory requirements a step at a time. EPA also relied, in part, on this doctrine in finalizing the Tailoring Rule. 75 FR 31514, 31578 (June 3, 2010).

In the proposed rule, EPA stated in footnote 13 that the ''one-step-at-a-time'' doctrine was not relevant to this rulemaking. This statement was made without explanation. The commenter stated ''[b]ased on EPA's statements in the Tailoring Rule, which does rely on the 'one-step-at-a-time' doctrine, it appears that the doctrine would apply equally well to EPA's decision to delay regulation of biogenic CO_2 emissions under the PSD and Title V programs.'' As explained in more detail elsewhere in the preamble, EPA now agrees that because of the complexity and uncertainty of the science associated with accounting for biogenic sources of CO_2 that the interim deferral of the PSD and Title V program for such emissions would be a reasonable exercise of the ''one-step-at-a-time'' doctrine.

This rulemaking constitutes an initial step toward full compliance, and, seen in that light, is supported by the ''one-step-at-a-time'' doctrine. Even if the doctrine were found to apply only when an agency is committed to fully implementing statutory requirements according to their literal terms, we believe that the interim deferral promulgated in this final rule would be considered valid under the one-step-at-a-time doctrine.

EPA received a number of comments in favor of expanding the deferral to CO_2e or other GHGs, not just CO_2. EPA disagrees with the commenters seeking expansion of the deferral to CO_2e. As explained elsewhere in the preamble, while CH_4 and N_2O are produced when biomass is combusted, the level of emissions and resulting impact on atmospheric concentrations of these gases are primarily related to the feedstock handling and combustion conditions at the specific plant rather than the source of the feedstocks. We finalized this rule as proposed and included only biogenic CO_2 emissions for this reason, and note that emissions of non-CO_2 GHG are typically a small proportion of the total GHG emissions from combustion of biologically based material. Since the non-CO_2 GHG are so small relative to CO_2, the deferral of biogenic CO_2 emissions will ensure the biomass combustion projects will likely not meet the applicability thresholds on their CH_4 and N_2O emissions alone. Subsequent regulations to establish treatment of specific sources of biogenic emissions under the PSD and Title V programs are beyond the scope of this action.

C. Comments on Science, Accounting, and Economic Issues

As noted above, we received a large number of comments that provided the same or similar information to the comments received through the CFI last year. Those comments are summarized briefly below and also contained in the response to comments document. While we did not respond to these comments as they are outside the scope of this rulemaking, we will consider many of them during our ongoing work on biogenic CO_2 emissions.

Carbon cycle dynamics. We received several comments on the net atmospheric impact of biomass. Some commenters supported the conclusion that biomass has zero net atmospheric impact based on the premise that biomass is part of the natural carbon cycle and does not add additional carbon to the atmosphere. Conversely, other commenters supported the conclusion that biomass combustion increases the atmospheric carbon load. Issues raised by commenters, including the time delays between sequestration from and release to the atmosphere, differences between feedstocks, influences of different spatial scale, and differences in combustion efficiencies, are important in the development of accounting methodologies and will be considered during the scientific review that will take place during the three-year deferral period. EPA will consider such issues in order to account for biogenic CO_2 emissions from stationary sources in ways that are scientifically sound and manageable in practice.

Accounting methodologies used by other programs. We received several comments discussing the accounting methodologies used in international, U.S. government (including U.S. EPA) and state regulatory and policy programs. The accounting approaches taken by other programs, including other EPA programs, will be considered in EPA's detailed examination of the scientific and technical issues related to biogenic CO_2 emissions and any subsequent rulemakings we undertake during the deferral period.

Components of accounting methodologies. We received several comments highlighting the challenges associated with different components of biogenic CO_2 emissions accounting methodologies, including using ''business-as-usual'' (BAU) projections, employing case-by-case analyses and considering a feedstock-based accounting approach. EPA will consider these topics in our review of the scientific and technical issues related to accounting for biogenic CO_2 emissions, as well as in the subsequent rulemaking to establish the treatment of these emissions in the PSD and Title V programs.

Forest economics and sustainability. We received some comments supporting forest biomass as an energy feedstock and discussing the role of bioenergy markets in sustaining forest conservation. EPA thanks the commenters for these comments and considers these views beyond the scope of this deferral action.

D. Comments on PSD, Title V and the Tailoring Rule

We received some comments on the PSD and Title V programs and how they relate to the Tailoring Rule, including comments about the need to adjust the thresholds for GHG applicability, facilities that should or should not be covered, and the ultimate treatment of biogenic CO_2 in these programs. These comments are contained in the response to comments document. The dates, thresholds and other requirements established in the Tailoring Rule are not a subject of this rulemaking and thus these comments are outside the scope of this action.

E. Comments on the Interim Guidance

We received some comments on the interim guidance document released in March 2011 designed to help permitting authorities establish a basis for concluding that under PSD and Title V Programs the combustion of biomass fuels can be considered BACT for biogenic CO_2 emissions at stationary sources before the deferral becomes effective. These comments are contained in the response to comments document and are briefly summarized below. While these comments are outside the scope of this rulemaking, we will likely be considering many of them during our ongoing work on biogenic CO_2 emissions.

Some commenters asserted that biogenic fuels should not be considered BACT for controlling biogenic CO_2 emissions at energy projects, while others supported the inclusion of biogenic fuels as BACT in the interim guidance. As stated in the March 2011 interim guidance document, EPA has not provided a final determination of BACT for any particular source, since such determinations can only be made by individual permitting authorities on a case-by-case basis after consideration of the record in each case. Upon consideration of the record in an individual case, if a permitting authority has a reasoned basis to address particular issues in a different manner than EPA recommends in the bioenergy BACT guidance, they have the discretion to do so. EPA is granting the deferral of biogenic CO_2 emissions from stationary source permitting requirements because the issue of accounting for the net atmospheric impact of biogenic CO_2 emissions is complex enough that further consideration of this important issue is warranted.

IV. Statutory and Executive Order Review

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

This action is not a ''significant regulatory action'' under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011).

B. Paperwork Reduction Act

This action does not impose any new information collection burden. Instead, this action will reduce costs incurred by any facility with biogenic CO_2 emissions, as well as permitting authorities, relative to the costs that would be incurred if EPA did not revise the rule.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB has previously approved the information collection requirements contained in the existing regulations for PSD (see, *e.g.,* 40 CFR 52.21) and Title V (see 40 CFR parts 70 and 71) under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2060–0003 and OMB control number 2060–0336. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of this action on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this final action on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives ''which minimize any significant economic impact of the rule on small entities.'' 5 U.S.C. 603 and 604. Thus, an agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule.

We believe that this final rule will relieve the necessary analysis and corresponding workload requirements for most affected facilities, including small businesses, subject to the PSD and Title V programs. As a result, the program changes provided in this rule are not expected to result in a significant economic impact on a substantial number of small entities. In addition, EPA determined that the final rulemaking would not have a significant impact on small governmental jurisdictions. The EPA has therefore concluded that this final action will not have a significant economic impact on a substantial number of small entities.

D. Unfunded Mandates Reform Act (UMRA)

This final rule does not contain a Federal mandate that may result in expenditures of $100 million or more for state, local, and tribal governments, in the aggregate, or the private sector in any one year. Only those few states whose permitting authorities do not implement the Federal PSD and Title V rules by reference in their SIPs will have a small increase in burden. If those states choose to adopt this deferral, they will have to amend their corresponding SIPs to incorporate the amendments from today's action, as the deferral that we finalized will not otherwise apply to the PSD and Title V programs. Thus, this rule is not subject to the requirements of sections 202 or 205 of the UMRA.

This rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. As discussed earlier, this rule is expected to result in an administrative burden reduction for all affected permitting authorities and permittees, including small governments.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in EO 13132. These amendments will simplify and reduce the burden of implementing the PSD and Title V operating permit programs, by deferral of PSD and Title V application requirements to biogenic CO_2 emissions at a facility. Thus, EO 13132 does not apply to this action.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (59 FR 22951, November 6, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by Tribal officials in the development of regulatory policies that have Tribal implications.''

The EPA has concluded that this final rule may have Tribal implications. However, it will neither impose substantial direct compliance costs on Tribal government, nor preempt Tribal law. There are no Tribal authorities currently issuing PSD and Title V permits; however, this may change in the future.

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

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

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

This action is not a ''significant energy action'' as defined in EO 13211 (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Further, we have concluded that this rule is not likely to have any adverse energy effects because this action would not create any new requirements for sources in the energy supply, distribution, or use sectors.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113 (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This action does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

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

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

The EPA has determined that this rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment, as any impacts that it will have will be global in nature and will not affect local communities or populations in a manner that adversely affects the level of protection provided to human health or the environment.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the U.S. prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). This rule will be effective on July 20, 2011.

List of Subjects

40 CFR Part 51

Environmental protection, Administrative practice and procedure, Air pollution control, Carbon dioxide, Carbon dioxide equivalents, Greenhouse gases, Incorporation by reference, Intergovernmental relations, Methane, Nitrous oxide.

40 CFR Part 52

Environmental protection, Administrative practice and procedure, Air pollution control, Carbon dioxide, Carbon dioxide equivalents, Greenhouse gases, Incorporation by reference, Intergovernmental relations, Methane, Nitrous oxide.

40 CFR Part 70

Environmental protection, Administrative practice and procedure, Air pollution control, Carbon dioxide, Carbon dioxide equivalents, Greenhouse gases, Intergovernmental relations, Methane, Nitrous oxide.

40 CFR Part 71

Environmental protection, Administrative practice and procedure, Air pollution control, Carbon dioxide, Carbon dioxide equivalents, Greenhouse gases, Intergovernmental relations, Methane, Nitrous oxide.

Dated: July 1, 2011.

Lisa P. Jackson,

Administrator.

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

PART 51—[AMENDED]

■ 1. The authority citation for part 51 continues to read as follows:

Authority: 23 U.S.C. 101; 42 U.S.C. 7401–7671q.

Subpart I—[Amended]

■ 2. Section 51.166 is amended by revising paragraph (b)(48)(ii)(*a*) to read as follows:

§ 51.166 Prevention of significant deterioration of air quality.

* * * * *

(b) * * *

(48) * * *

(ii) * * *

(a) Multiplying the mass amount of emissions (tpy), for each of the six greenhouse gases in the pollutant GHGs, by the gas's associated global warming potential published at Table A–1 to subpart A of part 98 of this chapter—Global Warming Potentials. For purposes of this paragraph (b)(48)(ii)(a), prior to July 21, 2014, the mass of the greenhouse gas carbon dioxide shall not include carbon dioxide emissions resulting from the combustion or decomposition of non-fossilized and biodegradable organic material originating from plants, animals, or micro-organisms (including products, by-products, residues and waste from agriculture, forestry and related industries as well as the non-fossilized and biodegradable organic fractions of industrial and municipal wastes, including gases and liquids recovered from the decomposition of non-fossilized and biodegradable organic material).

* * * * *

PART 52—[AMENDED]

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

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

Subpart A—[Amended]

■ 4. Section 52.21 is amended by revising paragraph (b)(49)(ii)(*a*) to read as follows:

§ 52.21 Prevention of significant deterioration of air quality.

* * * * *

(b) * * *

(49) * * *

(ii) * * *

(a) Multiplying the mass amount of emissions (tpy), for each of the six greenhouse gases in the pollutant GHGs, by the gas's associated global warming potential published at Table A–1 to subpart A of part 98 of this chapter—Global Warming Potentials. For purposes of this paragraph, prior to July 21, 2014, the mass of the greenhouse gas carbon dioxide shall not include carbon dioxide emissions resulting from the combustion or decomposition of non-fossilized and biodegradable organic material originating from plants, animals, or micro-organisms (including products, by-products, residues and waste from agriculture, forestry and related industries as well as the non-fossilized and biodegradable organic fractions of industrial and municipal wastes, including gases and liquids recovered from the decomposition of non-fossilized and biodegradable organic material).

* * * * *

PART 70—[AMENDED]

■ 5. The authority citation for part 70 continues to read as follows:

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

■ 6. Section 70.2 is amended by revising paragraph (2) of the definition of ''Subject to regulation'' to read as follows:

§ 70.2 Definitions.

* * * * *

Subject to Regulation

* * * * *

(2) The term *tpy CO_2 equivalent emissions (CO_2e)* shall represent an amount of GHGs emitted, and shall be computed by multiplying the mass amount of emissions (tpy), for each of the six greenhouse gases in the pollutant GHGs, by the gas's associated global warming potential published at Table A–1 to subpart A of part 98 of this chapter—Global Warming Potentials, and summing the resultant value for each to compute a tpy CO_2e. For purposes of this paragraph, prior to July 21, 2014, the mass of the greenhouse gas carbon dioxide shall not include carbon dioxide emissions resulting from the combustion or decomposition of non-fossilized and biodegradable organic material originating from plants, animals, or micro-organisms (including products, by-products, residues and waste from agriculture, forestry and related industries as well as the non-fossilized and biodegradable organic fractions of industrial and municipal wastes, including gases and liquids recovered from the decomposition of non-fossilized and biodegradable organic material).

* * * * *

PART 71—[AMENDED]

■ 7. The authority citation for part 71 continues to read as follows:

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

Subpart A—[Amended]

■ 8. Section 71.2 is amended by revising paragraph (2) of the definition of ''Subject to regulation'' to read as follows:

§ 71.2 Definitions.

* * * * *

Subject to Regulation

* * * * *

(2) The term *tpy CO_2 equivalent emissions (CO_2e)* shall represent an amount of GHGs emitted, and shall be computed by multiplying the mass amount of emissions (tpy), for each of the six greenhouse gases in the pollutant GHGs, by the gas's associated global warming potential published at Table A–1 to subpart A of part 98 of this chapter—Global Warming Potentials, and summing the resultant value for each to compute a tpy CO_2e. For purposes of this paragraph, prior to July 21, 2014, the mass of the greenhouse gas carbon dioxide shall not include carbon dioxide emissions resulting from the combustion or decomposition of non-fossilized and biodegradable organic material originating from plants, animals, or micro-organisms (including products, by-products, residues and waste from agriculture, forestry and related industries as well as the non-fossilized and biodegradable organic fractions of industrial and municipal wastes, including gases and liquids recovered from the decomposition of

non-fossilized and biodegradable organic material).

* * * * *

[FR Doc. 2011–17256 Filed 7–19–11; 8:45 am]

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Part V

Department of Transportation

Pipeline and Hazardous Materials Safety Administration

49 CFR Parts 107, 171, 172, *et al.*

Hazardous Materials; Miscellaneous Amendments; Final Rule

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

49 CFR Parts 107, 171, 172, 173, 174, 177, 178 and 180

[Docket No. PHMSA–2009–0151 (HM–218F)]

RIN 2137–AE46

Hazardous Materials; Miscellaneous Amendments

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Final rule.

SUMMARY: PHMSA is amending the Hazardous Materials Regulations to make miscellaneous amendments to update and clarify certain regulatory requirements. These amendments are intended to: promote safer transportation practices; eliminate unnecessary regulatory requirements; finalize outstanding petitions for rulemaking; facilitate international commerce; and simplify the regulations. PHMSA anticipates that the amendments contained in this rule will generate economic benefits to the regulated community.

DATES: *Effective Date:* This final rule is effective on August 19, 2011.

Voluntary Compliance Date: Voluntary compliance with all these amendments, including those with delayed mandatory compliance, is authorized as of July 20, 2011.

Incorporation by Reference Date: The incorporation by reference of publications listed in this final rule has been approved by the Director of the Federal Register as of August 19, 2011.

FOR FURTHER INFORMATION CONTACT: Deborah L. Boothe, Standards and Rulemaking Branch, (202) 366–8553, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

SUPPLEMENTARY INFORMATION:

I. Background

A. Notice of Proposed Rulemaking (NPRM)

On September 29, 2010, PHMSA published a Notice of Proposed Rulemaking (NPRM) under this docket HM–218F. (74 FR 16135). The NPRM proposed amendments to the Hazardous Materials Regulations (HMR; 49 CFR parts 171–180) based on PHMSA initiatives and petitions for rulemaking submitted in accordance with 49 CFR 106.95. Most of the amendments proposed in the NPRM were intended to provide relief to industry by eliminating, revising, clarifying, or relaxing regulatory requirements. Below we summarize the changes proposed in the September 29, 2010 NPRM:

- Update incorporations by reference of industry consensus standards issued by: the Aluminum Association; the American Society for Testing and Materials; and the Institute of Makers of Explosives (*see* §§ 173.63 and 177.835).
- Add a requirement for each applicant to a special permit under §§ 107.105, 107.107, and 107.109 to identify their role as a shipper (offeror), carrier, or both.
- Revise the definition of ''person'' to include those who manufacture, test, repair, and recondition packages (*see* § 171.8).
- Revise the Hazardous Materials Table (HMT) to harmonize certain entries with international standards (*see* § 172.101) by adding and revising certain proper shipping names. Most significantly, we proposed to add a new entry ''Formaldehyde solutions (with not less than 10% and less than 25% formaldehyde)'' to clarify requirements applicable to formaldehyde and formalin with less than 10% formaldehyde; revise the entry for ''Environmentally hazardous substances, liquid, n.o.s.'' to provide packaging exceptions for certain materials that are assigned to UN3082; and adding a new special provision 176 to § 172.102 to clarify the differences between Class 3 and Class 9 formaldehyde solutions.
- Add a new italicized entry to the HMT for ''Permeation devices'' referencing a new § 173.175 applicable to permeation devices to provide an exception for permeation devices containing hazardous materials. Permeation devices are used for calibrating air quality monitoring devices for consistency. This proposed change would harmonize the HMR with the current exception in the international regulations for these devices.
- Update and clarify various hazard communication requirements including: Class 9 label specifications; placard size; IBC markings; and Division 6.2 labels.
- Authorize the use of an alternative bend test for DOT 3AA and DOT 3AAX steelcylinders.
- Revise § 178.71 to authorize the use of either a proof pressure test or volumetric expansion test as described in the ISO 7866 and 9809 standards.
- Revise § 171.14 transitional provisions to remove expired transitional provisions and incorporate certain transitional provisions into the specific sections of the HMR.
- Revise provisions in § 173.56(j) to further clarify the use of the American Pyrotechnics Association (APA) standard for classifying and approving fireworks.
- Revise § 172.404 to provide a labeling exception for consolidation bins used to transport hazardous materials by motor carrier.
- Revise § 178.345.1 to allow vapors to escape through a vent or drain.
- Revise § 178.320 cargo tank wall definition.
- Revise § 178.347–1 to clarify that a cargo tank motor vehicle with a Maximum Allowable Working Pressure (MAWP) greater than 35 psig or designed to be loaded by vacuum must be constructed and certified in accordance with the ASME Code.
- Revise § 178.347–4 to make a clear distinction between ''designed to be loaded by vacuum'' and ''built to withstand full vacuum.''

B. Commenters

The comment period for the NPRM closed on November 29, 2010. Eleven different commenters provided comments in response to the NPRM. PHMSA received comments from the following companies, and organizations:

- United Parcel Service (UPS)
- Worthington Cylinder Corporation (Worthington)
- Veolia Environmental Services
- Institute of Makers of Explosives (IME)
- PPG Industries, Inc.
- Barlen and Associates, Inc.
- Arrowhead Industrial Services USA, Inc.
- New England Fuel Institute
- Stericycle, Inc.
- Truck Trailer Manufacturers Association (TTMA)
- American Trucking Associations (ATA)

II. Provisions Adopted in This Final Rule and Discussion of Comments

In this section, PHMSA discusses the changes proposed in the NPRM and the comments received in response to the NPRM. Based on an assessment of the proposed changes and the comments received, PHMSA identifies the provisions that are adopted in this final rule. Also, to clearly identify the issues addressed in this final rule, PHMSA provides the following list of contents for this section:

F. Hazard Communication for IBCs
G. HMT Revisions
H. Hazard Communication
I. Exclusive Use Vehicles for Regulated Medical Waste (RMW)
J. Fireworks
K. Explosives
L. Rail Transloading Operations
M. Cylinders
N. Cargo Tanks
O. Permeation Devices
P. Alcoholic Beverage Exception
Q. Special Permits
R. Lab Packs
S. Batteries Containing Sodium or Cells Containing Sodium
T. Additional Issues Addressed in This Rule

A. Updated Incorporations by Reference

Generally, PHMSA strives to promote consistency by incorporating existing consensus standards into the HMR. Through the ''National Technology Transfer and Advancement Act of 1996,'' government agencies are directed to use voluntary consensus standards. According to the Office of Management and Budget (OMB) Circular A–119, ''Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities,'' government agencies must use voluntary consensus standards whenever practical in the development of regulations. Agency adoption of industry standards promotes productivity and efficiency in government and industry, expands opportunities for international trade, conserves resources, improves health and safety, and protects the environment.

PHMSA actively participates in the development and updating of consensus standards through representation on more than 20 consensus standard bodies. Section 171.7 lists the matters incorporated by reference into the HMR. PHMSA regularly reviews updated consensus standards and considers their merit for inclusion into the HMR. Below we discuss the consensus standards being considered for adoption in this final rule.

In response to a petition for rulemaking (petition number P–1495; Docket Number PHMSA–2007–28054) submitted by IME, PHMSA reviewed the updated American Society for Testing and Materials Standard pertaining to the use of an alternate bend test for DOT 3AA and 3AAX cylinders in accordance with (ASTM E290–97a (2004), ''Standard Test Methods for Bend Testing for Material for Ductility''). PHMSA also reviewed the updated Association of American Railroads' (AAR) pamphlet pertaining to the Intermodal Loading of Products in Closed Trailers and Containers (AAR Pamphlet 6C); and the updated IME's Standard pertaining to the Safe Transportation of Detonators (IME SLP–22, Recommendations for the Safe Transportation of Detonators in a Vehicle with Certain Other Explosive Materials, dated February 2007).

Currently, we reference Bureau of Explosives (BOE) Pamphlets in several sections of the HMR that establish general handling and loading requirements for the transportation of hazardous materials by rail (*e.g.*, §§ 174.55(a); 174.101(o)(2)(3); 174.112(c)(3), and 174.115(b)(3)) (see § 171.7). The BOE, part of the AAR, was founded in 1907 by the railroad industry to serve as a self-policing agency to promote the safe transportation of explosives and other hazardous materials. The BOE wrote some of the first hazardous materials regulations which were subsequently adopted and expanded upon by the Interstate Commerce Commission (ICC) and later the U.S. Department of Transportation.

A number of BOE publications are referenced in the HMR for bulk and non-bulk shipments of hazardous materials. Several of the BOE publications focus on the safe transportation of non-bulk packages of hazardous materials in trailer-on-flatcar service, including: BOE Pamphlet No. 6, *Approved Methods for Loading and Bracing Carload and Less Than Carload Shipments of Explosives and Other Hazardous Materials;* Pamphlet No. 6A, *Approved Methods for Loading and Bracing Carload Shipments of Military Ammunition and Explosives; and* BOE Pamphlet 6C, *Approved Methods for Loading and Bracing Trailers and Less-Than-Trailer Shipments of Explosives and Other Dangerous Articles Via Trailer-on-Flat-Car and Container-on-Flat-Car.* Pamphlets 6 and 6A were last updated in 1976.

With the increasing use of intermodal methods as the preferred means of shipping non-bulk packages of hazardous materials, the AAR subsequently issued the *Intermodal Loading Guide for Products in Closed Trailers and Containers* (Guide), replacing BOE Pamphlet 6C, Pamphlet No. 45, and Circular No. 43–C. This Guide was issued in 1995. Despite the industry change, BOE Pamphlets 6 and 6A remain in effect and are referenced in the HMR.

The Guide is intended to be a comprehensive manual for loading commodities in trailers and containers for shipment by rail. Incorporated into this Guide are AAR Circular 43–D, *Rules for Governing the Loading, Blocking and Bracing of Freight in Closed Trailers and Containers for TOFC/COFC Service,* the approved loading and bracing information contained in AAR Bureau of Explosives Pamphlet 6C, and AAR Pamphlet No. 45 on general loading in closed trailers and containers.

The ''General Rules'' as contained in Circular 43–D are issued by the AAR, and have been formulated for the purpose of providing safe methods of loading in closed trailers or containers. During normal transportation, trailers and containers may move various directions during transport (*e.g.*, forward, backward, side-to-side, *etc.*). Dynamic forces may shift an unsecured load or cause lading to exert excessive pressure against the front, rear doors, or sides of the trailer or container. Lading that is improperly blocked and braced can shift and cause the vehicle to lean on the flatcar. A leaning vehicle can cause a sideswipe or contribute to a derailment. The loading methods, as described in the Guide, are approved by the Damage Prevention and Freight Claim Committee and are minimum industry acceptance standards that have been evaluated and approved by the member railroad carriers serving on the committee.

In the NPRM, PHMSA clearly indicated that updating the incorporation by adding reference to these standards promotes safety without imposing significant compliance burdens. The standards have a well established and documented safety history. Further, adopting the standards will enhance the current level of safety achieved under the HMR.

PHMSA received mostly supportive comments. However, PHMSA received one comment from the ATA opposing the incorporation by reference of AAR Pamphlet 6C into the HMR. ATA stated, ''ATA opposes the incorporation by reference of industry standards where such standards are developed without the benefit of formal rulemaking and where such standards are not provided to the public free of charge. We note that Pamphlet 6C is not available to the public but may be ordered from the Association of American Railroads for $120.'' ATA further stated that ''PHMSA should first publish the text of the standard in the **Federal Register** and solicit comments on it prior to its incorporation into the HMR. In addition, PHMSA should ensure that the specific industry standard incorporated into the HMR remains available to the regulated community free of charge.'' ATA suggested PHMSA make a copy of the standards available on its Web site.

PHMSA agrees with the commenter that it would be useful for everyone to be able to access these documents. To this end, PHMSA continues to research appropriate methods to provide matters incorporated by reference to the regulated community. For example, on March 1, 2011, PHMSA published an advance notice of proposed rulemaking (ANPRM) under Docket No. PHMSA–2005–0019 (HM–241), entitled ''Hazardous Materials: Adoption of ASME Code Section XII and the National Board Inspection Code.'' The ANPRM considers incorporation by reference of the ASME's ''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) and the National Board of Boiler and Pressure Vessel Inspector's (National Board) ''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 VII or ASME Section XII (76 FR 11191). In the ANPRM, PHMSA notified the public of the electronic availability of the ASME ''Boiler and Pressure Vessel Code, Section XII'' (2010 Edition) and the National Board's ''National Board Inspection Code'' (2007 Edition). Further, PHMSA extended the comment period for the ANPRM published on December 23, 2010 (75 FR 80765). Moving forward, PHMSA will work to make matters incorporated by reference available to the public for review, free of charge, during open comment periods.

As for AAR Pamphlet 6C, PHMSA believes that we can and should adopt the standard since the standard provides an enhanced level of safety without imposing significant compliance burdens. These materials have a well-established and documented safety history. As in the case of ASTM E290–97a, this is an alternative and this final rule does not mandate the use of this standard. Therefore, at this time, we are adopting all of the incorporation by references, including the AAR Pamphlet 6C, as proposed.

B. Definition of ''Person''

Section 171.8 lists definitions for commonly used terms in the HMR. The current definition of ''person'' is inconsistent with the definition in the Federal hazardous materials transportation law (Federal hazmat law; 49 U.S.C. 5101 *et seq.*) in that it does not include persons who manufacture, repair, or test packaging authorized for the transportation of hazardous materials. For consistency with the statutory definition, PHMSA proposed to revise the definition of ''person'' in § 171.8 to include packaging manufacturers as well as repairers and testers of packaging used for the transportation of hazardous materials.

PHMSA did not receive any comments regarding this amendment; therefore, PHMSA adopts this amendment as proposed.

C. Consolidation Bins

Consolidation bins are commonly used by motor carriers to consolidate and transport hazardous materials packages. Consolidation bins are not offered by a shipper, rather, they are used by a motor carrier to consolidate, secure against movement, and provide additional protection for small packages. Currently, under the provisions of § 172.404(b), a consolidation bin is an outside container and must be labeled as required for each of the hazardous materials it contains. The ATA petitioned PHMSA (petition number P–1545; Docket Number PHMSA–2009–0236) to allow motor carriers to use consolidation bins to transport packages of hazardous materials without having to affix labels to the consolidation bin for each class of hazardous material contained within the bin.

In its petition, ATA suggested that consolidation bins promote safety by reducing damage to packages of hazardous materials, improve regulatory compliance by ensuring that packages are effectively blocked and braced on a vehicle, improve transportation efficiency by minimizing handling of numerous small packages, and allow packages moving to a specific terminal to be grouped together and to be transferred more efficiently from one motor vehicle to another. However, according to ATA, motor carriers are foregoing the use of consolidation bins because the dynamic nature of motor carrier operations makes the labeling and unlabeling of the bins impracticable. ATA gives the following reasons:

- Drivers would have to be trained on when to affix and remove labels as freight is picked up and dropped off.
- Each motor vehicle would have to be equipped with multiple sets of all labels, as drivers do not know the hazard classes of freight they will pick up prior to arriving at the consignor's facility.
- It is physically difficult to properly affix labels on a reusable consolidation bin in a manner that ensures they do not come off while in transportation and then remove those labels as packages within the bins are delivered.

ATA states: ''The use of unlabeled consolidation bins will not compromise the safe transportation of hazardous materials. Hazardous materials packaging loaded into the consolidation bin will be marked, labeled, and manifested on a hazardous material shipping paper. While some of these package labels may not be visible within the consolidation bin, this situation is identical to the current transportation of packaging where labels may be obscured by the position of the package or its placement in the vehicle.* * * '' In its petition, ATA proposes a new paragraph (c) to § 172.404 to allow a motor carrier to use an unlabeled consolidation bin for its own convenience, to include trailer-on-flatcar service, and proposes a specific definition in § 171.8 for the term ''consolidation bin.''

In addition to the petition for rulemaking by ATA, PHMSA issued special permit, DOT–SP 14881, authorizing the use of consolidation bins without hazard warning labels on the outside of the bins. This special permit was issued on December 3, 2009, and has been routinely used with no reported incidents. The special permit requires the consolidation bin be marked with an indication of each hazard class or division within it; that packages be secured within the bin by other packages or other suitable means to prevent shifting or significant relative motion between the packages; that the consolidation bins be otherwise properly blocked and braced within the transport vehicle; and that the packages be loaded only by employees of the motor carrier.

PHMSA agrees that there are safety benefits to using consolidation bins and that it may be impractical for a motor carrier to label and remove labels for packages transported in consolidation bins. Therefore, we proposed to allow an exception from labeling for consolidation bins used for the convenience of a motor carrier. However, PHMSA was concerned that, in the absence of any marking or label on the consolidation bin, a person other than the person who had placed packages in the bin may have no indication the bin contains a hazardous material. To address this concern, and consistent with the terms of the special permit, we proposed in the NPRM to require the bin to be marked in a manner that indicates it contains a hazardous material. We also proposed to incorporate several provisions of the special permit, including limiting the size of a consolidation bin to less than

64 cubic feet capacity, so as not to conflict with hazard communication requirements for freight containers. We also proposed that the consolidation bin must be reusable, made of materials such as plastic, wood, or metal. PHMSA was concerned that consolidation bins made of cardboard are not of sufficient strength to meet the requirements in this proposal. Accordingly, PHMSA requested comments on the use of cardboard and what standards should be established if cardboard would be authorized for use, *i.e.*, thickness, wall type, burst strength, *etc.*

We also proposed in the NPRM that packages may only be placed within the consolidation bin and the bin be loaded on a motor vehicle by an employee of a single motor carrier. Additionally, we proposed that consolidation bins may only be transported by a single motor carrier, or on railcars transporting such vehicles. We believe the proposed language in § 172.404(c) obviates the need for a separate definition for ''consolidation bin'' in § 171.8.

In addition to the proposal to address the ATA petition, we proposed to revise paragraph (b) of § 172.404, to clarify that an outside container or overpack need not be labeled, if labels on the packages contained therein are visible, for consistency with the overpack provisions of § 173.25(a)(2).

PHMSA received comments, from ATA, the UPS, and PPG Industries, Inc. regarding this proposed amendment. UPS supports the proposed labeling exception for consolidation bins. UPS indicated their experience using consolidation bins has been very successful. According to UPS, terminals using the bins have experienced zero damage to packages contained in the bins, a great improvement compared to UPS's efforts to secure these types of packages without consolidations bins. UPS supports, and ATA does not object to, proposals that would permit marking the bin or using a tag to indicate each hazard class or division contained therein, in place of requiring the application of individual hazard labels. According to UPS, ''the ability to use such consolidation bins without the labeling requirement greatly improves and simplifies the processes involved in using the bins.'' However, UPS and ATA do not support the proposal to limit the use of consolidation bins to a single motor carrier. UPS states ''* * * that this proposed limitation potentially removes the safe and beneficial handling practices it experiences from application in networks involving motor carriers utilizing contracts with other motor carriers to extend coverage.''

UPS indicates that when used for small, unpalletized packages of hazardous materials, the consolidation bins significantly reduce damages. In light of these benefits, UPS respectfully requests that PHMSA reconsider its proposed limitation restricting use of the bins to a single motor carrier. UPS states, ''These bins should be available to move among motor carriers that collectively, and through contracts, make up a comprehensive operating network * * *'' UPS believes that ''as long as the motor carriers in the network are operating under contract to the main motor carrier company, the drivers working for the vendor carriers are fully informed about bins being used, and are advised on how to identify the contents in the bins, interlining can successfully be used across the network.'' In addition, ATA commented that PHMSA could permit interlining and transfers of consolidation bins between carriers by including a requirement to inform the subsequent carrier on the use of the consolidation bin and its contents.

PPG Industries supports the use of consolidation bins by motor carriers to consolidate small packages of hazardous materials as proposed. PPG states, ''The benefits of package consolidation and reduced damage would seem to outweigh the lack of display of hazard labels on the outside of consolidation bins containing small packages.''

PHMSA agrees with the important safety benefits of providing for the use of consolidation bins when transporting hazardous materials by motor vehicle. However, we do not agree with commenters who requested that the proposed limitation for the use of consolidation bins by a single motor carrier be removed. The use of consolidation bins is a carrier function. Each carrier operation is unique to that particular carrier, as well as their consolidation bins they use for consolidating and securing freight. Limiting the use of the consolidation bins to a single motor carrier actually enhances safety in handling and transporting hazardous materials. In addition, freight transferred between carriers may be overpacked to provide the same safety and handling benefits. Therefore, we are adopting this amendment as proposed.

PHMSA requested comments on the use of cardboard and what standards should be established if cardboard would be authorized for use, *i.e.,* thickness, wall type, burst strength, *etc.* We received no comments on the use of cardboard and what standards should be established if cardboard would be authorized. PHMSA is concerned that consolidation bins made of cardboard are not of sufficient strength to meet the requirements in this proposal. Therefore, PHMSA is not authorizing the use of cardboard consolidation bins. The consolidation bin requirements are adopted as proposed.

D. Transitional Provisions

Section 171.14 provides transitional provisions for recently adopted regulatory changes. Most of the provisions in this section are outdated. Therefore, for better understanding of the transitional provisions, we proposed in the NPRM to remove this section and outdated provisions from the HMR and add the remaining provisions to the appropriate sections in the HMR to which they apply, as follows:

- *Shipping description sequence.* Section 171.14(e) permits the shipping description sequences in effect on December 31, 2006, to be used until January 1, 2013. PHMSA proposed to relocate this transitional provision to § 172.202(b).
- *Division 5.2 labels and placards.* Section 171.14(f) authorizes the use of a Division 5.2 label and a Division 5.2 placard that conform to the label and placard specifications in effect on December 31, 2006, until January 1, 2011, except for transportation by highway. For transportation by highway, a Division 5.2 placard conforming to the specifications in § 172.552 of this subchapter in effect on December 31, 2006 may be used until January 1, 2014. PHMSA proposed to relocate this transitional provision to § 172.552.
- *Class 3 and Division 6.1 definitions.* Section 171.14(g) authorizes the use of the Class 3 and Division 6.1 classification criteria and packing group assignments in effect on December 31, 2006, until January 1, 2012. PHMSA proposed to relocate these transitional provisions to §§ 173.120 and 173.121 for Class 3 materials and to §§ 173.132 and 173.133 for Division 6.1 materials.
- *Gasohol.* The transitional provision for gasohol in § 171.14(h) would be relocated to a new Special Provision 178 to specify that effective October 1, 2010, the proper shipping name ''Ethanol and gasoline mixture or ethanol and motor spirit mixture or ethanol and petrol mixture,'' and the revised proper shipping name ''Gasohol gasoline mixed with ethyl alcohol, with not more than 10% alcohol'' must be used, as appropriate when describing gasoline and ethanol mixtures.

PHMSA did not receive any comments opposing these amendments. However, PHMSA received comments from PPG Industries and New England

Fuel Institute (NEFI) supporting these amendments.

PHMSA's proposal to move the provision for use of the 5.2 label and 5.2 placard, conforming to the label and placard specifications in effect on December 31, 2006, with a January 1, 2011 transition date, except for highway transportation, is now outdated. Therefore, PHMSA is removing the provision authorizing use of the 5.2 label and 5.2 placard in effect on December 31, 2006 for all modes except highway until January 1, 2011 since the date has now passed. The use of the 5.2 placard in effect on December 31, 2006, is authorized for use by highway until January 1, 2014. With the exception of the transitional provision regarding the 5.2 label with the January 1, 2011 transition date discussed above, PHMSA is adopting this amendment as proposed.

Additionally, PHMSA's proposal to move the provision to a Special Provision 178 for the use of proper shipping name ''Gasohol gasoline mixed with ethyl alcohol, with no more than 20 percent alcohol'' which went into effect on January 28, 2008, may continue to be used until October 1, 2010. This provision authorizing the use of the proper shipping name ''Gasohol gasoline mixed with ethyl alcohol, with no more than 20 percent alcohol'' is now out dated since the October 1, 2010 transition date has passed. Therefore, we are not adopting this amendment as proposed. As of October 1, 2010, the new proper shipping name ''Ethanol and gasoline mixture or ethanol and motor spirit mixture or ethanol and petrol mixture'' and the revised proper shipping name ''Gasohol gasoline mixed with ethyl alcohol, with not more than 10% alcohol'' must be used as appropriate.

E. Reporting Infectious Substances Incidents

Section 171.15 establishes requirements for immediate notice of incidents involving certain hazardous materials. The Centers for Disease Control and Prevention is no longer accepting calls providing notice of incidents involving an infectious substance (etiologic agent). In the NPRM, PHMSA proposed to remove the alternative to provide notice to the Centers for Disease Control and Prevention of incidents involving an infectious substance (etiologic agent). Specifically, we proposed to remove the following text from paragraph (a) referencing the Centers for Disease Control and Prevention which states: ''Notice involving an infectious substance (etiologic agent) may be given to the Director, Centers for Disease Control and Prevention, U.S. Public Health Service, Atlanta, GA, 800–232–0124 (toll free), in place of notice to the NRC.''

PHMSA did not receive any comments opposing this amendment; therefore, this deletion is adopted as proposed.

F. Hazard Communication for Intermediate Bulk Containers (IBCs)

Section 172.336 requires identification numbers to be displayed on either orange panels or a plain white square-on-point display configuration having the same outside dimensions as a placard. Section 172.514 provides an exception to placarding for IBCs that authorizes IBCs to be labeled rather than placarded. However, there is no provision in the HMR that allows the proper shipping name and UN number to be displayed in lieu of displaying the UN number on a placard, orange panel, or white square-on-point configuration. 49 CFR 172.332(a). For international transport in accordance with the IMDG Code, IBCs are not required to display a UN number on a placard or orange panel. They are, however, required to be marked and labeled. To comply with both the HMR and IMDG Code, some shippers are having difficulty fitting all of the various markings, labels, placards on a steel cage IBC. These IBCs are constructed with a metal plate and all of the required markings, labels, placards do not fit in the allowed space on the metal plate; some must be affixed to the metal boards with clips or other holding devices which, although secured, run the risk of becoming dislodged during transportation. To meet all of the necessary requirements, a shipper may place all of the following items on the IBC: a placard with the UN number; a hazard label; the proper shipping name and UN number; and the GHS product labeling requirements. Shippers generally do not use the UN number on the orange panel because this configuration is too large for the metal plate.

For international harmonization, PHMSA proposed in the NPRM to revise § 172.336 by adding a new paragraph (d) to indicate that when a bulk packaging is labeled instead of placarded in accordance with § 172.514(c), identification numbers may be displayed in accordance with § 172.301(a)(1). Additionally, we proposed to revise § 172.514(c)(4) to indicate that IBCs that are labeled on two opposite sides rather than placarded, are authorized to display the proper shipping name and UN number in lieu of displaying the UN number on a placard, orange panel, or white square-on-point configuration.

In a petition for rulemaking (P–1392), Vinings Industries, Inc., has noted that given the size of bulk packaging covered by the placard-to-label exception and the fact that these packaging are generally transported in closed vehicles, the same logic used to justify a small display of the hazard identity (*e.g.* labels instead of placards) would support a small, more flexible, display of the identification number. PHMSA agrees that the petition has merit. Therefore, in the NPRM, PHMSA proposed to revise § 172.336 by adding new paragraph (d) to allow the use of smaller identification markings when a bulk packaging is labeled instead of placarded.

PHMSA did not receive any comments opposing these amendments. However, PPG Industries suggested that it would be clearer to have the IBC marking options displayed in one section within Subpart D of Part 172. They believed having the marking reference within the placarding section is confusing.

PHMSA disagrees with PPG Industries' suggestion. The placarding exception in § 172.514(c) is the impetus of this regulatory change. The link between the placarding and marking exceptions is essential to provide consistency and eliminate confusion. We are adopting these amendments as proposed.

G. HMT Revisions

PHMSA proposed a number of revisions to the Hazardous Materials Table (HMT; § 172.101), for the purpose of harmonizing with international standards. These proposed revisions included the following:

- Section 172.101(c) provides instruction on the use of the Column (2) list of hazardous materials descriptions and proper shipping names in the HMT. Included in paragraph (c)(2) is instruction on use of the word ''or.'' The word ''or'' in italics indicates that there is a choice of terms in the sequence that may be used as the proper shipping name or as part of the proper shipping name. PHMSA proposed to clarify this provision by including further instruction on the use of the word ''or.'' We proposed to include examples to indicate that the term ''or'' authorizes the use of either the first or the second term in the description of the hazardous materials in the proper shipping name. For example, the entry ''Carbon dioxide, solid *or* Dry ice'' means that either ''Carbon dioxide, solid'' or ''Dry ice'' may be used as the proper shipping name; and, the entry ''Articles, pressurized pneumatic *or* hydraulic'' means that either ''Articles, pressurized pneumatic'' or ''Articles, pressurized hydraulic'' may be used as the proper shipping name.

• The entries for ''Formaldehyde, solutions'' and ''Formalin'' are sometimes used incorrectly. Formalin is specifically defined as a 37% aqueous solution of formaldehyde. A 10% formalin solution and 10% formaldehyde solution are not the same materials for transport purposes. Many diagnostic and biological samples are transported by commercial aircraft in formaldehyde solutions of various concentrations. Some samples transported in 10% or greater formaldehyde solutions are incorrectly shipped as unregulated materials. Other samples transported in 3.7% formaldehyde (10% formalin) solutions are incorrectly shipped as fully regulated hazardous materials. A formaldehyde solution, with less than 25% but not less than 10% formaldehyde is a Class 9 material. PHMSA proposed to include a new italicized entry in Column (2) of the HMT for 10%–25% formaldehyde solutions to enhance understanding of the entries in the HMT. This new entry would reference the proper shipping names ''Aviation regulated liquid, n.o.s'' and ''Other regulated substances, liquid, n.o.s.''

Formalin is an aqueous solution of formaldehyde and methanol and is a Class 3 flammable liquid material. The entry ''Formaldehyde solutions, flammable, UN1198'' is intended for use as a hazardous materials description for formalin. Note that the less common ''methanol-free'' formalin is not a Class 3 material. Therefore, for further clarification, we proposed to revise the ''Formaldehyde, solutions, flammable'' entry by adding a new special provision 176 to specify that the entry is intended for use as proper shipping name for formaldehyde solutions containing methanol.

PHMSA became aware of a typographical error in the entry ''Formaldehyde solutions'' which has an extra comma between ''Formaldehyde'' and ''solutions.'' Therefore, PHMSA proposed to correct this error by removing the comma between ''Formaldehyde'' and ''solutions'' in the proper shipping name for UN1198.

PHMSA received no comments on these proposed changes to the HMT. Therefore, we are adopting these amendments, with an edit to ''Formaldehyde solutions, UN1198,'' entry as proposed.

• In a final rule, under Docket HM–215I, PHMSA revised the proper shipping name for ''Regulated medical waste, n.o.s, UN3291'' to include ''Clinical waste unspecified, n.o.s.'' and ''(BIO) Medical waste, n.o.s.'' under a combined proper shipping name entry. It has come to our attention that combining all the proper shipping names under the one entry makes it difficult to know the other proper shipping names exist. In the NPRM, PHMSA proposed to give each proper shipping name its own entry in the HMT with a cross reference to the others.

• For the entry ''Battery-powered vehicle or Battery-powered equipment, UN3171,'' the stowage category ''A'' entry in Column (10A) was inadvertently omitted. PHMSA proposed to reinstate in Column (10A) of the HMT stowage category ''A.''

• A new italicized entry ''Permeation devices, containing dangerous goods, for calibrating air quality monitoring equipment'' would be added referencing § 173.175 to indicate that permeation devices that contain dangerous goods and are used for calibrating air quality monitoring devices are not subject to the HMR requirements provided the conditions of § 173.175 are met. This proposed revision was submitted to PHMSA as a petition for rulemaking (petition number P–1493; Docket Number PHMSA–2007–27318) from the URS Corp. requesting harmonization with the international regulations on the exception for permeation devices in Special Provision A41 of the ICAO Technical Instructions.

PHMSA received no comments concerning these proposed amendments. Therefore, we are adopting these amendments as proposed.

• Section 172.102 lists a number of special provisions applicable to the transportation of specific hazardous materials. Special provisions contain packaging requirements, prohibitions, and exceptions applicable to particular quantities or forms of hazardous materials. For consistency with international regulations, PHMSA proposed in the NPRM to add a new Special Provision 173 to provide a specification package exception for certain adhesives, printing inks, printing ink-related materials, paints, paint-related materials, and resin solution which are assigned to ''Environmentally hazardous substances, liquid, n.o.s., UN3082.''

The proposed change is consistent with an exception recently adopted within the United Nations Model Regulations on the Transport of Dangerous Goods (UN Model Regulations). The exception adopted into the UN Model Regulations expands packing provision PP1 of Packing Instruction P001 and provides that metal or plastic packaging for substances of Packing Groups II and III in quantities of 5 liters or less per packaging are not required to be packed in specification packaging when transported under specific conditions. In the HM–215J final rule published January 4, 2010, PHMSA indicated that it was evaluating the adoption of these provisions. (75 FR 63). PHMSA has completed this review and proposed to adopt this provision on the basis that environmentally hazardous paints, adhesives, printing inks, *etc.* pose a lesser hazard than flammable and corrosive paints which are already provided this exception in the HMR.

PHMSA received one comment from PPG Industries supporting the proposal to add Special Provision 173. PHMSA did not receive any comments opposing the HMT changes discussed above. Therefore, we are adopting this amendment as proposed.

H. Hazard Communication

1. Section 172.203(c) provides additional shipping paper description requirements. PHMSA received a petition for rulemaking (petition number P–1456; Docket Number PHMSA–2005–21198) from the AAR to suggest that we require shipping papers to include a notation for shipments of non-odorized liquefied petroleum gas (LPG). Most LPG shipments contain an odorant. Thus, in the event of an accident involving LPG, emergency responders may assume that no LPG is leaking if they cannot detect an odor. To ensure that emergency responders are made aware that a shipment of LPG is not odorized, PHMSA proposed to revise § 172.203(c) to require a notation that the LPG shipment does not contain an odorant.

We received one comment from New England Fuel Institute (NEFI) supporting this proposed amendment. NEFI supports adding the words ''non-odorized'' to the proper shipping name on shipping papers for non-odorized LPG, and believes it will aid emergency responders.

We received no comments opposing this amendment. Therefore, we are adopting this amendment as proposed.

2. *Section 172.324* provides additional marking requirements for hazardous substances in non-bulk packaging. For clarification purposes, PHMSA proposed to amend this section to require a package containing a limited quantity that also meets the definition for a hazardous substance to be marked with the name of the hazardous substance on the package, in

parentheses, in association with the proper shipping name or the identification number, as applicable.

PHMSA received one comment from PPG Industries noting that PHMSA adopted this marking requirement under Docket HM–215K (76 FR 3308). The commenter is correct, the new limited quantity marking amendment was adopted in the Docket HM–215K, final rule, published on January 19, 2011. Therefore, PHMSA is not adopting the proposed amendment in this final rule.

3. *Section 172.432* describes the Infectious Substance label size and color and provides an illustration of how it must appear. References to the Centers for Disease Control (CDC) are no longer required on this label. Therefore, we proposed to remove the text that refers to the CDC on the label. The text states ''In U.S.A. Notify Director—CDC, Atlanta, GA 1–800–232–0124''. PHMSA proposed to allow three years from the effective date of the final rule to use up existing stocks.

PHMSA received no comments on this proposed amendment. Therefore, we are adopting this amendment as proposed.

4. *Section 172.446* describes the Class 9 label specifications, including size, color, and an illustration of how it must appear. The Class 9 label specifications illustrated in the HMR is different from international regulations in that it features a thin, horizontal line running across the label at its midpoint (just at the bottom of the vertical black bars). There is no similar line in the international standards such as the International Civil Aviation Organization (ICAO) Technical Instructions and the International Maritime Dangerous Good (IMDG) Code. Some shipments are being delayed and required to be relabeled by international carriers due to this difference in the Class 9 label specifications. In an effort to avoid continued frustrated or delayed shipments, PHMSA proposed in the NPRM to revise the Class 9 label specifications by removing the horizontal line running across the label at its midpoint. We also proposed a three year transition from the effective date of the final rule to deplete existing stocks.

PHMSA received one comment from the UPS on this proposal to revise the Class 9 label. UPS supports this proposed change for its potential to eliminate shipment delays.

PHMSA received no comments opposing this amendment. Therefore, PHMSA is adopting this amendment as proposed.

5. *Section 172.519* establishes general specifications for placards. Paragraph (c)(1) states that each placard must measure at least 273 mm (10.8 inches) on each side and must have a solid line inner border approximately 12.7 mm (0.5 inches) from each edge.

For international harmonization, PHMSA proposed in the NPRM to authorize the use of placards measuring from 250 mm (9.84 inches) on each side and having a solid line inner border approximately 12.7 mm (0.5 inches) from each edge.

PHMSA received one comment from the New England Fuel Institute supporting this proposed amendment, as long as the current placard size and design is maintained and authorized, in addition to the harmonized placards. PHMSA is adopting this amendment as proposed. However, the HMR will continue to permit the use of the larger placard sizes.

I. Exclusive Use Vehicles for Regulated Medical Waste (RMW)

Section 173.134 establishes definitions and exceptions for infectious substances. Paragraph (c)(2) requires RMW that contains Category B cultures and stocks to be transported on a vehicle ''used exclusively'' to transport RMW. In the NPRM, PHMSA proposed to revise § 173.134(c)(2) to incorporate the clarifications from a March 19, 2007 letter of interpretation (Ref. No. 07–0057). Specifically, PHMSA proposed to clarify that the following materials may be transported on a vehicle used exclusively to transport RMW: (1) Plant and animal waste regulated by the Animal and Plant Health Inspection Service (APHIS); (2) waste pharmaceutical materials; (3) laboratory and recyclable wastes; (4) infectious substances that have been treated to eliminate or neutralize pathogens; (5) forensic materials being transported for final destruction; (6) rejected or recalled health care products; and (7) documents intended for destruction in accordance with Health Insurance Portability and Accountability Act of 1996 (HIPAA) requirements.

PHMSA received one comment from Stericycle, Inc. (Stericycle) supporting this amendment. Stericycle also commented that the rationale underlying PHMSA's decision to authorize the transportation of multiple waste streams from medical facilities should also apply to other regulated activities, specifically to Special Permit 13556, which authorizes the transportation of sharps in specialized containers.

PHMSA has determined that incorporating Special Permit 13556 into the HMR is beyond the scope of this rulemaking. Therefore, PHMSA is adopting this amendment as proposed.

J. Fireworks

Section 173.56 specifies the requirements for classification and approval of new explosives, including fireworks in § 173.56(j). The section incorporates by reference the APA Standard 87–1 for classifying and approving fireworks. The text of § 173.56(j) permits the use of APA Standard 87–1 for determining fireworks classification as Division 1.3 or 1.4 explosive materials. The APA standard is also used to classify a pyrotechnic device as 1.1G. Therefore, in the NPRM, PHMSA proposed to delete the words ''Division 1.3 and 1.4'' in the introductory paragraph so that the sentence reads, ''Fireworks may be classed and approved by the Associate Administrator without prior examination and offered for transportation if the following conditions are met:''

PHMSA did not receive any comments regarding this amendment. However, PHMSA is developing a more comprehensive rulemaking to address this issue, as well as other issues involving fireworks. Therefore, in this final rule, PHMSA is not adopting any requirements specific to fireworks.

K. Explosives

Section 173.60 provides general packaging requirements for shipping Class 1 (explosive) materials. In a petition for rulemaking (petition number P–1527; Docket Number PHMSA–2008–0195), Mr. Alexander Fucito, the petitioner, asks PHMSA to revise the HMR to allow flexibility in testing and preparation of unpackaged shipments consisting of large and robust explosive articles. The petitioner contends that the current thermal stability and drop test requirements provided by Test Series 4 of the UN Manual of Tests and Criteria are unsafe and pose an unrealistic burden for persons who transport these articles. The petitioner asks PHMSA to revise § 173.60(b) to allow large and robust foreign munitions to be transported in the original, manufacturer provided, shipping configuration.

Section 173.60(b)(14) contains the same language as the footnote in Packaging Instruction 130 for named UN numbers in the UN Recommendations, Paragraph 4.1.5.15. However, there is a second paragraph to Paragraph 4.1.5.15 that has not yet been incorporated into the HMR. That paragraph reads: ''Where such large explosive articles are as part of their operational safety and suitability tests are subjected to test regimes that meet the intentions of these Regulations and such tests have been successfully undertaken, the competent authority may approve such articles to be transported under these Regulations.'' In the NPRM, PHMSA proposed to add modified text of this paragraph from the 15th Edition of the UN Recommendations to §§ 173.60(b)(14) and 173.62(c) Packing Instruction 130 in the Table of Packing Methods to provide greater harmonization and account for the concerns expressed by Mr. Fucito in Petition P–1527.

PHMSA did not receive any comments regarding this amendment; therefore, we are adopting this amendment as proposed.

L. Rail Transloading Operations

Section 174.67 provides general requirements for rail tank car transloading operations for hazardous materials. In a petition for rulemaking (petition number P–1481; Docket Number PHMSA–2006–25900), Musket Corporation requests several revisions to this section. Specifically, the petitioner asks for clarification of manhole opening requirements, suggesting that the requirement for manhole covers to be opened during transloading operations conflicts with procedures to contain or control vapors during transloading or unloading operations where venting is accomplished through vapor valves rather than manhole openings. Additionally, certain companies pneumatically unload tank cars, and this process cannot be accomplished with the manhole cover open. In addition, the petitioner notes that the language requiring manhole covers to be opened during this process conflicts with regulations from other regulatory bodies, such as the Environmental Protection Agency National Emission Standards for Hazardous Air Pollutants for Source Categories, Subpart PP. Finally, the petitioner suggests that this requirement conflicts with a number of air quality control permits that restrict the amount of emissions companies can vent into the atmosphere.

In response to this petition, PHMSA proposed to revise § 174.67 in the NPRM to clarify and further address closed systems in transloading operations. PHMSA proposed that for closed systems, before a manhole cover or outlet valve cap is removed from a tank car, the car must be relieved of all interior pressure by cooling the tank with water or by venting the tank by raising the safety valve or opening the dome vent at short intervals. However, if venting to relieve pressure will cause a dangerous amount of vapor to collect outside the car, venting and unloading must be deferred until the pressure is reduced by allowing the car to stand overnight, otherwise cooling the contents, or allow venting to a closed collection system. These precautions are not necessary when the car is equipped with a manhole cover that hinges inward or with an inner manhole cover that does not have to be removed to unload the car, and when pressure is relieved by piping vapor into a condenser or storage tank.

PHMSA received no comments regarding this amendment; therefore, we are adopting this amendment as proposed.

M. Cylinders

1. *Section 173.302* provides the requirements for filling cylinders with non-liquefied (permanent) compressed gases. Section 173.304 provides the requirements for filling cylinders with liquefied compressed gases. In a final rule under Docket HM–224B [72 FR 55091], PHMSA added DOT 39 cylinders to the types of cylinders authorized for the transportation of compressed oxygen and other oxidizing gases aboard aircraft in §§ 173.302 and 173.304. It has come to our attention that when we included DOT 39 cylinders with the other types of cylinders, we did not recognize that DOT 39 cylinders have a different pressure relief device (PRD) setting tolerance than the other authorized cylinders. Therefore, in the NPRM, we proposed to revise paragraph (f)(2) of § 173.302 and paragraph (f)(2) of § 173.304 to prescribe the PRD setting tolerance for DOT 39 cylinders. In the NPRM, PHMSA proposed to revise these sections to prescribe the PRD setting tolerance for DOT 39 cylinders.

Worthington Cylinder Corporation (Worthington) supports the proposal but stated it creates a major conflict with CGA Publication S–1.1 and completely eliminates shipping DOT 39 cylinders by air where the rupture disk is welded to the cylinder. Worthington agrees that a proposed change can be submitted to CGA and CGA Publication S–1.1 in order to ''catch-up'' to 49 CFR requirements. Worthington also stated that oxygen can be shipped in low-pressure cylinders and that PHMSA only considered high pressure DOT 39 cylinders that contain a valve with a rupture disk. Worthington suggested adding the alternative use of a CG–2 or CG–3 device as defined in CGA Publication S–1.1 to our proposal to maintain an acceptable level of safety. Worthington stated, ''Adding the alternative use of a CG–2 or CG–3 device would maintain the level of safety by having maximum containment of the oxygen or oxygen mixture in the cylinder. Like the CG–1 device, the CG–2 or CG–3 device will empty the contents of the cylinder.''

Barlen and Associates (Barlen) did not support our proposal stating it effectively bans air shipment of oxygen and its mixtures in DOT 39-cylinders. Barlen stated that ''even if the DOT at some point again allowed air shipment of oxygen, this proposed change would still for all practicable purposes ban air shipments of oxygen and oxygen-rich mixtures in DOT–39 cylinders.'' Barlen also suggested that a ''different solution might be for DOT to totally ignore the CGA S–1.1 and change all DOT–39 cylinders to its 'shipped by air only' setting. However, that solution would involve changing the settings on millions of DOT–39 cylinders (all those 1 pound Bernzomatic type cylinders, etc.)''

PHMSA has considered Worthington and Barlen's comments and suggestions. Further, PHMSA recently received a petition for rulemaking (P–1580) highlighting additional concerns regarding the PRD setting for DOT 39 cylinders. To fully consider both the comments and the petition PHMSA has elected not to adopt the proposed amendment to the PRD setting for DOT–39 cylinders in this final rule. PHMSA plans to address the issue in a future rulemaking.

2. *Section 178.35* contains general requirements for specification cylinders. Paragraphs (c)(4) and (g) require the inspector to complete certain reports containing the applicable information listed in the Compressed Gas Association publication, CGA C–11 ''Recommended Practices for Inspection of Compressed Gas Cylinders at Time of Manufacture'' and any additional information or markings required by the applicable specification. These documents must be provided to the cylinder manufacturer and, upon request, to the purchaser. PHMSA compliance inspections reveal sometimes these reports are completed several months after the cylinders are sold. In the NPRM, PHMSA proposed to consolidate the inspectors' reports requirements into paragraph (c)(4). A new paragraph (g) would be added to clarify the cylinder manufacturer must have all completed test and certification reports available at or before the time of delivering the cylinders to the purchaser. In addition, the manufacturer's report retention requirement in paragraph (h) would be relocated to paragraph (g) and paragraph (h) would be removed.

Worthington opposed the proposed amendments in § 178.35 to require certification reports available at or before the time of delivering the cylinders to the purchaser. Worthington indicates that the proposal should consider that a single manufacturing facility can produce tens of thousands of cylinders daily. Depending on the cylinder design, this could require 50–75 reports daily. To comply with the required proposal for reports before shipment arrives at the customers, Worthington stated that, ''cylinder manufacturers and independent inspection agencies will have to add personnel which increases customer costs for no value added or safety benefit.''

PHMSA does not agree with the commenter. This documentation is necessary to understand and evaluate cylinder related failures (*e.g.,* as cylinder burst) and to promote safety. The certification reports from the inspector and given to the manufacturer must be available at or before the time of delivering the cylinders to the purchaser. PHMSA compliance inspectors revealed that sometimes these reports are completed several months after the cylinders are sold.

PHMSA is adopting the revisions to test reports in § 178.35 as proposed. This change will clarify that a cylinder manufacturer must have all completed test and certification reports available at or before the time of delivering the cylinders to the purchaser.

3. *Section 178.37* sets forth manufacturing specifications for DOT 3AA and 3AAX seamless steel cylinders, in addition to requirements set forth in § 173.35. Paragraphs (j) and (l) specify the flatting test procedures and rejection criteria respectively. PHMSA received a petition (petition number P–1513; Docket Number PHMSA–2008–0065) from Worthington requesting a revision to § 178.37 to authorize the use of an alternate bend test conducted in accordance with the procedures in ASTM E 290–97a (2004) for DOT 3AA and 3AAX cylinders. The petitioner states that the proposed bend test demonstrates ductility of the cylinder with the same accuracy as the flattening test at a lower cost to cylinder manufacturers. We agree with the petitioner that the use of the bend test is acceptable for cylinders. Therefore, in the NPRM, PHMSA proposed to revise paragraphs (j) and (l) in § 178.37 to authorize the use of the bend test.

PHMSA received no comments regarding this proposed amendment to allow the use of the bend test on cylinders. Therefore, PHMSA is adopting this amendment as proposed.

4. *Section 178.71* contains design and manufacturing specifications for UN pressure receptacles, including the specification marking requirements. In the NPRM, PHMSA proposed to relax the requirements in paragraph (o)(6) of the HMR to allow the use of a proof pressure test. The ISO 7866 and 9809 standards permit either the proof pressure test or volumetric expansion test to be used. The volumetric expansion test measures the cylinder's elastic expansion and assures the cylinder received a proper heat treatment. However, the ISO standards also require each cylinder be subjected to a hardness test and a comprehensive shear wave ultrasonic examination (UE). PHMSA indicated in the NPRM that the combination of the proof pressure test, hardness test, and UE should provide adequate assurance that each cylinder received a proper heat treatment.

Arrowhead opposed the proposal in § 178.71 to allow the use of proof pressure testing versus the current mandatory volumetric expansion testing on all cylinders. The ISO 7866 and 9809 standards currently permit the use of either the proof pressure test or volumetric expansion test. The commenter recommends that the current language in the HMR remain unchanged requiring the mandatory volumetric expansion testing of all cylinders.

PHMSA does not agree with Arrowhead's comments. Arrowhead did not provide any evidence of cylinder failure due to lack of volumetric expansion testing or technical rational in support of its comments. PHSMA is not eliminating the current volumetric expansion test for cylinders. ISO Standards 9809–1, 2, 3 and 7866 provides alternative volumetric expansion test to proof pressure testing. Based on extensive technical work of ISO/TC58/SC3/WG14 which was completed by the U.S. experts and major U.S. cylinder manufacturers, we have concluded the testing methods as described in ISO 9809(s) and ISO 7866 standards provide adequate and safe methods of ensuring proper heat treatment. Additionally, many of these cylinders have been manufactured under these standards and safely used for over 15 years.

PHMSA does not agree with Arrowhead's comments as stated above. Therefore, we are adopting this amendment as proposed.

N. Cargo Tanks

1. *Section 178.345–1(i)(2)* establishes general design and construction requirements for DOT 406 (§ 178.346), DOT 407 (§ 178.347), and DOT 412 (§ 178.348) cargo tank motor vehicles. Cargo tank motor vehicles composed of more than one cargo tank may be constructed with the individual cargo tanks manufactured to a single specification or to different specifications. Each cargo tank must conform in all respects with the specification for which it is constructed and certified.

The strength of the connecting structure joining multiple cargo tanks in a cargo tank motor vehicle must meet the structural design requirements in § 178.345–3. Any void within the connecting structure must be vented to the atmosphere and have a drain located on the bottom centerline. Each drain must be accessible and must be kept open at all times. The drain in any void within the connecting structure of a carbon steel, self-supporting cargo tank may be either a single drain of at least 1.0 inch diameter, or two or more drains of at least 0.5 inch diameter, 6.0 inches apart, one of which is located on the bottom centerline.

Previous interpretations indicate that a vent must be located as close to the top centerline of the tank as practicable and the drain as close to the bottom centerline of the tank as practicable. Through discussions with industry and enforcement personnel, PHMSA determined that requiring an opening on top of a cargo tank to vent vapors that accumulate in the void space may not be the best practice. In many instances, such as with gasoline, the vapors are heavier than air and it is not necessary to require cargo tanks to be vented to the atmosphere through a vent located near the top centerline. Vapors heavier than air escape through the drain opening. In addition, venting voids through the top of a cargo tank may cause premature corrosion of the void space as a result of water penetration. Allowing the vent to be plugged will also make it easier to identify when there is actually a leak in the bulkhead. Hazardous materials leaking from the drain will cause an obvious stain/dirt buildup that, with the top vent plugged, cannot be a result of water draining from the top vent and must be a leaking bulkhead.

To address this problem, in the NPRM, PHMSA proposed to revise § 178.345–1 to clearly indicate that any void area within the connecting structure of a cargo tank between double bulk heads must be vented to the atmosphere through the required drain or through a separate vent. The proposed revision will ensure that void spaces in the connecting structure of DOT 406, 407, and 412 cargo tank motor vehicles are properly vented to allow for the escape of product vapors. This change also promotes the longevity of the tanks by clarifying that it is not necessary to place a vent in the top of a void space where rain water can easily infiltrate the void space and cause corrosion if the product vapors are heavier than air and will vent through the drain. This clarification ensures that the vent is located in the most appropriate location for the material being transported. However, we urge manufacturers to continue allowing for access to the void space through the top of the tank. In addition, we suggest the continued placement of inspection openings of sufficient size and number to permit proper visual internal inspection of the connecting structure.

PHMSA received two comments from New England Fuel Institute (NEFI) and Truck Trailer Manufacturers Association (TTMA) on the proposal to clarify that it is no longer necessary to place a vent on the top of the center line of a cargo tank vehicle and that venting the void space through the existing required drain or other separate vent. NEFI supports this clarification, provided it is only a clarification, and will not require that the top vent be plugged or that a new vent other than the currently required drain be installed in existing specification and non specification cargo tanks. NEFI stated, ''Requiring a new vent or a vent plug would create significant compliance costs for small business petroleum suppliers that are not currently accounted for under the NPRM.''

TTMA supports the clarification regarding vents in the void for cargo tank trailers. TTMA indicated that the original language in the regulations required numerous letters of interpretation and developed problems in the application of the regulations. TTMA stated, ''The new language reflects the industry input over the last few years and achieves the goal of a common sense solution to the venting problem.''

PHMSA's proposal is to clarify that it is not necessary to place a vent on top of the center line of a cargo tank vehicle and that venting the void space through the existing required drain or other separate vent is authorized. Therefore, we are adopting this amendment as proposed.

Section 178.320 includes a definition for ''cargo tank wall.'' The cargo tank wall includes those parts of the cargo tank that make up the primary lading retention structure, including shell, bulkheads, and fittings and, when closed, yield the minimum volume of the cargo tank assembly. Confusion has resulted from the use of ''cargo tank assembly'' in the definition. The term ''cargo tank assembly'' as used in that definition, is simply referring to the completed cargo tank motor vehicle. Since ''cargo tank assembly'' is synonymous with ''cargo tank motor vehicle,'' a term that is defined in § 178.320, we proposed to replace the term ''cargo tank assembly'' with ''completed cargo tank motor vehicle.''

PHMSA received no comments on these proposed amendments. Therefore, PHMSA is adopting these amendments as proposed.

2. *Section 178.347–1(c)* requires a cargo tank with a MAWP greater than 35 psig and each tank designed to be loaded by vacuum to be constructed and certified in accordance with the ASME Code. The wording used for this requirement has resulted in some confusion. Generally, the ''and'' would mean that a tank would need to be both designed to be loaded by vacuum and have a MAWP greater than 35 psig to be subject to the construction and certification requirements of the ASME Code. This is not the intent of the current requirement. Therefore, we proposed to clarify the requirement to clearly state that a cargo tank motor vehicle with a MAWP greater than 35 psig or a cargo tank designed to be loaded by vacuum must be constructed and certified in accordance with the ASME Code, in line with our original intent.

The introductory text to § 178.347–1(d) requires tanks with a MAWP of 35 psig or less to be constructed in accordance with the ASME Code. We are clarifying this requirement to indicate, in line with § 178.347–1(b), cargo tanks that are designed to withstand full vacuum but have a MAWP of 35 psig or less and are not designed to be loaded by vacuum are only required to be constructed in accordance with the ASME Code. They do not require certification under the ASME Code.

PHMSA received no comments on this proposed amendment. Therefore, PHMSA is adopting this amendment as proposed.

3. *Section 178.347–4(b)* states that vacuum relief devices are not required for cargo tanks designed to be loaded by vacuum or built to withstand full vacuum. In the NPRM, we proposed revisions to this section to make a clear distinction between the phrase ''designed to be loaded by vacuum'' and ''built to withstand full vacuum.'' Basically, if a cargo tank manufacturer designs a cargo tank ''to withstand full vacuum,'' it is only required to be constructed in accordance with the ASME Code but not certified under the ASME Code. However, a cargo tank that is loaded by vacuum is required to be constructed and certified in accordance with the ASME Code. The intent of the final user of the equipment will determine whether a tank will be vacuum loaded and required to be a certified (''U'' stamped) vessel. A manufacturer may design a tank to withstand full vacuum to ensure that it is sufficiently robust to endure the stresses associated with transportation of hazardous materials, including changes in product temperatures and the vacuum created during unloading. Designing a tank to withstand full vacuum does not mean that the tank is actually equipped to or used in vacuum service.

PHMSA received no comments on this proposed amendment. Therefore, PHMSA is adopting this amendment as proposed.

4. *Section 180.417(b)(1)(v)* requires the minimum thickness of the cargo tank shell and heads to be noted on inspection and test reports when the cargo tank thickness is tested in accordance with § 180.407(d)(4), § 180.407(e)(3), § 180.407(f)(3), or § 180.407(i). The reference to § 180.407(d)(4), which addresses thickness testing of ring stiffeners or other appurtenances, is incorrect. After reviewing the final rule to Docket HM–213 (68 FR 19257; April 18, 2003) and the response to appeals (68 FR 52363; September 3, 2003), the rules that established current paragraph (b)(1), it is apparent that the correct reference for this section should be § 180.407(d)(5), which refers to thickness testing of corroded or abraded areas of the cargo tank wall. In the NPRM, PHMSA proposed to remove the reference to § 180.407(d)(4) in § 180.417(b)(1)(v) and replace it with the reference to § 180.407(d)(5).

PHMSA received no comments on this amendment. Therefore, we are adopting it as proposed.

O. Permeation Devices

Permeation devices are used to calibrate air quality monitoring equipment. These devices may contain extremely small quantities of hazardous materials and are subject to Special Provision A41 when transported by air in accordance with the International Civil Aviation Organization's (ICAO TI) Technical Instructions for the Safe Transport of Dangerous Goods by Air. Special Provision A41 authorizes the transportation of permeation devices on aircraft provided stringent safety requirements are met. International shippers of these devices are able to take advantage of this special provision. However, no similar provision exists in the HMR. Therefore, in response to a petition (petition number P–1493; Docket Number PHMSA–2007–27318) from the URS Corporation, and to facilitate domestic and international transportation, in the NPRM, PHMSA proposed to add a new § 173.175 on permeation devices in Part 173 that would authorize the transportation of permeation devices in the same manner as is provided in Special Provision A41 of the ICAO T1.

PHMSA received no comments regarding this amendment; therefore, we are adopting this amendment as proposed.

P. Alcoholic Beverage Exception

Section 173.150 provides exceptions from regulation for Class 3 flammable liquid material. Specifically, § 173.150(d) provides exceptions for alcoholic beverages. An alcoholic beverage (as defined in 27 CFR 4.10 and 5.11) that meets one of three conditions outlined in § 173.150(d) is not subject to the requirements of the HMR for a Class 3 flammable liquid material. One of these conditions states that the alcoholic beverage must be in an inner packaging of 5 L (1.3 gallons) or less, and for transportation on passenger aircraft, must conform to § 175.10(a)(4) of the HMR as checked or carry-on baggage (see § 173.150(d)(2)). This provision for transportation by passenger aircraft was added in a final rule published on June 21, 2001 (HM–215D; 66 FR 33316) to clarify that alcoholic beverages carried by passengers or crewmembers must conform to the air passenger and crewmember exception provided in § 175.10(a)(4). In the final rule, we indicated that PHMSA was revising the exception in § 173.150(d) by clarifying that alcoholic beverages containing over 24% alcohol by volume are not excepted from regulation when transported by a passenger or crewmember on passenger-carrying aircraft except as provided in § 175.10(a)(4).

In the NPRM, PHMSA proposed to clarify § 173.150(d)(2) by specifying that the condition for transportation on passenger aircraft applies to an alcoholic beverage carried by passengers or crewmembers and that an alcoholic beverage (of any concentration of alcohol by volume) in an inner packaging of 5 L (1.3 gallons) or less transported as cargo on a cargo aircraft or a passenger aircraft is not subject to the requirements of the HMR.

PHMSA did not receive any comments regarding this amendment. However, PHMSA is not adopting this amendment as proposed. PHMSA plans to more fully address this issue in a future international harmonization rulemaking.

Q. Special Permits

Procedures for special permit applications are established in 49 CFR Part 107. In a final rule published under Docket HM–233B (76 FR 454; January 5, 2011), PHMSA adopted new requirements for application of a new special permit, party status to a special permit, and renewal of a special permit issued by PHMSA under 49 CFR Part 107, Subpart B (§§ 107.101 to 107.127).

PHMSA conducts a fitness review of each company requesting action on a special permit including applications for a new special permit. In the NPRM, we proposed to incorporate an additional requirement for each applicant to identify whether they are acting as a shipper or a carrier under §§ 107.105, 107.107, and 107.109. We indicated that the added information would assist PHMSA in determining the fitness of the applicant.

PHMSA received comments from Institute of Makers of Explosives (IME) and Veolia Environmental Services (Veolia), regarding the proposed amendment. Both commenters support the proposed amendment, but believe shippers as well as carriers should be included in these proposed procedures for applying for a special permit. Both commenters also indicated the importance of fitness determinations for both shippers and carriers. We appreciate the comments and have adopted the amendment as proposed.

R. Lab Packs

In a final rule under docket HM–233A (75 FR 20275; May 14, 2010), PHMSA incorporated Special Permit 13192 into the HMR. The special permit authorized relief from segregation requirements in Parts 174, 176, and 177 of the HMR provided the materials conform with the packaging and segregation requirements for lab packs in § 173.12(e).

1. *Special Permit 13192—flashpoint.* In the final rule, PHMSA inadvertently left out a proposal to except lab packs from the requirement in § 172.203(i)(2) of the HMR which requires the minimum flashpoint if it is 60 °C (140 °F) or below (in °C closed cup (c.c.)) in association with the basic description when transported by water. This requirement may be overly restrictive for a lab pack which may contain a number of hazardous materials with different flashpoints. Instead, for those materials with a flashpoint of 61 °C or less, Special Permit 13192 authorized the identification of the lowest flashpoint for all hazardous materials in the lab pack as a range of less than 23 °C or 23 °C to 61 °C. In the NPRM, PHMSA proposed to incorporate this exception for lab packs transported by cargo vessel.

PHMSA received one comment from Veolia regarding Special Permit 13192 which authorizes the lowest flashpoint of all hazardous materials contained in the lab pack being transported by cargo vessel to be indicated on the shipping paper as either being ''below 23 °C'' or in a range ''between 23 °C and 60 °C'' in lieu of indicating the exact minimum flashpoint. Veolia is concerned with the use of the word ''must'' in the new regulatory language as amended in § 172.203(i)(2) as being too restrictive. Veolia requested PHMSA replace the word ''must'' with ''may'' to allow the shipper of lab packs to indicate the flashpoint as either a range or as a specific temperature if known.

PHMSA has considered Veolia's comments and disagrees with the suggestion that the word ''must'' in the proposed language be replaced with ''may.'' This change was proposed because the current requirement to provide the minimum flashpoint for each material in a lab pack with a flashpoint of 60 °C (140 °F) or below is overly restrictive. Providing a single flashpoint for the material in the lab pack with the lowest flashpoint is sufficient. However, the commenter's suggested revision would relax current requirements even further and possibly cause confusion. Therefore, we are adopting this amendment as proposed.

2. *Special Permit 13192—segregation.* In this same final rule, PHMSA adopted exceptions from segregation for certain waste hazardous materials in lab packs and non-bulk packaging consistent with the provisions of Special Permit 13192. These exceptions are referenced in the segregation requirements for public highway transport in § 177.848(c). In making the conforming amendment to § 177.848(c), PHMSA inadvertently prohibited all cyanides, cyanide mixtures and solutions from being stored, loaded and transported with acids. The prohibition applies only to those cyanides, cyanide mixtures and solutions that would generate hydrogen cyanide when mixed with acids. Therefore, in the NPRM we proposed to correct this section by clarifying the segregation conditions.

PHMSA received no comments on this proposal on segregation conditions. Therefore, we are adopting this amendment as proposed.

S. Batteries Containing Sodium or Cells Containing Sodium

The HMR currently authorize the transport of sodium cells and batteries under the descriptions ''Batteries containing sodium'' or ''Cells containing sodium'' (UN3292). Section 173.189 limits the types of hazardous materials which may be contained in such batteries to sodium, sulfur and polysulfides. Over time, other sodium battery chemistries have emerged and become more widely used and commonly transported. For example, some batteries with sodium metal chloride chemistries use sodium tetrachloroaluminate as a secondary electrolyte. In the NPRM, PHMSA proposed to expand the list of authorized chemistries to include all sodium compounds provided they meet the criteria specified in § 173.189. This amendment aligns the HMR with the 17th Edition of the UN Model Regulations effective January 1, 2013.

PHMSA received no comments regarding this amendment; therefore, we are adopting this amendment as proposed.

T. Additional Issues Addressed in This Rule

1. *Section 175.10* prescribes the conditions for which passengers, crew members or an operator may carry hazardous materials aboard an aircraft. In a final rule published under Docket HM–215K (76 FR 3308, January 19, 2011), PHMSA amended the HMR to maintain alignment with international standards by adding a new paragraph (a)(17) to permit a mobility aid such as a wheelchair containing a lithium ion battery to be transported in accordance with the provisions provided in this section.

Since publication of the HM–215K final rule, PHMSA has noted an inconsistency between the requirements of the ICAO Technical Instructions and the requirements of the HMR in relation to the acceptance of lithium battery powered mobility aids for transportation by aircraft. In particular, it has been noted that the HMR require the removal of the battery under certain conditions prior to transportation by aircraft. It is not our intent to be inconsistent with the requirements of the ICAO Technical Instructions in this regard. Thus, in this final rule § 175.10(a)(17) is corrected to clearly indicate that batteries are not required to be removed.

2. *Section 173.3.* In a final rule published in the **Federal Register** on May 14, 2010 under Docket No. PHMSA–2009–0289 (HM–233A; 75 FR 27205), PHMSA revised 173.3(d)(6) to permit damaged or leaking cylinders containing a Division 2.1, 2.2, 2.3 or 6.1, or Class 3 or 8 material to be overpacked in a salvage cylinder and transported by cargo vessel for repair or disposal. Prior to this revision, these cylinders were permitted to be transported for repair or disposal by motor vehicle only and only under the terms of Special Permit DOT–SP 14168. However, when this change was made the language in § 173.3(c)(6) was inadvertently replaced with language prescribed in the rule for § 173.3(d)(6), and paragraph (d)(6) was unchanged. In this final rule, PHMSA is correcting these errors by revising § 173.3(c)(6) to reinstate the language authorized for that paragraph prior to the issuance of the Docket No. HM–233A final rule, and revising § 173.3(d)(6) to reflect the regulatory language change authorized in the final rule issued under Docket HM–233A.

III. Regulatory Analyses and Notices

A. Statutory/Legal Authority for This Rulemaking

1. This final rule is published under authority of Federal hazardous materials transportation law (Federal hazmat law; 49 U.S.C. 5101 *et seq.*). Section 5103(b) of Federal hazmat law authorizes the Secretary of Transportation to prescribe regulations for the safe transportation, including security, of hazardous materials in intrastate, interstate, and foreign commerce.

2. 49 U.S.C. 5120(b) authorizes the Secretary of Transportation to ensure that, to the extent practicable, regulations governing the transportation of hazardous materials in commerce are consistent with standards adopted by international authorities.

B. Executive Order 12866, Executive Order 13563, and DOT Regulatory Policies and Procedures

This final rule is not considered a significant regulatory action under section 3(f) Executive Order 12866 and, therefore, was not reviewed by the Office of Management and Budget (OMB). The final rule is not considered a significant rule under the Regulatory Policies and Procedures order issued by the U.S. Department of Transportation (44 FR 11034).

Executive Orders 12866 and 13563 require agencies to regulate in the ''most cost-effective manner,'' to make a ''reasoned determination that the benefits of the intended regulation justify its costs,'' and to develop regulations that ''impose the least burden on society. As discussed in this rulemaking, PHMSA amends various provisions in the HMR to clarify the provisions and to relax overly burdensome requirements. This final rule also responds to requests from industry associations to update and add references to standards that are incorporated in the HMR. PHMSA anticipates the amendments contained in this rule generate economic benefits to the regulated community. This final rule is designed to increase the clarity of the HMR, thereby increasing voluntary compliance while reducing compliance costs. This final rule also updates a number of incorporations by reference to permit the industry to utilize the most recent versions of industry consensus standards. Incorporation of material by reference reduces the regulatory burden on persons who offer hazardous material for transportation and persons who transport hazardous materials in commerce. Industry standards developed and adopted by consensus are accepted and followed by the industry; thus, their inclusion in the HMR assures that the industry is not forced to comply with a different set of standards to accomplish the same safety goal.

Further, the addition of an exception for permeation devices containing hazardous materials used for calibrating air quality monitoring devices for consistency with the current exception in the international regulations for these devices, as well as adding a new italicized entry to the HMT for ''Permeation devices'' referencing § 173.175, will result in reduced compliance costs by reducing regulatory compliance. This exception will also promote international harmonization. The amendment to provide an exception to labeling for consolidation bins used to transport hazardous materials by motor carrier will reduce compliance costs.

Additionally, this final rule adds a new Special Provision 173 to provide relief from the specification package requirements for certain adhesives, printing inks, printing ink-related materials, paints, paint-related materials and resin solution assigned to ''Environmentally hazardous substances, liquid, n.o.s., UN 3082.'' Overall, the amendments in this final rule should reduce regulatory burdens on the regulated community while increasing flexibility and transportation options.

C. Executive Order 13132

This final rule was analyzed in accordance with the principles and criteria contained in Executive Order 13132 (''Federalism''). This final rule would preempt state, local and Indian Tribe requirements but does not propose any regulation that has substantial direct effects on the states, the relationship between the national government and the states, or the distribution of power and responsibilities among the various levels of government. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

The Federal hazardous material transportation law, 49 U.S.C. 5125(b)(1), contains an express preemption provision (49 U.S.C. 5125(b)) preempting state, local, and Indian Tribe requirements on certain covered subjects. Covered subjects are:

(i) The designation, description, and classification of hazardous materials;

(ii) The packing, repacking, handling, labeling, marking, and placarding of hazardous materials;

(iii) The preparation, execution, and use of shipping documents related to hazardous materials and requirements related to the number, content, and placement of those documents;

(iv) The written notification, recording, and reporting of the unintentional release in transportation of hazardous materials; or

(v) The design, manufacture, fabrication, marking, maintenance, reconditioning, repair, or testing of a packaging or container which is represented, marked, certified, or sold as qualified for use in the transport of hazardous materials.

This final rule concerns the classification, packaging, marking, labeling, and handling of hazardous materials, among other covered subjects. As adopted, this rule preempts any state, local, or Indian Tribe requirements concerning these subjects unless the non-Federal requirements are ''substantively the same'' (see 49 CFR 107.202(d) as the Federal requirements.)

Federal hazardous materials transportation law provides at 49 U.S.C. 5125(b)(2) that if PHMSA issues a regulation concerning any of the covered subjects, PHMSA must determine and publish in the **Federal Register** the effective date of Federal preemption. That effective date may not be earlier than the 90th day following the date of issuance of the final rule and not later than two years after the date of issuance. The effective date of Federal preemption will be 90 days from publication of this final rule in this matter in the **Federal Register**.

D. Executive Order 13175

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13175 (''Consultation and Coordination with Indian Tribal Governments''). Since this final rule does not have Tribal implications and does not impose substantial direct compliance costs on Indian Tribal governments, the funding and consultation requirements of Executive Order 13175 do not apply, and a Tribal summary impact statement is not required.

E. Regulatory Flexibility Act, Executive Order 13272, and DOT Procedures and Policies

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires an agency to review regulations to assess their impact on small entities unless the agency determines the rule is not expected to have a significant impact on a substantial number of small entities. This final rule would amend miscellaneous provisions in the HMR to clarify provisions based on PHMSA's own initiatives and also based on petitions for rulemaking. While maintaining safety, the provisions of this final rule would relax certain overly burdensome requirements and would update references to consensus standards that are incorporated in the HMR. The changes are intended to provide relief to shippers, carriers, and packaging manufacturers, including many small entities.

Consideration of alternative proposals for small businesses. The Regulatory Flexibility Act directs agencies to establish exceptions and differing compliance standards for small businesses, where it is possible to do so and still meet the objectives of applicable regulatory statutes. In the case of hazardous materials transportation, it is not possible to establish exceptions or differing standards and still accomplish our safety objectives.

The impact of this final rule is not expected to be significant. The changes are generally intended to provide relief to shippers, carriers, and packaging manufacturers and testers, including small entities. The majority of entities affected by this rule are small entities. Although the rule will create less burden, the overall effect of this positive change is not significant. Therefore, this final rule will not have a significant economic impact on a substantial number of small entities.

This final rule has been 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 of draft rules on small entities are properly considered.

F. Paperwork Reduction Act

By requiring additional information be included on certain shipping papers, this final rule will result in a minimal increase in annual paperwork burden and costs under OMB Control No. 2137–0034. PHMSA currently has an approved information collection under OMB Control No. 2137–0034, ''Hazardous Materials Shipping Papers & Emergency Response Information'' with 260,000,000 responses and 6,500,834 burden hours. This rule is imposing new requirements pertaining to § 172.203(c), additional shipping paper information requirements. We are requiring non-odorized LPG shipments to indicate ''non-odorized'' on the shipping papers to aid emergency responders in the event of an accident involving non-odorized shipments of LPG. It is estimated that only 5% of LPG shipments are non-odorized, therefore, we anticipate only a minimal increase in burden to include this additional notation on the shipping paper.

Under the Paperwork Reduction Act of 1995, no person is required to respond to an information collection unless it has been approved by OMB and displays a valid OMB control number. 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 and recordkeeping requests.

This final rule identifies an information collection request that PHMSA is submitting to OMB for approval based on the amendment in this rule. PHMSA has developed burden estimates based on the amendment in this rule. PHMSA estimates that the net information collection and recordkeeping burden for this proposed requirement would be as follows: OMB Control No. 2137–0034.

Annual Respondents	29,850
Annual Responses	29,850
Annual Burden Hours	12.5
Annual Costs	$312.50

Requests for a copy of this information collection should be directed to Deborah Boothe or T. Glenn Foster, Office of Hazardous Materials Standards (PHH–11), Pipeline and Hazardous Materials Safety Administration, 1200 New Jersey Avenue, SE., East Building, 2nd Floor, PHH–10, Washington, DC 20590–0001, telephone (202) 366–8553.

G. 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 number contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

H. Unfunded Mandates Reform Act

This final rule does not impose unfunded mandates under the Unfunded Mandates Reform Act of 1995. It does not result in costs of $141,300,000 or more to either state, local, or Tribal governments, in the aggregate, or to the private sector, and is the least burdensome alternative that achieves the objective of the rule.

I. Environmental Assessment

The National Environmental Policy Act, 42 U.S.C. 4321–4375, requires Federal agencies to analyze actions to determine whether the action will have a significant impact on the human environment. In accordance with the Council on Environmental Quality (CEQ) regulations, Federal agencies must conduct an environmental review considering: (1) The need for the action; (2) alternatives to the action; (3) probable environmental impacts of the action and alternatives; and (4) the agencies and persons consulted during the consideration process. PHMSA is making miscellaneous amendments to the HMR based on petitions for rulemaking and PHMSA's own initiatives. The amendments are intended to update, clarify, or provide relief from certain existing regulatory requirements to promote safer transportation practices; eliminate unnecessary regulatory requirements; finalize outstanding petitions for rulemaking; facilitate international commerce; and make these requirements easier to understand.

Description of Action

Docket No. PHMSA–2009–0151 (HM–218F), Final Rule

Transportation of hazardous materials in commerce is subject to requirements in the HMR, issued under authority of Federal hazardous materials transportation law, codified at 49 U.S.C. 5001 *et seq.* To facilitate the safe and efficient transportation of hazardous materials in international commerce, the HMR provide that both domestic and international shipments of hazardous materials may be offered for transportation and transported under provisions of the international regulations.

Amendments to the HMR

In this final rule, key changes include:

Updating § 171.7 incorporations by reference of industry consensus standards issued by the Aluminum Association; the American Society for Testing and Materials; and the Institute of Makers of Explosives.

Adding a requirement for each applicant to a special permit under §§ 107.105, 107.107, and 107.109 to identify their role as a shipper (offeror), carrier, or both.

Revising the definition of ''person'' in § 171.8 to include those who manufacture, test, repair and recondition packages.

Revising the HMT to harmonize certain entries with international standards by adding and revising certain proper shipping names. Most significantly, we are adding a new entry ''Formaldehyde solutions (with not less than 10% and less than 25%) formaldehyde)'' to clarify requirements applicable to formaldehyde and formalin with less than 10% formaldehyde; revising the entry for ''Environmentally hazardous substances, liquid, n.o.s.'' to provide packaging exceptions for certain materials that are assigned to UN3082; and adding a new special provision to clarify the differences between Class 3 and Class 9 formaldehyde solutions.

Adding a new § 173.175 applicable to permeation devices to provide an exception for permeation devices containing hazardous materials that are used for calibrating air quality monitoring devices for consistency with the current exception in the international regulations for these devices; and add a new italicized entry to the HMT for ''Permeation devices'' referencing § 173.175.

Updating and clarifying hazard communication requirements applicable to Class 9 label specifications; placard size; IBCs; and Division 6.2 labels.

In § 178.37, authorizing the use of an alternative bend test for DOT 3AA and 3AAX steel cylinders.

In § 178–347–1, clarifying that cargo tank motor vehicles that have a MAWP greater than 35 psig or are designed to be loaded by vacuum must be constructed and certified in accordance with the ASME Code.

Revising § 171.14 transitional provisions to remove expired dates and incorporate certain dates into the specific sections of the HMR.

Revising provisions in § 173.56(j) to further clarify the use of the American Pyrotechnics Association (APA) standard for classifying and approving fireworks.

Revising § 172.404 to provide a labeling exception for consolidation bins used to transport hazardous materials by motor carrier, and clarify labeling requirements for consolidated packages.

Alternatives Considered

Alternative (1): Do nothing

Our goal is to update, clarify and provide relief from certain existing regulatory requirements to promote safer transportation practices, eliminate unnecessary regulatory requirements, finalize outstanding petitions for rulemaking, and facilitate international commerce. We rejected the do-nothing alternative.

Alternative (2): Go forward with the amendments to the HMR in this final rule.

This is the selected alternative.

Environmental Consequences

Hazardous materials are transported by aircraft, vessel, rail, and highway. The potential for environmental damage or contamination exists when packages of hazardous materials are involved in accidents or en route incidents resulting from cargo shifts, valve failures, package failures, loading, unloading, collisions, handling problems, or deliberate sabotage. The release of hazardous materials can cause the loss of ecological resources (*e.g.* wildlife habitats) and the contamination of air, aquatic environments, and soil. Contamination of soil can lead to the contamination of ground water. The adverse environmental impacts associated with releases of most hazardous materials are short term impacts that can be reduced or eliminated through prompt clean up/decontamination of the accident scene. Most hazardous materials are not transported in quantities sufficient to cause significant, long-term environmental damage if they are released.

The hazardous material regulatory system is a risk management system that is prevention oriented and focused on identifying a safety hazard and reducing the probability and quantity of a hazardous material release. Amending the HMR to clarify requirements and maintain alignment with international standards enhances the safe transportation of hazardous materials in domestic and international commerce.

Conclusion

PHMSA is making miscellaneous amendments to the HMR based on petitions for rulemaking and PHMSA's own initiatives. The amendments are intended to: update, clarify, or provide relief from certain existing regulatory requirements to promote safer transportation practices; eliminate unnecessary regulatory requirements; finalize outstanding petitions for rulemaking; facilitate international commerce; and make these requirements easier to understand. In conclusion, these amendments will likely result in positive environmental effects. Overall, these effects are not significant.

J. 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/search/footer/privacyanduse.jsp*.

K. 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. Pursuant to these Acts, the establishment of standards is not considered an unnecessary obstacle to the foreign commerce of the United States, so long as the standards have a legitimate domestic objective, such as the protection of safety, and do not operate in a manner that excludes imports that meet this objective. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. PHMSA notes the purpose is to ensure the safety of the American public, and has assessed the effects of this rule to ensure that it does not exclude imports that meet this objective. As a result, this rule is not considered as creating an unnecessary obstacle to foreign commerce.

List of Subjects

49 CFR Part 107

Administrative practice and procedure, Hazardous materials transportation, Penalties, Reporting and record keeping requirements.

49 CFR Part 171

Exports, Hazardous materials transportation, Hazardous waste, Imports, Incorporation by reference, Reporting and recordkeeping requirements.

49 CFR Part 172

Education, Hazardous materials transportation, Hazardous waste, Labeling, Markings, Packaging and containers, Reporting and recordkeeping requirements.

49 CFR Part 173

Hazardous materials transportation, Incorporation by reference, Packaging and containers, Radioactive materials, Reporting and recordkeeping requirements, Uranium.

49 CFR Part 174

Hazardous materials transportation, Incorporation by reference, Rail carriers, Reporting and recordkeeping.

49 CFR Part 175

Hazardous materials transportation, Air carriers, Incorporation by reference, Radioactive materials, Reporting and recordkeeping requirements.

49 CFR Part 177

Hazardous materials transportation, Incorporation by reference, Loading and Unloading, Segregation and Separation.

49 CFR Part 178

Hazardous materials transportation, Incorporation by reference, Motor vehicle safety, Packaging and containers, Reporting and recordkeeping requirements.

49 CFR Part 180

Hazardous materials transportation, Continuing qualification and maintenance of packaging.

In consideration of the foregoing, we are amending 49 CFR chapter I as follows:

PART 107—HAZARDOUS MATERIALS PROGRAM PROCEDURES

■ 1. The authority citation for part 107 continues to read as follows:

Authority: 49 U.S.C. 5101–5128, 44701; Pub. L. 101–410 section 4 (28 U.S.C. 2461 note); Pub. L. 104–121 sections 212–213; Pub. L. 104–134 section 31001; 49 CFR 1.45, 1.53.

■ 2. In § 107.105, add paragraph (c)(14) to read as follows:

§ 107.105 Application for special permit.

* * * * *

(c) * * *

(14) A statement indicating whether the applicant will be acting as a shipper (offeror), carrier or both under the terms of the special permit.

* * * * *

■ 3. In § 107.107, add paragraph (b)(7) to read as follows:

§ 107.107 Application for party status.

* * * * *

(b) * * *

(7) A statement indicating whether the applicant will be acting as a shipper (offeror), carrier or both under the terms of the special permit.

* * * * *

■ 4. In § 107.109, add paragraph (a)(9) to read as follows:

§ 107.109 Application for renewal.

(a) * * *

(9) A statement indicating whether the applicant will be acting as a shipper (offeror), carrier or both under the terms of the special permit.

* * * * *

PART 171—GENERAL INFORMATION, REGULATIONS, AND DEFINITIONS

■ 5. The authority citation for Part 171 continues to read as follows:

Authority: 49 U.S.C. 5101–5128, 44701; 49 CFR 1.45 and 1.53; Pub. L. 101–410 section 4 (28 U.S.C. 2461 note); Pub. L. 104–134, section 31001.

■ 6. In § 171.7, the table in paragraph (a)(3) is amended as follows:

■ a. Under the entry ''The Aluminum Association,'' the organization's mailing address is revised;

■ b. Under the entry ''The American Society for Testing and Materials,'' the entry ASTM E 290–97a, ''Standard Test Methods for Bend Testing of Material for Ductility'' is added in appropriate numerical order;

■ c. Under the entry ''Association of American Railroads,'' the entry ''Intermodal Loading Guide for Products in Closed Trailers and Containers'' is added in appropriate alphabetical order; and

■ d. Under the entry ''Institute of Makers of Explosives,'' the entry ''IME Safety Library Publication No. 22, IME Standard 22, ''Recommendation for the Safe Transportation of Detonators in a Vehicle with Certain Other Explosive Materials'' is revised.

The revisions and additions read as follows:

§ 171.7 Reference material.

(a) * * *

(3) *Table of material incorporated by reference.* * * *

Source and name of material	49 CFR reference
* * * * * * *	
The Aluminum Association, 1525 Wilson Blvd, Suite 6000, Arlington, VA 22209, telephone 703–358–2960, *http://www.aluminum.org*.	
* * * * * * *	
American Society for Testing and Materials, 100 Barr Harbor Drive, West Conshohoken, PA 19428, telephone 610–832–9585, *http://www.astm.org*.	
* * * * * * *	
ASTM E 290–97a Standard Test Methods for Bend Testing of Material for Ductility, published February 1998.	178.37.
* * * * * * *	
Association of American Railroads, 425 Third Street, SW., Suite 1000, Washington, DC 20001, telephone 202–639–2100, *http://www.aar.org*.	
* * * * * * *	
Intermodal Loading Guide for Products in Closed Trailers and Containers, issued June 2001	174.55; 174.101; 174.112; 174.115.
* * * * * * *	
Institute of Makers of Explosives, 1120 19th Street, NW., Suite 310, Washington, DC 20036–3605, telephone 202–429–9280, *http://www.ime.org*.	
IME Safety Library Publication No. 22 (IME Standard 22), Recommendations for the Safe Transportation of Detonators in a Vehicle with Certain Other Explosive Materials, February 2007.	173.63; 177.835.
* * * * * * *	

* * * * *

■ 7. In § 171.8, the definition of ''Person'' is revised to read as follows:

§ 171.8 Definitions and abbreviations.

* * * * *

Person means an individual, corporation, company, association, firm, partnership, society, joint stock company; or a government, Indian Tribe, or authority of a government or Tribe, that offers a hazardous material for transportation in commerce, transports a hazardous material to support a commercial enterprise, or designs, manufactures, fabricates, inspects, marks, maintains, reconditions, repairs, or tests a package, container, or packaging component that is represented, marked, certified, or sold as qualified for use in transporting hazardous material in commerce. This term does not include the United States Postal Service or, for purposes of 49 U.S.C. 5123 and 5124, a Department, agency, or instrumentality of the government.

* * * * *

§ 171.14 [Removed and Reserved]

■ 8. Section 171.14 is removed and reserved.

■ 9. Section 171.15, paragraph (a) introductory text is revised to read as follows:

§ 171.15 Immediate notice of certain hazardous materials incidents.

(a) *General.* As soon as practical but no later than 12 hours after the occurrence of any incident described in paragraph (b) of this section, each person in physical possession of the hazardous material must provide notice by telephone to the National Response Center (NRC) on 800–424–8802 (toll free) or 202–267–2675 (toll call) or online at *http://www.nrc.uscg.mil.* Each notice must include the following information:

* * * * *

PART 172—HAZARDOUS MATERIALS TABLE, SPECIAL PROVISIONS, HAZARDOUS MATERIALS COMMUNICATIONS, EMERGENCY RESPONSE INFORMATION, AND TRAINING REQUIREMENTS

■ 10. The authority citation for Part 172 continues to read as follows:

Authority: 49 U.S.C. 5101–5128, 44701; 49 1.53.

■ 11. In § 172.101, paragraph (c)(2) is revised and the Hazardous Materials Table is amended by adding the entries under ''[ADD]'' and revising entries under [REVISE]'' in the appropriate alphabetical sequence to read as follows:

§ 172.101 Purpose and use of hazardous materials table.

* * * * *

(c) * * *

(2) Punctuation marks and words in italics are not part of the proper shipping name, but may be used in addition to the proper shipping name. The word ''or'' in italics indicates that there is a choice of terms in the sequence that may alternately be used as the proper shipping name or as part of the proper shipping name, as appropriate. For example, for the hazardous materials description ''Carbon dioxide, solid or Dry ice'' either ''Carbon dioxide, solid'' or ''Dry ice'' may be used as the proper shipping name; and for the hazardous materials description ''Articles, pressurized pneumatic or hydraulic,'' either ''Articles, pressurized pneumatic'' or ''Articles, pressurized hydraulic'' may be used as the proper shipping name.

* * * * *

§ 172.101 HAZARDOUS MATERIALS TABLE

Symbols	Hazardous materials descriptions and proper shipping names	Hazard class or division	Identification Numbers	PG	Label Codes	Special Provisions (§ 172.102)	(8) Packaging (§ 173.***)			(9) Quantity limitations		(10) Vessel stowage	
							Exceptions	Non-bulk	Bulk	Passenger aircraft/rail	Cargo aircraft only	Location	Other
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8A)	(8B)	(8C)	(9A)	(9B)	(10A)	(10B)
	*		*		*		*		*		*		*
	[ADD]												
	*		*		*		*		*		*		*
	Formaldehyde solutions (with not less than 10% and less than 25% formaldehyde), see Aviation regulated liquid, n.o.s. or Other regulated substances, liquid, n.o.s.												
	*		*		*		*		*		*		*
	Permeation devices for calibrating air quality monitoring equipment See §173.175												
	*		*		*		*		*		*		*
	[REVISE]												
	*		*		*		*		*		*		*
	Battery-powered vehicle or Battery-powered equipment	9	UN3171	….	9	134	220	220	None	No limit	No limit	A	…..
	*		*		*		*		*		*		*
G	Environmentally hazardous substance, liquid, n.o.s.	9	UN3082	III	9	8, 146, 173, 335, IB3, T4, TP1, TP29	155	203	241	No limit	No limit	A	…..
	*		*		*		*		*		*		*
	Ethanol and gasoline mixture or Ethanol and motor spirit mixture or Ethanol and petrol mixture, with more than 10% ethanol	3	UN3475	II	3	144, 177, IB2, T4, TP1	150	202	242	5 L	60 L	E	…..
	*		*		*		*		*		*		*
	Formaldehyde solutions, flammable	3	UN1198	III	3, 8	176, B1, IB3, T4, TP1	150	203	242	5 L	60 L	A	40
	*		*		*		*		*		*		*
D	Gasohol gasoline mixed with ethyl alcohol, with not more than 10% alcohol	3	NA1203	II	3	144, 177,	150	202	242	5 L	60 L	E	……….
	Gasoline includes gasoline mixed with ethyl alcohol, with not more than 10% alcohol	3	UN1203	II	3	144, 177, B1, B33, IB2, T8	150	202	242	5 L	60 L	E	……….
	*		*		*		*		*		*		*

* * * * *

■ 12. In § 172.102(c)(1), new Special Provisions 173 and 176, are added in appropriate numerical order to read as follows:

§ 172.102 Special provisions.

* * * * *

(c) * * *

(1) * * *

Code/Special Provisions

* * * * *

173. For adhesives, printing inks, printing ink-related materials, paints, paint-related materials, and resin solutions which are assigned to UN3082, and do not meet the definition of another hazard class, metal or plastic packaging for substances of packing groups II and III in quantities of 5 L (1.3 gallons) or less per packaging are not required to meet the UN performance package testing when transported:

a. Except for transportation by aircraft, in palletized loads, a pallet box or unit load device (*e.g.* individual packaging placed or stacked and secured by strapping, shrink or stretch-wrapping or other suitable means to a pallet). For vessel transport, the palletized loads, pallet boxes or unit load devices must be firmly packed and secured in closed cargo transport units; or

b. Except for transportation by aircraft, as an inner packaging of a combination packaging with a maximum net mass of 40 kg (88 pounds). For transportation by aircraft, as an inner packaging of a combination packaging with a maximum gross mass of 30 kg when packaged as a limited quantity in accordance with § 173.27(f).

* * * * *

176. This entry must be used for formaldehyde solutions containing methanol as a stabilizer. Formaldehyde solutions not containing methanol and not meeting the Class 3 flammable liquid criteria must be described using a different proper shipping name.

* * * * *

■ 13. In § 172.202, paragraph (b) is revised to read as follows:

§ 172.202 Description of hazardous material on shipping papers.

* * * * *

(b) Except as provided in this subpart, the basic description specified in paragraphs (a)(1), (2), (3), and (4) of this section must be shown in sequence with no additional information interspersed. For example, ''UN2744, Cyclobutyl chloroformate, 6.1, (8, 3), PG II.'' The shipping description sequences in effect on December 31, 2006, may be used until January 1, 2013.

* * * * *

■ 14–15. In § 172.203, paragraph (i)(2) is revised and paragraph (p) is added to read as follows:

§ 172.203 Additional description requirements.

* * * * *

(i) * * *

(2) Minimum flashpoint if 60 °C (140 °F) or below (in °C closed cup (c.c.)) in association with the basic description. For lab packs packaged in conformance with § 173.12(b) of this subchapter, an indication that the lowest flashpoint of all hazardous materials contained in the lab pack is below 23 °C or that the flash point is not less than 23 °C but not more than 60 °C must be identified on the shipping paper in lieu of the minimum flashpoint.

* * * * *

(p) *Liquefied petroleum gas (LPG).* The word ''non-odorized'' must immediately precede the proper shipping name on a shipping paper when non-odorized liquefied petroleum gas is offered for transportation.

■ 16. In § 172.336, paragraph (d) is added to read as follows:

§ 172.336 Identification numbers; special provisions.

* * * * *

(d) When a bulk packaging is labeled instead of placarded in accordance with § 172.514(c) of this subchapter, identification number markings may be displayed on the package in accordance with the marking requirements of § 172.301(a)(1) of this subchapter.

■ 17. Section 172.404 is revised to read as follows:

§ 172.404 Labels for mixed and consolidated packaging.

(a) *Mixed packaging.* When compatible hazardous materials having different hazard classes are packed within the same packaging, or within the same outside container or overpack as described in § 173.25, the packaging, outside container or overpack must be labeled as required for each class of hazardous material contained therein.

(b) *Consolidated packaging.* When two or more packages containing compatible hazardous materials are placed within the same outside container or overpack, the outside container or overpack must be labeled as required for each class of hazardous material contained therein, unless labels representative of each hazardous material in the outside container or overpack are visible.

(c) *Consolidation bins used by a single motor carrier.* Notwithstanding the provisions of paragraph (b) of this section, labeling of a consolidation bin is not required under the following conditions:

(1) The consolidation bin must be reusable, made of materials such as plastic, wood, or metal and must have a capacity of 64 cubic feet or less;

(2) Hazardous material packages placed in the consolidation bin must be properly labeled in accordance with this subpart;

(3) Packages must be compatible as specified in § 177.848 of this subchapter;

(4) Packages may only be placed within the consolidation bin and the bin be loaded on a motor vehicle by an employee of a single motor carrier;

(5) Packages must be secured within the consolidation bin by other packages or by other suitable means in such a manner as to prevent shifting of, or significant relative motion between, the packages that would likely compromise the integrity of any package;

(6) The consolidation bin must be clearly and legibly marked on a tag or fixed display device with an indication of each hazard class or division contained within the bin;

(7) The consolidation bin must be properly blocked and braced within the transport vehicle; and

(8) Consolidation bins may only be transported by a single motor carrier, or on railcars transporting such vehicles.

■ 18. In § 172.432, paragraph (a) is revised and paragraph (c) is added to read as follows:

§ 172.432 INFECTIOUS SUBSTANCE label.

(a) Except for size and color, the INFECTIOUS SUBSTANCE label must be as follows:

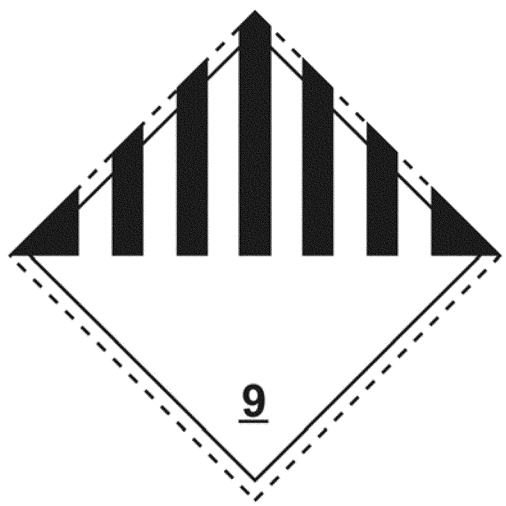
* * * * *

(c) Labels conforming to requirements in place on September 30, 2011 may continue to be used until October 1, 2014.

■ 19. In § 172.446, paragraph (a) is revised and paragraph (c) is added to read as follows:

§ 172.446 CLASS 9 label.

(a) Except for size and color, the ''CLASS 9'' (miscellaneous hazardous materials) label must be as follows:



* * * * *

(c) Labels conforming to requirements in place on September 30, 2011 may continue to be used until October 1, 2014.

■ 20. Section 172.514, paragraph (c)(4) is revised to read as follows:

§ 172.514 Bulk packagings.

* * * * *

(c) * * *

(4) *An IBC.* For an IBC labeled in accordance with subpart E of this part instead of placarded, the IBC may display the proper shipping name and UN identification number in accordance with the size requirements of § 172.302(b)(2) in place of the UN number on an orange panel or placard.

* * * * *

■ 21. In § 172.519, paragraph (c)(1) is revised to read as follows:

§ 172.519 General specifications for placards.

* * * * *

(c) * * *

(1) Each placard prescribed in this subpart must measure at least 250 mm (9.84 inches) on each side and must have a solid line inner border approximately 12.7 mm (0.5 inches) from each edge.

* * * * *

■ 22. In § 172.552, paragraph (c) is added to read as follows:

§ 172.552 ORGANIC PEROXIDE placard.

* * * * *

(c) For transportation by highway, a Division 5.2 placard conforming to the specifications in this section in effect on December 31, 2006 may continue to be used until January 1, 2014.

PART 173—SHIPPERS—GENERAL REQUIREMENTS FOR SHIPMENTS AND PACKAGINGS

■ 23. The authority citation for part 173 continues to read as follows:

Authority: 49 U.S.C. 5101–5128, 44701; 49 CFR 1.45 and 1.53.

■ 24. In § 173.3, revise paragraphs (c)(6) and (d)(6) to read as follows:

§ 173.3 Packaging and exceptions.

* * * * *

(c) * * *

(6) The overpack requirements of § 173.25 do not apply to drums used in accordance with this paragraph.

* * * * *

(d) * * *

(6) Transportation is authorized by motor vehicle and cargo vessel only.

* * * * *

■ 25. In § 173.60, paragraph (b)(14) is revised to read as follows:

§ 173.60 General packaging requirements for explosives.

* * * * *

(b) * * *

(14) Large and robust explosives articles, normally intended for military use, without their means of initiation or with their means of initiation containing at least two effective protective features, may be carried unpackaged provided that a negative result was obtained in Test Series 4 of the UN Manual of Tests and Criteria on an unpackaged article. When such articles have propelling charges or are self-propelled, their ignition systems must be protected against conditions encountered during normal transportation. Such unpackaged articles may be fixed to cradles or contained in crates or other suitable handling, storage or launching devices in such a way that they will not become loose during normal conditions of transport and are in accordance with DOD-approved procedures. When such large explosive articles, as part of their operational safety and suitability tests, are subjected to testing that meets the intentions of Test Series 4 of the UN Manual of Tests and Criteria with successful test results, they may be offered for transportation in accordance with the requirements prescribed in (b)(14) above subject to approval by the Associate Administrator.

■ 26. In § 173.62, in paragraph (c), in the Table of Packing Methods, Packing Instruction 130 is revised to read as follows:

§ 173.62 Specific packaging requirements for explosives.

* * * * *

(c) * * *

TABLE OF PACKING METHODS

Packing Instruction	Inner packaging	Intermediate packaging	Outer packaging
* * *	*	*	* *
130	Not necessary	Not necessary	Boxes. Steel (4A). Wood natural, ordinary (4C1). Plywood (4D). Reconstituted wood (4F). Fiberboard (4G). Plastics, expanded (4H1). Plastics, solid (4H2). Drums. Steel, removable head (1A2). Aluminum, removable head (1B2). Plywood (1D). Fiber (1G). Plastics, removable head (1H2). Large Packagings. Steel (50A). Aluminum (50B). Metal other than steel or aluminum (50N). Rigid plastics (50H). Natural wood (50C). Plywood (50D). Reconstituted wood (50F). Rigid fiberboard (50G).
PARTICULAR PACKING REQUIREMENTS OR EXCEPTIONS: 1. The following applies to UN 0006, 0009, 0010, 0015, 0016, 0018, 0019, 0034, 0035, 0038, 0039, 0048, 0056, 0137, 0138, 0168, 0169, 0171, 0181, 0182, 0183, 0186, 0221, 0238, 0243, 0244, 0245, 0246, 0254, 0280, 0281, 0286, 0287, 0297, 0299, 0300, 0301, 0303, 0321, 0328, 0329, 0344, 0345 0346, 0347, 0362, 0363, 0370, 0412, 0424, 0425, 0434, 0435, 0436, 0437, 0438, 0451, 0459 and 0488. Large and robust explosives articles, normally intended for military use, without their means of initiation or with their means of initiation containing at least two effective protective features, may be carried unpackaged. When such articles have propelling charges or are self-propelled, their ignition systems must be protected against stimuli encountered during normal conditions of transport. A negative result in Test Series 4 on an unpackaged article indicates that the article can be considered for transport unpackaged. Such unpackaged articles may be fixed to cradles or contained in crates or other suitable handling devices. 2. Subject to approval by the Associate Administrator, large explosive articles, as part of their operational safety and suitability tests, subjected to testing that meets the intentions of Test Series 4 of the UN Manual of Tests and Criteria with successful test results, may be offered for transportation in accordance with the requirements of this subchapter.			
* * *	*	*	* *

* * * * *

■ 27. In § 173.120, paragraph (e) is added to read as follows:

§ 173.120 Class 3—Definitions.

* * * * *

(e) *Transitional provisions.* The Class 3 classification criteria in effect on December 31, 2006, may continue to be used until January 1, 2012.

■ 28. In § 173.121, paragraph (c) is added to read as follows:

§ 173.121 Class 3—Assignment of packing group.

* * * * *

(c) *Transitional provisions.* The criteria for packing group assignments in effect on December 31, 2006, may continue to be used until January 1, 2012.

■ 29. In § 173.132, paragraph (e) is added to read as follows:

§ 173.132 Class 6, Division 6.1—Definitions.

* * * * *

(e) *Transitional provisions.* The Division 6.1 classification criteria in effect on December 31, 2006, may continue to be used until January 1, 2012.

■ 30. In § 173.133, paragraph (c) is added to read as follows:

§ 173.133 Assignment of packing group and hazard zones for Division 6.1 materials.

* * * * *

(c) *Transitional provisions.* The criteria for packing group assignments in effect on December 31, 2006, may continue to be used until January 1, 2012.

■ 31. In § 173.134, paragraph (c)(2) is revised to read as follows:

§ 173.134 Class 6, Division 6.2—Definitions and exceptions.

* * * * *

(c) * * *

(2) The following materials may be offered for transportation and transported as a regulated medical waste when packaged in a rigid non-bulk packaging conforming to the general packaging requirements of §§ 173.24 and 173.24a and packaging requirements specified in 29 CFR 1910.1030 and transported by a private or contract carrier in a vehicle used exclusively to transport regulated medical waste:

(i) Waste stock or culture of a Category B infectious substance;

(ii) Plant and animal waste regulated by the Animal and Plant Health Inspection Service (APHIS);

(iii) Waste pharmaceutical materials;

(iv) Laboratory and recyclable wastes;

(v) Infectious substances that have been treated to eliminate or neutralize pathogens;

(vi) Forensic materials being transported for final destruction;

(vii) Rejected or recalled health care products;

(viii) Documents intended for destruction in accordance with the Health Insurance Portability and Accountability Act of 1996 (HIPAA) requirements; and

(ix) Medical or clinical equipment and laboratory products provided they are properly packaged and secured against exposure or contamination. Sharps containers must be securely closed to prevent leaks or punctures.

* * * * *

■ 32. Section 173.175 is added to read as follows:

§ 173.175 Permeation devices.

Permeation devices that contain hazardous materials and that are used for calibrating air quality monitoring devices are not subject to the requirements of this subchapter provided the following requirements are met:

(a) Each device must be constructed of a material compatible with the hazardous materials it contains;

(b) The total contents of hazardous materials in each device is limited to 2 ml (0.07 ounces) and the device must not be liquid full at 55 °C (131 °F);

(c) Each permeation device must be placed in a sealed, high impact resistant, tubular inner packaging of plastic or equivalent material. Sufficient absorbent material must be contained in the inner packaging to completely absorb the contents of the device. The closure of the inner packaging must be securely held in place with wire, tape or other positive means;

(d) Each inner packaging must be contained in a secondary packaging constructed of metal, or plastic having a minimum thickness of 1.5 mm (0.06 inches). The secondary packaging must be hermetically sealed;

(e) The secondary packaging must be securely packed in strong outer packaging. The completed package must be capable of withstanding, without breakage or leakage of any inner packaging and without significant reduction in effectiveness:

(1) The following free drops onto a rigid, non resilient, flat and horizontal surface from a height of 1.8 m (5.9 feet):

(i) One drop flat on the bottom;

(ii) One drop flat on the top;

(iii) One drop flat on the long side;

(iv) One drop flat on the short side;

(v) One drop on a corner at the junction of three intersecting edges; and

(2) A force applied to the top surface for a duration of 24 hours, equivalent to the total weight of identical packages if stacked to a height of 3 m (10 feet) (including the test sample).

(3) Each of the above tests may be performed on different but identical packages.

(f) The gross mass of the completed package must not exceed 30 kg.

■ 33. In § 173.189, the first sentence of paragraph (a) is revised to read as follows:

§ 173.189 Batteries containing sodium or cells containing sodium.

(a) Batteries and cells may not contain any hazardous material other than sodium, sulfur or sodium compounds (*e.g.,* sodium polysulfides, sodium tetrachloroaluminate, *etc.*). * * *

* * * * *

PART 174—CARRIAGE BY RAIL

■ 34. The authority citation for part 174 continues to read as follows:

Authority: 49 U.S.C. 5101–5128, 44701; 49 CFR 1.53.

■ 35. In § 174.55, paragraph (a) is revised to read as follows:

§ 174.55 General requirements.

(a) Each package containing a hazardous material being transported by rail in a freight container or transport vehicle must be loaded so that it cannot fall or slide and must be safeguarded in such a manner that other freight cannot fall onto or slide into it under conditions normally incident to transportation. When this protection cannot be provided by using other freight, it must be provided by blocking and bracing. For examples of blocking and bracing in freight containers and transport vehicles, see Bureau of Explosives Pamphlet No. 6 and the Intermodal Loading Guide for Products in Closed Trailers and Containers (IBR, see § 171.7 of this subchapter).

* * * * *

■ 36. In § 174.67, paragraphs (a)(6), (b) introductory text, (b)(1), and (c) introductory text are revised to read as follows:

§ 174.67 Tank car unloading.

* * * * *

(a) * * *

(6) Before a manhole cover or outlet valve cap is removed from a tank car, the car must be relieved of all interior pressure by cooling the tank with water or by venting the tank by raising the safety valve or opening the dome vent at short intervals. However, if venting to relieve pressure will cause a dangerous amount of vapor to collect outside the car, venting and unloading must be deferred until the pressure is reduced by allowing the car to stand overnight, otherwise cooling the contents, or venting to a closed collection system. These precautions are not necessary when the car is equipped with a manhole cover which hinges inward or with an inner manhole cover which does not have to be removed to unload the car, and when pressure is relieved by piping vapor into a condenser or storage tank.

(b) After the pressure is released, for unloading processes that require the removal of the manhole cover, the seal must be broken and the manhole cover removed as follows:

(1) *Screw type.* The cover must be loosened by placing a bar between the manhole cover lug and knob. After two complete turns, so that the vent openings are exposed, the operation must be stopped, and if there is any sound of escaping vapor, the cover must be screwed down tightly and the interior pressure relieved as prescribed in paragraph (a)(6) of this section, before again attempting to remove the cover.

* * * * *

(c) When the car is unloaded through a bottom outlet valve, for unloading processes that require the removal of the manhole cover, the manhole cover must be adjusted as follows:

* * * * *

■ 37. In § 174.101, paragraphs (o)(2) and (o)(3) are revised to read as follows:

§ 174.101 Loading Class 1 (explosive) materials.

* * * * *

(o) * * *

(2) Each truck body or trailer must be secured on the rail car so that it will not permanently change position or show evidence of failure or impending failure of the method of securing the truck body or trailer under impact from each end of at least 13 km (8.1 miles) per hour. Its efficiency must be determined by actual test, using dummy loads equal in weight and general character to the material to be shipped. For recommended methods of blocking and bracing, see the Intermodal Loading Guide for Products in Closed Trailers and Containers (IBR, *see* § 171.7 of this subchapter).

(3) Lading must be loaded, blocked, and braced within or on the truck body or trailer so that the lading will not change position under impact from each end of at least 13 km (8.1 miles) per hour. For recommended methods of blocking and bracing, see the Intermodal Loading Guide for Products in Closed Trailers and Containers (IBR, *see* § 171.7 of this subchapter).

* * * * *

■ 38. In § 174.112, paragraph (c)(3) is revised to read as follows:

§ 174.112 Loading Division 1.3 materials and Division 1.2 (explosive) materials (Also see § 174.101).

* * * * *

(c) * * *

(3) Packages of Division 1.2 materials and Division 1.3 (explosive) materials are blocked and braced within the truck body, trailer, or container to prevent their shifting and possible damage due to shifting of other freight during transportation (ends, sidewalls, or doors of the truck body, trailer, or container may not be relied on to prevent the shifting of heavy loads). For recommended methods of blocking and bracing see the Intermodal Loading Guide for Products in Closed Trailers and Containers (IBR, *see* § 171.7 of this subchapter).

■ 39. In § 174.115, paragraph (b)(3) is revised to read as follows:

§ 174.115 Loading Division 1.4 (explosive) materials.

* * * * *

(b) * * *

(3) Packages of Division 1.4 (explosive) materials are blocked and braced within the truck body, trailer, or container to prevent their shifting and possible damage due to shifting of other freight during transportation. Ends, side walls, or doors of the truck body, trailer, or container may not be relied on to prevent shifting of heavy loads. For recommended methods of blocking and bracing see the Intermodal Loading Guide for Products in Closed Trailers and Containers (IBR, *see* § 171.7 of this subchapter).

PART 175—CARRIAGE BY AIRCRAFT

■ 40. The authority citation for part 175 continues to read as follows:

Authority: 49 U.S.C. 5101–5128, 44701; 49 CFR 1.45 and 1.53.

■ 41. In § 175.10, paragraphs (a)(17)(i)(B) and (a)(17)(ii)(B) are revised to read as follows:

(a) * * *

(17) * * *

(i) * * *

(B) Visual inspection of the wheelchair or mobility aid reveals no obvious defects;

* * * * *

(ii) * * *

(B) The lithium ion battery and any spare batteries are carried in the same manner as spare batteries in paragraph (a)(18) of this section.

* * * * *

PART 177—CARRIAGE BY PUBLIC HIGHWAY

■ 42. The authority citation for part 177 continues to read as follows:

Authority: 49 U.S.C. 5101–5127; 49 CFR 1.53.

■ 43. In § 177.848, paragraph (c) is revised to read as follows:

§ 177.848 Segregation of hazardous materials.

* * * * *

(c) In addition to the provisions of paragraph (d) of this section and except as provided in § 173.12(e) of this subchapter, cyanides, cyanide mixtures or solutions may not be stored, loaded and transported with acids if a mixture of the materials would generate hydrogen cyanide; Division 4.2 materials may not be stored, loaded and transported with Class 8 liquids; and Division 6.1 Packing Group I, Hazard Zone A material may not be stored, loaded and transported with Class 3 material, Class 8 liquids, and Division 4.1, 4.2, 4.3, 5.1 or 5.2 materials.

* * * * *

PART 178—SPECIFICATIONS FOR PACKAGINGS

■ 44. The authority citation for part 178 continues to read as follows:

Authority: 49 U.S.C. 5101–5128; 49 CFR 1.53.

■ 45. In § 178.35, paragraphs (c)(4) and (g) are revised and paragraph (h) is removed.

The revisions read as follows:

§ 178.35 General requirements for specification cylinders.

* * * * *

(c) * * *

(4) *Inspector's report.* Prepare a report containing, at a minimum, the applicable information listed in CGA C–11 (IBR, see § 171.7 of this subchapter). Any additional information or markings that are required by the applicable specification must be shown on the test report. The signature of the inspector on the reports certifies that the processes of manufacture and heat treatment of cylinders were observed and found satisfactory. The inspector must furnish the completed test reports required by this subpart to the maker of the cylinder and, upon request, to the purchaser. The test report must be retained by the inspector for fifteen years from the original test date of the cylinder.

* * * * *

(g) *Manufacturer's reports.* At or before the time of delivery to the purchaser, the cylinder manufacturer must have all completed certification documents listed in CGA C–11. The manufacturer of the cylinders must retain the reports required by this subpart for 15 years from the original test date of the cylinder.

■ 46. In § 178.37, paragraphs (j) and (l) are revised to read as follows:

§ 178.37 Specification 3AA and 3AAX seamless steel cylinders.

* * * * *

(j) *Flattening test.* A flattening test must be performed on one cylinder taken at random out of each lot of 200 or less, by placing the cylinder between wedge shaped knife edges having a 60° included angle, rounded to ½-inch radius. The longitudinal axis of the cylinder must be at a 90-degree angle to knife edges during the test. For lots of 30 or less, flattening tests are authorized to be made on a ring at least 8 inches long cut from each cylinder and subjected to the same heat treatment as the finished cylinder. Cylinders may be subjected to a bend test in lieu of the flattening test. Two bend test specimens must be taken in accordance with ISO 9809–1 or ASTM E 290 (IBR, *see* § 171.7 of this subchapter), and must be subjected to the bend test specified therein.

* * * * *

(l) *Acceptable results for physical, flattening and bend tests.* An acceptable result for physical and flattening tests is elongation of at least 20 percent for 2 inches of gauge length or at least 10 percent in other cases. Flattening is required, without cracking, to 6 times the wall thickness of the cylinder. An acceptable result for the alternative bend test is no crack when the cylinder is bent inward around the mandrel until the interior edges are not further apart than the diameter of the mandrel.

* * * * *

■ 47. In § 178.71, paragraphs (c) and (p)(6) are revised to read as follows:

§ 178.71 Specifications for UN pressure receptacles.

* * * * *

(c) Following the final heat treatment, all cylinders, except those selected for batch testing must be subjected to a proof pressure or a hydraulic volumetric expansion test.

* * * * *

(p) * * *

(6) The test pressure in bar, preceded by the letters ''PH'' and followed by the letters ''BAR''.

* * * * *

■ 48. In § 178.320, in paragraph (a), the definition of ''Cargo tank wall'' is revised to read as follows:

§ 178.320 General requirements applicable to all DOT specification cargo tank motor vehicles.

(a) * * *

Cargo tank wall means those parts of the cargo tank that make up the primary lading retention structure, including shell, bulkheads, and fittings and, when closed, yield the minimum volume of a completed cargo tank motor vehicle.

* * * * *

■ 49. In § 178.345–1, paragraph (i)(2) is revised to read as follows:

§ 178.345–1 General requirements.

* * * * *

(i) * * *

(2) The strength of the connecting structure joining multiple cargo tanks in a cargo tank motor vehicle must meet the structural design requirements in § 178.345–3. Any void within the connecting structure must be equipped with a drain located on the bottom centerline that is accessible and kept open at all times. For carbon steel, self-supporting cargo tanks, the drain configuration may consist of a single drain of at least 1.0 inch diameter, or two or more drains of at least 0.5 inch diameter, 6.0 inches apart, one of which is located as close to the bottom centerline as practicable. Vapors trapped in a void within the connecting structure must be allowed to escape to the atmosphere either through the drain or a separate vent.

* * * * *

■ 50. In § 178.347–1, paragraphs (c) and (d) introductory text are revised to read as follows:

§ 178.347–1 General requirements.

* * * * *

(c) Any cargo tank motor vehicle built to this specification with a MAWP greater than 35 psig or any cargo tank motor vehicle built to this specification designed to be loaded by vacuum must be constructed and certified in accordance with Section VIII of the ASME Code (IBR, see § 171.7 of this subchapter). The external design pressure for a cargo tank loaded by vacuum must be at least 15 psi.

(d) Any cargo tank motor vehicle built to this specification with a MAWP of 35 psig or less or any cargo tank motor vehicle built to this specification designed to withstand full vacuum but not equipped to be loaded by vacuum must be constructed in accordance with Section VIII of the ASME Code.

* * * * *

■ 51. In § 178.347–4, paragraph (b) is revised to read as follows:

§ 178.347–4 Pressure relief.

* * * * *

(b) *Type and construction.* Vacuum relief devices are not required for cargo tank motor vehicles that are designed to be loaded by vacuum in accordance with § 178.347–1(c) or built to withstand full vacuum in accordance with § 178.347–1(d).

* * * * *

PART 180—CONTINUING QUALIFICATION AND MAINTENANCE OF PACKAGINGS

■ 52. The authority citation for part 180 continues to read as follows:

Authority: 49 U.S.C. 5101–5128; 49 CFR 1.53.

■ 53. In § 180.417, paragraph (b)(1)(v) is revised to read as follows:

§ 180.417 Reporting and record retention requirements.

* * * * *

(b) * * *

(1) * * *

(v) Minimum thickness of the cargo tank shell and heads when the cargo tank is thickness tested in accordance with § 180.407(d)(5), § 180.407(e)(3), § 180.407(f)(3), or § 180.407(i);

* * * * *

Issued in Washington, DC, on July 8, 2011, under authority delegated in 49 CFR Part 1.

Cynthia L. Quarterman,

Administrator, Pipeline and Hazardous Materials Safety Administration.

[FR Doc. 2011–17687 Filed 7–19–11; 8:45 am]

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H.R. 2279/P.L. 112–21

Airport and Airway Extension Act of 2011, Part III (June 29, 2011; 125 Stat. 233)

S. 349/P.L. 112–22

To designate the facility of the United States Postal Service located at 4865 Tallmadge Road in Rootstown, Ohio, as the "Marine Sgt. Jeremy E. Murray Post Office". (June 29, 2011; 125 Stat. 236)

S. 655/P.L. 112–23

To designate the facility of the United States Postal Service located at 95 Dogwood Street in Cary, Mississippi, as the "Spencer Byrd Powers, Jr. Post Office". (June 29, 2011; 125 Stat. 237)

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